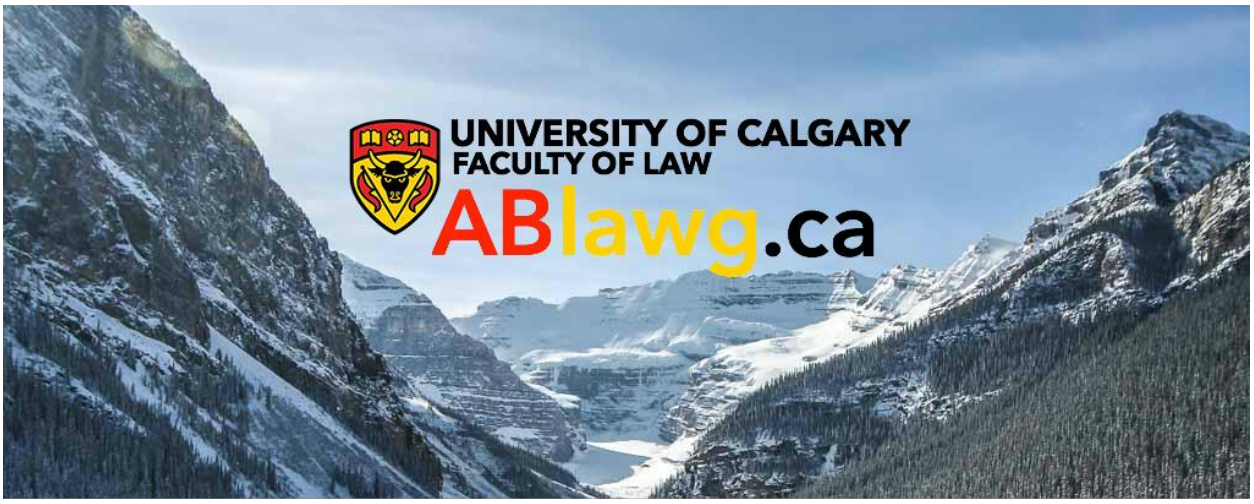

LANDLORDS, TENANTS AND DOMESTIC VIOLENCE

An ebook collection of ABlawg posts concerning residential tenancies and victims of domestic violence

DECEMBER 6, 2017

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Landlords, Tenants and Domestic Violence: Introduction to a New ABlawg Ebook

By: Jennifer Koshan and Jonnette Watson Hamilton

This ebook is a compilation of ABlawg posts from the last two years concerning residential tenancies and domestic violence.

In December 2015, Alberta's *Residential Tenancies (Safer Spaces for Victims of Domestic Violence) Amendment Act, 2015* (Bill 204) received Royal Assent, and was proclaimed in force on August 8, 2016. Bill 204 revised the *Residential Tenancies Act*, SA 2004 cR-17.1, to allow tenants to terminate leases early without the usual consequences where they were forced to vacate the premises because of domestic violence. A June 2014 report by Professor Lois Gander, QC of the University of Alberta and Rochelle Johannson of the Centre for Public Legal Education Alberta (CPLEA), The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence, set the stage for this legislation with its suggestion that financial obligations are often the biggest problem facing victims of domestic violence in the residential tenancy context. In passing Bill 204, Alberta joined other jurisdictions such as Manitoba (see *The Residential Tenancies Act*, CCSM c R119, ss 92.2-92.4), Quebec (see *Civil Code of Quebec*, SQ 1991, c 64, article 1974.1), and Nova Scotia (see *Residential Tenancies Act*, RSNS 1989, c 401, s 10F) in providing some protections for victims of domestic violence seeking to terminate their tenancies. Similar legislation has now been passed in British Columbia (see *Residential Tenancy Act*, SBC 2002, c 78, ss 45.1-45.3), Saskatchewan (see *Residential Tenancies Act, 2006,* SS 2006, c R-22.0001, ss 64.1-64.3), Ontario (see *Residential Tenancy Act, 2006*, SO, 2006, c 17, s 47.1-47.4), and the Northwest Territories (see *Residential Tenancies Act*, RSNWT 1988, c R-5, s 54.1). Our ABlawg comment on Bill 204 is the first post in this ebook.

Although these amendments are a step in the right direction, there are many other issues faced by landlords and tenants where residential tenancies are affected by domestic violence, and the law is not always clear on how to resolve these issues. A second report by Professor Gander was released by CPLEA in March 2017; Domestic Violence: Roles of Landlords and Property Managers recommends that "further consideration should be given to ways that the law impedes or assists landlords in accommodating the needs of their tenants who are experiencing domestic violence" (at 9). Several legal issues were raised in interviews with landlords and property managers, revealing uncertainty about: (1) whether privacy laws constrain them from reporting domestic violence to tenants' emergency contacts, guarantors and family members, (2) who is a tenant and how and when a guest or occupant acquires the rights and responsibilities of tenants, (3) the power of landlords to suspend or terminate tenancies for acts of domestic violence, (4) the power of landlords and tenants to change locks and bar access, (5) the ability of landlords to recover the cost of repairs for damages caused by tenants or their guests, and (6) the implications of different forms of no-contact orders for landlords and property managers (at 44-45).

Professor Gander asked to meet with us in June 2017 to see if we would provide analysis on these legal issues on ABlawg. As noted by Professor Gander, "these are complex, intersecting legal issues with far-reaching implications. But they attract little legal comment. So I approached Professors Koshan and Watson Hamilton and was pleased that they were willing to take up the

challenge of analyzing the law as it currently exists so that discussion about possible reforms can be well-grounded."

Our meeting led to a series of six ABlawg posts on "Landlords, Tenants, and Domestic Violence", addressing the legal uncertainties identified in the CPLEA report.

The first post in the series, Landlords, Tenants, and Domestic Violence: Clarifying Privacy Issues, reviews landlords' confidentiality obligations under the amendments to the *Residential Tenancies Act* enacted by Bill 204, as well as under Alberta's *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 and *Personal Information Protection Act*, SA 2003, c P-6.5. The post concludes that Alberta privacy laws make it difficult for landlords and property managers to act in a preventative manner in domestic violence cases unless there is an emergency or grave risk of harm. It recommends the consideration of explicit provisions like those in BC's *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165, which allow the collection, use and disclosure of personal information where necessary to reduce the risk of domestic violence.

The post Landlords, Tenants, and Domestic Violence: Who is a Tenant? explains why it may be difficult to determine who is a "tenant" under Alberta's *Residential Tenancies Act*, and reviews the importance of this inquiry for issues including who a landlord can evict or lock out, who is obligated to pay rent, and who might be responsible for damage to the property. It notes that many more occupants meet the definition of tenant than is commonly thought, mainly because a tenant need not sign a written lease. The post also discusses definitions of "tenant" in legislation from other Canadian jurisdictions, showing some possibilities for reform of Alberta's *Residential Tenancies Act*.

The third post in this series is Landlords, Tenants, and Domestic Violence: Landlords' Power to Terminate Residential Tenancies for Acts of Domestic Violence (and an Argument for Publicly-Accessible RTDRS Reasons for Decisions). It reviews the different circumstances in which landlords may terminate tenancies, noting the lack of flexibility or alternatives to termination, such as the ability to suspend a tenancy or to convert a tenancy into one with fewer tenants. It also notes the problems with the *Residential Tenancies Act* termination provisions, including uncertainty about what will amount to "significant" interference or "significant" damage for the purposes of termination, the problems with using a simple notice to vacate to terminate a tenancy, and the requirement to terminate the whole tenancy rather than only part of it.

Landlords, Tenants, and Domestic Violence: Clarifying the Implications of Different Protection Orders reviews the availability of protection orders under various statutes and the implications of these different orders for residential tenancies. Alberta's *Protection Against Family Violence Act,* RSA 2000, c P-27, allows for protection orders that grant victims of domestic violence exclusive occupation of the family residence, with a related right not to be evicted simply because they are not a party to the lease and to take over the lease from the respondent in these circumstances. Exclusive possession orders are also available under the *Family Law Act,* SA 2003, c F-4.5 and *Matrimonial Property Act,* RSA 2000, c M-8, and those obtaining such orders are deemed to be tenants. The post Landlords, Tenants, and Domestic Violence: Changing Locks and Barring Access discusses the repercussions of these different types of orders for landlords' and tenants'

ability to change locks or otherwise bar access to residential premises to perpetrators of domestic violence, as well as for who is responsible to pay rent and for the security deposit.

The penultimate post in this series is Landlords, Tenants, and Domestic Violence: Liability for Damage to Residential Premises. This post reviews the general rules in Alberta about responsibility for damages to residential premises, as well as responsibility for security deposits and for damage that exceeds the amount of a security deposit, concluding with suggestions for reform.

Matters are more complicated still for domestic violence victims who live on First Nations reserves in light of jurisdictional issues and specialized legislation such as the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20. Elysa Darling's post, Landlords, Tenants, and Domestic Violence: The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, discusses some of these jurisdictional complexities, and notes how victims of domestic violence living on First Nations reserves may face legal vacuums or other hurdles when they seek exclusive possession of the family home.

Collectively, these posts show that landlords and property managers are rightly concerned about how the law may impede them "in accommodating the needs of their tenants who are experiencing domestic violence" (Domestic Violence: Roles of Landlords and Property Managers at 9). This is unfortunate, as the CPLEA report found that many property managers and landlords genuinely wish to support victims of domestic violence (at 7). The recent amendments to Alberta's *Residential Tenancies Act* may make it easier for victims to leave residential tenancies, but they do not make it easier for them to stay, even if their landlords are supportive. Alberta may wish to consider implementing second generation amendments to residential tenancy legislation, such as those adopted in some Australian states, which give victims of domestic violence more and better choices in this context (see Landlords, Tenants, and Domestic Violence: Who is a Tenant? for a discussion of these amendments).

These posts also illustrate the many intersecting laws that victims of domestic violence face even in the relatively narrow context of dealing with residential tenancy issues. When one considers that many victims must also interact with the criminal and family justice systems, and sometimes with immigration laws and social assistance regimes, their legal situations become even more complex. Jennifer Koshan is studying these intersections in a Social Sciences and Humanities Research Council (SSHRC) funded project, *Domestic Violence and Access to Justice Within and Across Multiple Legal Systems* (with Wendy Chan, Michaela Keet, Janet Mosher and Wanda Wiegers), and Elysa Darling's LLM project focuses on the specific access to justice issues faced by Indigenous women in this context. Jennifer and Elysa will post future research results from the SSHRC project to ABlawg, and are grateful for SSHRC's funding, which supported some of the posts in this ebook.

This ebook may be cited as: Jennifer Koshan and Jonnette Watson Hamilton, eds, *Landlords, Tenants and Domestic Violence: An ebook collection of ABlawg posts concerning residential tenancies and victims of domestic violence* (6 December, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/12/DV_Law_Ebook.pdf

December 4, 2015

The Residential Tenancies Act and Domestic Violence: Facilitating Flight?

By: Jennifer Koshan and Jonnette Watson Hamilton

Legislation Commented On: Bill 204: Residential Tenancies (Safer Spaces for Victims of Domestic Violence) Amendment Act, 2015

Bill 204, the Residential Tenancies (Safer Spaces for Victims of Domestic Violence) Amendment Act, 2015, was introduced by Deborah Drever, Independent MLA for Calgary-Bow, to mark Family Violence Prevention Month on November 15, 2015. At that time, MLA Drever stated that "This bill seeks to empower and support survivors of violence by removing some of the barriers to leaving an unsafe home environment." (Hansard, November 15, 2015). At Second Reading on November 16, 2015, MLAs from all parties expressed support for the Bill, which passed unanimously. Perhaps most powerful was the statement of the MLA for Lethbridge-East, Maria Fitzpatrick, who told her own story of domestic violence and the barriers to leaving her former spouse (Hansard, November 16, 2015). Amendments to the Bill were agreed to and introduced by the Committee of the Whole on November 30, 2015. This post will describe the ways in which Bill 204, as amended, proposes to revise the *Residential Tenancies Act*, SA 2004 cR-17.1, and will raise a number of issues that the Legislature may wish to consider before it passes the Bill in final form.

The Details of Bill 204

Essentially, Bill 204 allows tenants to end their residential tenancies early without the usual financial penalties. It does so by adding "Part 4.1 Victims of Domestic Violence" to the current *Residential Tenancies Act*. The key aspects of Bill 204 are as follows:

- The threshold requirement is that the tenant (the "victim") believes their safety or that of their dependent child(ren) is at risk because of "domestic violence" (defined in section 47.2) if the tenancy continues (section 47.3(1)). The Committee of the Whole broadened this threshold requirement to include the victim's fear for the safety of a protected adult who lives with them, with "protected adult" including assisted adults, represented adults, or supported adults as defined in the *Adult Guardianship and Trustee Act*, SA 2008, c A-4.2.
- If the threshold requirement is met, the victim may terminate their tenancy by giving the landlord 28 days' notice and a certificate confirming there are grounds for the termination no later than 90 days after the certificate is issued by the designated authority (section 47.3(2)). This 28 day notice period would apply to all types of tenancies, including monthly periodic tenancies, yearly periodic tenancies and fixed term tenancies. Under the current *Residential Tenancies Act*, one calendar month's notice is required for a tenant to terminate a monthly periodic tenancy (section 8(1)(a)) — the most common type of

periodic tenancy. A yearly periodic tenancy can only be terminated at the end of the year by notice served at least 60 days before the end of the tenancy year (section 9). Notice does not terminate a fixed term tenancy such as a typical one year lease (section 15); it cannot be terminated prior to the day specified as the end of the term as the law now stands.

- When notice is given pursuant to the provisions of Bill 204, the victim is responsible for the rent only for the 28 day notice period, without penalty for early termination, and can ask the landlord to use their security deposit towards this payment (section 47.3(4)). Under the current *Residential Tenancies Act*, terminating a monthly periodic tenancy without the required calendar month's notice results in a delay in the notice becoming effective to the last day of the first complete tenancy month following the date on which the notice is served, with more rent — up to 33 days more rent — being payable. Termination of a yearly periodic tenancy late might result in 60 days of rent being payable, 29-32 days more (section 10(2)(c). The current consequences for leaving premises rented under a fixed term agreement before the end date are potentially much more serious, depending on how early in the fixed term the tenant leaves. If the tenant abandons the rented premises, the landlord can continue the tenancy and sue for rent to the end of the term, or the landlord can choose to accept the tenant's repudiation and sue the tenant for damages for the loss of the benefit of the residential tenancy agreement up to the date it would have expired (section 27). If a tenant abandons rented premises one month into a one-year fixed term lease, the tenant may be on the hook for the remaining 11 months' of rent, although the landlord has a duty to try to find a new tenant. Security deposits can be used to pay the rent if the landlord and tenant so agree (section 46(2)).
- Under Bill 204, the termination of tenancy applies to all the tenants in the same residential premises, and they are entitled to notice of the termination. The termination therefore potentially binds the perpetrator of domestic violence; however, that person and the landlord are free to enter into a new tenancy relationship, as are any other tenants affected by the termination (sections 47.3(5),(6)). Quite often people living in the rented premises are not, strictly speaking, "tenants" but instead people whose name is not on the residential tenancy agreement. They might be spouses, children, relatives, friends or roommates. They would not be entitled to notice and, as is already the case under the current law, they are vulnerable to being evicted on 48 hours' notice (section 33(2)).
- The only apparent basis upon which the landlord can challenge the victim's termination notice is where the notice and certificate were not properly served on the landlord. Section 43.3(7) appears to indicate that the landlord cannot challenge the notice or the certificate substantively. However, the consequences of a tenant not complying with the mandatory form of notice (section 47.3(3)), the mandatory 28 day notice period (section 47.3(2)), or the mandatory certificate in a prescribed form (section 47.2)) are not clear. It may be that the tenant loses their right to pay only 28 days rent (section 47.3(4)), because that right accrues only "[i]f a notice to terminate a tenancy is given under this section".
- The termination notice must be supported by a certificate, confirming that domestic violence grounds for early termination of the tenancy do exist, issued by a designated authority. The application for a certificate may be made by either the victim or by someone acting on their behalf with their consent (section 47.4(1)).
- The grounds for the issuance of the certificate include an order under the *Protection Against Family Violence Act,* RSA 2000, c P-27, a restraining order, a peace bond or

similar court order restraining the perpetrator from contacting the victim, or an opinion provided by a professional authorized to provide their opinion that that the victim has been the subject of domestic violence (section 47.4(2)). The list of professionals includes physicians, nurses, social workers, psychologists, police officers, shelter workers, and victim support workers (sections 47.4(3)).

- The designated authority is to be appointed by the Minister responsible for the *Residential Tenancies Act*. Designated authorities' decisions on whether or not to issue certificates are final unless there is a change in circumstances, and they are protected from being compelled to disclose information they received related to the victim. (sections 47.5, 47.6).
- Landlords are required to keep the information they receive from or about the victim confidential (section 47.7). Failure to do so is made an offence, with the landlord liable to a fine of up to $5,000 (section 7 of Bill 204, amending section 60(1)(a) of the *Residential Tenancies Act*).
- Domestic violence is defined broadly in Bill 204 to include physical, sexual, psychological, and emotional abuse, forced confinement, stalking, and threats that create a reasonable fear of property damage or personal injury. The definition encompasses violence within a range of relationships, including spousal, cohabiting, dating, parental, family, and caregiving relationships (section 47.2).

At the Second Reading of Bill 204, MLA Drever advised that Bill 204 was drafted in consultation with "stakeholders such as police services, women's shelters, market and nonmarket landlords, housing organizations, and advocacy groups." It was also noted during debate that similar legislation exists in Manitoba (see *The Residential Tenancies Act*, CCSM c R119, ss. 92.2-92.4), Quebec (see *Civil Code of Quebec*, SQ 1991, c 64, article 1974.1) and Nova Scotia (see *Residential Tenancies Act*, RSNS 1989, c 401, section 10F), and that a Bill (which is more encompassing) has been introduced in Ontario (Bill 132, *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2015). (Hansard, November 16, 2015)

Commentary

As indicated during Second Reading, Bill 204 does not itself provide housing options for victims fleeing domestic violence. Although the government is providing increased funding for shelters, shelters only offer limited term stays. A longer term housing strategy and other measures to deal with social and economic inequality are also needed to respond to the many barriers facing victims of domestic violence. The Bill should be seen as a very limited, but welcome, response to one particular set of barriers associated with leaving situations of domestic violence.

We do have some questions and concerns about the Bill, however.

First, it is potentially confusing that Bill 204 uses the terminology of domestic violence, when other government legislation uses the terminology of family violence. It is the *Protection Against Family Violence Act,* RSA 2000, c P-27 (*PAFVA*) that allows victims to obtain emergency and longer term protection orders that can be the basis for a certificate under Bill 204. Will this

difference in terminology create confusion amongst those who seek access to or are applying the proposed amendments to the *Residential Tenancies Act*?

Second, the definitions of family violence in the *PAFVA* and of domestic violence in Bill 204 are different. Dating relationships are included in Bill 204 but not in the *PAFVA* (see *PAFVA* section 1(1)(d)). Bill 204 includes emotional and psychological abuse in the definition of domestic violence, but these are not included in the definition of family violence in the *PAFVA* (see section 1(1)(e)). To the extent that Bill 204 is broader, that is to be commended, and indeed recommendations have been made to broaden the *PAFVA* in similar ways (see Leslie Tutty, Jennifer Koshan, Deborah Jesso, & Kendra Nixon, *Alberta's Protection Against Family Violence Act: A summative evaluation* (Calgary: RESOLVE Alberta, 2005) at 93-94). But again, will this cause confusion?

Third, Bill 204 uses a mix of subjective and objective standards in assessing the presence of domestic violence. In section 47.3(1), cited above, the victim may terminate where they believe their safety or that of their children or a protected adult who resides with them is at risk, which appears to be a subjective standard. In contrast, section 47.2(2) defines some domestic violence using an objective standard of reasonableness (emphasis added):

> **47.2(2)** The following acts and omissions constitute domestic violence for the purposes of this Part:
>
> > (a) any intentional or reckless act or omission that causes injury or property damage and that intimidates or harms a person;
> > (b) any act or threatened act that intimidates a person by creating a reasonable fear of property damage or injury to a person;
> > (c) conduct that reasonably, in all circumstances, constitutes psychological or emotional abuse;
> > (d) forced confinement;
> > (e) sexual contact of any kind that is coerced by force or threat of force;
> > (f) stalking (defined in section 1(1)(n.1) to mean "repeated conduct by a person, without lawful excuse or authority, that the person knows or reasonably ought to know constitutes harassment of another person and causes that other person to fear for his or her personal safety.")

Again, will this mix of subjective and objective standards cause confusion?

Fourth, the definition of sexual contact that constitutes domestic violence in Bill 204 — which is identical to that in the *PAFVA* — is narrower than the definition of sexual assault in the *Criminal Code*, RSC 1985, c C-46. Sexual assault is the intentional application of force in circumstances of a sexual nature without consent, with consent defined as the voluntary agreement of the complainant to the sexual activity in question (*Criminal Code*section 271, 273.1). To define domestic violence as including "sexual contact of any kind that is coerced by force or threat of force" is considerably narrower and should be at least as broad as the definition in the *Criminal Code*.

Fifth, the limitation on the availability of appeals of the decisions of the designated authority raises issues regarding procedural fairness (see section 47.5(5)). Presumably judicial review would be available, but that would require an application to the Court of Queen's Bench with considerable costs and delay, making such an application unfeasible for most victims of domestic violence. This limitation on the review of decisions regarding certificates should be reconsidered. And in any event, the designated authority who is appointed by the Minister must be someone who is well versed with the complexities of domestic violence and its broader socio-legal context, in light of the powers the authority will have under the amended *Residential Tenancies Act*.

Sixth, and relatedly, are the procedures in Bill 204 too complex? For example, we have already noted that there is a mandatory form of notice, a mandatory 28 day notice period, and a mandatory certificate in a prescribed form (sections 47.2, 47.3), and that the consequences of not complying with these requirements are unclear. Professor Lois Gander, QC of the University of Alberta and Rochelle Johannson of the Centre for Public Legal Education Alberta prepared a June 2014 Report entitled "The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence" (which includes as Appendix B an annotated bibliography on the topic of "Residential Tenancies Issues of Victims of Domestic Violence" organized by jurisdiction). Their research into the rental housing legal context for victims of domestic violence included interviews with five key informants and three focus groups. The authors note that victims of domestic violence have to appear before a variety of courts and tribunals; confront an array of laws, regulations, policies, and procedures that require them to play a range of roles; have to frame their lives and tell their stories in different ways to access the services and remedies to which they may be entitled — and all at a time when their lives are in upheaval and their ability to cope is limited (at 4). They conclude that "the law is likely the last thing on her mind as she tries to find a safe place to live and some way to meet her basic needs" (at 5, 31). The current complexity of the law appears to be added to rather substantially with Bill 204.

Nonetheless, Gander and Johannson's work suggests that financial obligations are the biggest problems facing most victims of violence when they try to obtain or maintain rental accommodation. They note that "it is often the victim that the landlord pursues for overdue rent and damages" (at 5, 34, 38). To the extent that Bill 204 alleviates this or similar problems, it is a positive step. However, the reforms to the *Residential Tenancies Act* proposed by Bill 204 are not among the recommendations made by Gander and Johannson (at 55-56).

Seventh, Bill 204 will have its most significant monetary impact when the victim is in a yearly periodic tenancy or in a long fixed term tenancy. For those in month-to-month periodic tenancies the relaxation of notice requirements may only amount to two or three days of rent saved. However, the current one month's notice to terminate a monthly periodic tenancy must be given before the start of a new calendar month in order to be effective on the last day of that month (e.g., on or before December 1 to be effective on December 31). The new 28-day notice period is not affected by calendar months, so that notice could be given, for example, on December 15 to be effective on January 12, rather than January 31, a saving of 20 days' rent. The 28-day period is thus more flexible, but its impact may be limited.

Eighth, do we know if the provisions in Bill 204 will work and whether anyone will use them? Are victims of domestic violence often the tenants or is their name usually not on the lease? Will victims apply for certificates? Bill 204 is very similar to the legislation in Nova Scotia, Quebec and Manitoba. The revisions to residential tenancy law in those provinces are helpfully summarized and compared in Appendix C of Gander and Johannson's Final Report. The authors note that additional research needs to be undertaken to find out "whether the revisions made to residential tenancy law in other jurisdictions has been helpful for victims of domestic violence" (at 10, 56). Unfortunately, there do not appear to be any publicly available evaluations of the measures already implemented in these three other provinces.

Ninth, Bill 204 — like the revisions enacted in Nova Scotia, Quebec and Manitoba, as well as those proposed for Ontario — does not take a proactive approach to the landlord and tenant relationship in the context of domestic violence. The legislation does not protect victims of domestic violence from eviction based on acts of violence against them or allow a landlord to remove a perpetrator of the violence from the tenancy agreement upon the request of the victim (although the landlord can terminate the lease of their own accord in circumstances involving physical violence; see our tenth point below). As Gander and Johannson note, the American federal *Violence Against Women Reauthorization Act* of 2013 appears to be more protective about such matters (at 85).

Tenth, not being believed is a frequent experience of victims of domestic violence. The requirement in Bill 204 (as in the legislation elsewhere in Canada) for a certificate that confirms domestic violence grounds exist is a corroboration requirement, suggesting that victims of domestic violence cannot be trusted to tell the truth. In Bill 204, the victim can only choose between two types of certificates: an already acquired court order or an opinion from an authorized professional. In the United States, the victim can choose among three types of evidence to prove domestic violence, including simply filling out an approved form and certifying that the information given is true. A police report, a criminal complaint or a conviction will also do (Gander and Johannson at 85-86).

Why require a victim of domestic violence to produce a certificate at all? Section 30 of the *Residential Tenancies Act* allows a landlord to terminate a tenant's lease on 24 hours' notice if the tenant has "done or permitted significant damage to the residential premises, the common areas or the property of which they form a part, or (b) physically assaulted or threatened to physically assault the landlord or another tenant". The landlord does not need a certificate from a third party to confirm the violence that they witnessed or heard about, so it is puzzling that Bill 204 requires corroboration of the victim's account.

Eleventh, Bill 204 is very limited in its scope. Nova Scotia also allows early termination of leases without financial penalties in a wider variety of cases, some of which seem as compelling as do the situations covered by Bill 204. For example, Nova Scotia also allows early termination for income reduction due to a significant deterioration in the tenant's health (section 10B); early termination for health reasons (section 10C); early termination upon acceptance into a long-term care facility (section 10D) and early termination on death (section 10E). Some seniors on fixed incomes and some newly disabled persons may have a similarly great need for early termination of their leases without financial penalties. This is not to say that Bill 204 is wrong or that quick

movement is not needed for victims of domestic violence, but it is to say that piecemeal revisions of a statute may not be the best way to proceed in the long run. There is much that is wrong with the *Residential Tenancies Act*. It is one of the weakest pieces of consumer protection legislation in Canada, if not the weakest, and piecemeal reform is therefore problematic.

This point leads us to ask whether the *Residential Tenancies Act* is the best place for these provisions. It may be better to include them in the existing statute relevant to domestic violence, the *Protection Against Family Violence Act*, where — as noted above — there are definitions of family violence already in place. The *Residential Tenancies Act* already incorporates the *Public Health Act* into reasons to terminate a lease; so it could incorporate another act that deals with domestic violence in a more comprehensive fashion, and which victims and those providing services to victims would be more likely to turn to first.

Twelfth, Bill 204 would make landlords, who are private parties — and usually innocent bystanders — bear all of the costs of early termination. Some landlords are low-income individuals renting out a portion of their house to make ends meet and they may be counting on the income from a one-year lease. Re-leasing the premises to another renter may be difficult to do, especially in a falling market such as the one that Alberta is now experiencing. If landlords do experience financial hardship as a result of bearing this new burden, is it not appropriate to ask if they should bear the entire burden, without compensation from the public? Domestic violence is a public issue and responsibility, which for too long was relegated to the private realm and ignored by the law. We no longer dismiss domestic violence as a matter between private parties, and our collective responsibility should extend to the financial costs of dealing with domestic violence in tenancy situations.

This post may be cited as: Jennifer Koshan and Jonnette Watson Hamilton "The Residential Tenancies Act and Domestic Violence: Facilitating Flight?" (4 December, 2015), online: ABlawg, https://ablawg.ca/wp-content/uploads/2015/12/Blog_JK_JWH_Bill204_Dec2015.pdf

August 10, 2017

Landlords, Tenants, and Domestic Violence: Clarifying Privacy Issues

By: Jennifer Koshan

Case Commented On: Centre for Public Legal Education Alberta, Domestic Violence: Roles of Landlords and Property Managers

A recent report written by Professor Lois Gander for the Centre for Public Legal Education Alberta (CPLEA) explores how landlords and property managers can play a part in responding to domestic violence. Domestic Violence: Roles of Landlords and Property Managers concludes that "some property managers and the landlords they represent go to considerable lengths to prevent, intervene, and support victims of domestic violence as much as they can" (at 7). This was the case even before Bill 204, the *Residential Tenancies (Safer Spaces for Victims of Domestic Violence) Amendment Act, 2015*, amended the *Residential Tenancies Act,* SA 2004 cR-17.1 (*RTA*), to allow victims of domestic violence to terminate their tenancies early without the usual penalties (for a post on Bill 204 see here). The report includes several recommendations to support landlords and property managers as front-line service providers in this context, including the development of training and resources. It also recommends that "further consideration should be given to ways that the law impedes or assists landlords in accommodating the needs of their tenants who are experiencing domestic violence" (at 9). Appendix F sets out several legal issues revealed by interviews with landlords and property managers, including uncertainty about: (1) the extent to which privacy laws constrain them from reporting domestic violence to tenants' emergency contacts, guarantors and family members, (2) who is a tenant and how and when a guest or occupant acquires the rights and responsibilities of tenants, (3) the power of landlords to suspend or terminate tenancies for acts of domestic violence, (4) the power of landlords and tenants to change locks and bar access, (5) the ability of landlords to recover the cost of repairs for damages caused by tenants or their guests, and (6) the implications of different forms of no-contact orders for landlords and property managers (at 44-45). This post will address the first issue; I will comment later on issue 6 and Jonnette Watson Hamilton will discuss issues 2, 3, 4 and 5.

Confidentiality Obligations under the *Residential Tenancies Act*

The most directly relevant privacy obligation for landlords is found in the amendments to the *RTA* enacted by Bill 204. Under section 47.7, landlords must ensure that any information they receive from or about a tenant who is a victim of domestic violence under Part 4.1 of the *RTA*, Victims of Domestic Violence, is kept confidential, unless they are authorized by the regulations to disclose that information. Failure to abide by these confidentiality obligations is an offence, with the landlord liable to a fine of up to $5,000 (see section 60(1)(a) of the *Residential Tenancies Act*).

Section 4(1) of the *Termination of Tenancy (Domestic Violence) Regulation*, Alta Reg 130/2016, provides that a landlord may disclose the information in several circumstances:

> (a) to the Minister / Director of Residential Tenancies or their delegates in connection with the investigation or prosecution of an alleged offence under the Act;
>
> (b) to the designated authority responsible for issuing a certificate confirming that there are grounds for terminating the tenancy because of domestic violence;
>
> (c) to a law enforcement agency, but only upon the request of the agency in relation to an investigation;
>
> (d) in connection with an emergency that threatens the life, health or security of an individual or the public;
>
> (e) to a lawyer who provides services to the landlord;
>
> (f) to a court or the Residential Tenancy Dispute Resolution Service in proceedings under the Act;
>
> (g) with the consent of the tenant who claims domestic violence;
>
> (h) to the extent that the information is available to the public; or
>
> (i) as otherwise required by law.

The interaction of clauses (c) and (d) is interesting to contemplate. Although disclosure to a law enforcement agency is only permitted upon the request of the agency in relation to an investigation, it seems reasonable to interpret these clauses such that a landlord could disclose information from or about a tenant who is a victim of domestic violence where there was an emergency threatening her or someone else's life, health or security, whether to law enforcement officials or others. Clause (g) also permits landlords to disclose such information with the consent of the tenant, which may include consent given on a lease about contact information for emergency purposes. These provisions do not appear to have been subject to any judicial interpretation yet, at least in reported decisions.

Section 4(2) of the *Termination of Tenancy (Domestic Violence) Regulation* also provides that a landlord is not prevented from disclosing the following information to any tenants referred to in section 47.3(5) of the *RTA* – i.e. all the tenants residing in the same residential premises as the victim of domestic violence:

- the fact that a notice for termination of tenancy was served; and
- the termination date specified in the notice.

This *Regulation* is to be reviewed beginning on or before August 1, 2017 (section 5), and to ensure that it is reviewed for ongoing relevancy and necessity, it expires on July 31, 2018, with the option that it may be reenacted in its current or amended form following a review (section 6).

These confidentiality obligations and exceptions only apply to information landlords receive about tenants under Part 4.1 of the *RTA* in relation to the termination of a tenancy because of domestic violence. What do other laws provide about landlords' privacy obligations?

Privacy Laws

Freedom of Information and Protection of Privacy Act

Alberta's *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 (*FOIP Act*) does not mention domestic violence explicitly. It does, however, create restrictions and obligations on public bodies around the collection, use and disclosure of personal information that could be relevant in the domestic violence context. Public bodies are defined in s 1(p) to include government departments, branches, and offices; agencies, boards, commissions, corporations, and offices; the Executive Council Office and Legislative Assembly Office; offices of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner, the Child and Youth Advocate and the Public Interest Commissioner; and local public bodies, including educational and health care bodies and local government bodies.

The only public bodies covered by the *FOIP Act* in the housing context are management bodies administering and operating social housing under the *Alberta Housing Act*, RSA 2000, c A-25 (*FOIP* s 1(i)(vii)), and, pursuant to the *Freedom of Information and Protection of Privacy Regulation*, Alta Reg 186/2008, the Alberta Social Housing Corporation and the Residential Tenancy Dispute Resolution Service (RTDRS). Apart from the social housing context, private landlords and property managers are not "public bodies" bound by the *FOIP Act.* Their obligations flow from the *Personal Information Protection Act*, SA 2003, c P-6.5 *(PIPA)*, which I will discuss later.

The following provisions of the *FOIP Act* are relevant to public bodies in the domestic violence context.

Generally speaking, no personal information may be collected by or for a public body unless the collection of the information is expressly authorized by legislation, is for law enforcement purposes, or is directly related to and necessary for a program or activity of the public body (*FOIP Act,* section 33). Any personal information that is collected within these parameters must be collected directly from the individual the information is about, with some exceptions, including where the information: "is collected in a health or safety emergency" and "direct collection could reasonably be expected to endanger the mental or physical health or safety of the individual or another person" (section 34(1)(c)(ii)); "concerns an individual who is designated as a person to be contacted in an emergency or other specified circumstances" (section 34(1)(d)); or "is collected for the purpose of law enforcement" (section 34(1)(g)). In the latter circumstances, personal information can be collected indirectly.

Turning to disclosure, public bodies must refuse to disclose personal information to an applicant seeking that information if the disclosure would be an unreasonable invasion of a third party's

personal privacy. Disclosure is deemed not to be unreasonable where there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party, who does not object (see *FOIP Act* sections 17(2)(b) and 17(3)). Disclosure is also not considered an unreasonable invasion of privacy where it is necessary to dispose of a law enforcement matter or to continue an investigation (section 17(4)). See also section 40(1)(ee) of the *FOIP Act*, which provides that a public body may disclose personal information if it reasonably believes the disclosure will avert or minimize the risk of harm to the health or safety of a minor or an imminent danger to the health or safety of any person.

These provisions around disclosure would apply to entities such as social housing management bodies and the RTDRS so as to permit disclosure where necessary to protect tenants' health and safety or for law enforcement purposes in the domestic violence context.

The *FOIP Act*'s disclosure provisions were addressed in a case where a complainant argued that his personal information had been improperly disclosed by the Calgary Police Service (CPS) to an unnamed society for the prevention of domestic violence and to child welfare authorities. In Order F2008-029, 2009 CanLII 90966 (AB OIPC), Adjudicator Christina Gauk found that the complainant's personal information contained in police reports had been disclosed by the CPS to the domestic violence organization and child welfare authorities, including his name, address, phone number, employment information, driver's license number, physical description, marital status, race, and relationship with other persons who were involved in the domestic violence incidents described in police reports (at paras 19, 21). The evidence showed that CPS reports were shared with the domestic violence organization pursuant to an Interagency Domestic Violence Protocol under which the CPS provides the organization with information about domestic violence reported to and investigated by it, and the information was then used by the organization to contact victims of domestic violence and offer them support and safety planning and information about the court process. The organization's caseworkers also received CPS reports regarding an upcoming court date in Calgary's domestic violence court (at para 36). The Adjudicator held that the CPS had disclosed the complainant's personal information for the purpose of enforcing the law, policing and reducing incidents of domestic conflict, even though the domestic violence organization was a private entity not bound by *FOIP Act* and even though its caseworkers were not themselves involved in policing – nevertheless, "the disclosure [was] for the same purpose – maintaining peace and preventing crime – for which the CPS collected the information" (at paras 44, 47-48). The CPS had thus complied with section 40(1)(c) of the *FOIP Act* by disclosing the complainant's personal information to the domestic violence organization for the purpose for which the information was collected.

The Adjudicator also addressed the disclosure of the complainant's personal information to child welfare authorities. It was unclear from the evidence if this disclosure had been made by the CPS or the domestic violence organization. If the CPS had made the disclosure, she found that it was authorized by section 40(1)(f) of the *FOIP Act,* which provides that "A public body may disclose personal information … for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure." The *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 (*CYFEA*), section 4(1) provides that "Any person who has reasonable and probable grounds to believe that a child is in need of intervention shall forthwith report the matter to a director." Under section 1(2)(g) of the *CYFEA,* "a child is in need of intervention if there are

reasonable and probable grounds to believe that the survival, security or development of a child is endangered because the guardian of the child is unable or unwilling to protect the child from emotional injury." In turn, section 1(3)(a)(ii)(C) defines a child as "emotionally injured" when there are reasonable and probable grounds to believe that "exposure to domestic violence or severe domestic disharmony" has caused emotional injury to the child. The Adjudicator noted the CPS reports indicated that "there were children present at the time domestic violence or severe domestic disharmony occurred", which "in itself triggers the reporting requirement" (at para 61). Alternatively, if the domestic violence organization had disclosed the information, and it was bound by *PIPA* rather than the *FOIP Act,* a similar provision authorized disclosure pursuant to a statute of Alberta that requires the disclosure (*PIPA* section 20(b)).

Unfortunately, this case does not engage in an interpretation of section 40(1)(ee) of the *FOIP Act*, the provision allowing disclosure to avert the risk of harm to minors or of an imminent danger to any persons, which could be relied upon by public bodies in the social housing context where there are risks posed to health or safety due to domestic violence. However, the case provides the opportunity to remind landlords and property managers – including those not bound by the *FOIP Act* – that they have a duty to disclose any knowledge they have of children's exposure to domestic violence or severe domestic disharmony under the *CYFEA*, where that knowledge is based on reasonable and probable grounds. The case also shows that where police disclose information to private actors such as landlords and property managers, that disclosure may be protected under the *FOIP Act* where it is made for policing purposes.

In addition to their ability to disclose personal information to avert harm, public bodies may also refuse to disclose personal information to an applicant, if the disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health or interfere with public safety (*FOIP Act,* section 18(1)). This provision would presumably allow public bodies (including social housing authorities and the RTDRS) to refuse disclosure to perpetrators of domestic violence about the personal information of their victims. Public bodies may also refuse to disclose to applicants their own personal information if, in the opinion of appropriate experts, "the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety" (section 18(2)). Importantly for landlords and property managers, section 18(3) of the *FOIP Act* provides that public bodies "may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health." This provision would likely protect the identities of landlords and property managers who provide information about the risk of domestic violence to public bodies such as police, child welfare or housing authorities.

Section 18 was considered in a case where the Edmonton Police Service (EPS) refused an applicant's request for access to records in circumstances where they were concerned about the likelihood of harm to third parties. The applicant had made a complaint to EPS against a number of its officers who were involved in investigations that led to charges against him, and sought records of the EPS internal investigations. In Order F2004-029, 2006 CanLII 80889 (AB OIPC), Adjudicator Dave Bell noted that the burden was on the EPS to prove on a balance of probabilities that it is "more likely than not that the disclosure of the information in the records

could reasonably be expected to threaten anyone's safety or mental or physical health" (at para 12). Based on earlier case law, the following criteria must be met (at para 13):

- there must be a causal connection between the disclosure and the anticipated harm;
- the harm must constitute "damage" or "detriment" and not mere inconvenience;
- there must be a reasonable expectation that the harm will occur.

In the case at hand, the evidence (including that of the applicant and a psychiatrist) was found to meet these criteria. The applicant had been convicted of "serious violent crime" and "failed to comply with provisions of court orders that were made in response to previous violence and were designed to prevent that crime" including "specific conditions prohibiting contact with his victim" (at para 19). Moreover, "the [a]pplicant blames many people in the criminal justice system with whom he has had contact, as well as his victim. He has made threats of violence towards them…and seeks information to further blame based on that information" (at para 20). There was also evidence that the applicant had been diagnosed with a "serious mental illness" for which he had not sought treatment, the features of which "go directly to the likelihood of harm occurring to third parties" (at para 22). The Adjudicator noted that "exceptions to disclosure are to be applied narrowly" (at para 27); however, this was a "rare case" where severing the records "could not be done in a way that would afford the protection required by section 18 and still provide meaningful information to the [a]pplicant" (at para 25).

This case reads like one involving domestic violence, although the relationship between the applicant and victim is not specified. One could apply the same reasoning where a perpetrator of domestic violence sought personal information about a tenancy from one of the public bodies covered by the *FOIP Act.* Disclosure could be justifiably refused because of a reasonable expectation of harm to the victim, landlord or other tenants. The Adjudicator indicated that "the threat of harm need not be to a specific individual and need not be based on an individual's subjective fear" (at para 24). At the same time, "being difficult, challenging, or troublesome, having intense feelings about injustice, being persistent, and to some extent, using offensive language, do not necessarily bring section 18 into play" (at para 23).

In contrast to Alberta's *FOIP Act*, BC's *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165, contains a number of provisions dealing explicitly with domestic violence. The Act generally restricts the circumstances in which public bodies can collect personal information, but allows such information to be collected where it is "necessary for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur" (section 26(f)). Public bodies are required to collect personal information directly from the individual the information is about, but an exception is created where "the information is collected for the purpose of … reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur" (section 27(1)(c)(5)). The Act also allows public bodies to disclose personal information in circumstances including "for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur" (s 33.1(m.1)). While many of these provisions are similar to those in Alberta's *FOIP Act* in terms of seeking to reduce harm, it is useful that they explicitly reference public bodies' obligations in cases involving domestic violence, and Alberta may wish to consider amending its legislation to do so.

Personal Information Protection Act

PIPA governs the collection, use and disclosure of personal information by "organizations" in order to recognize the right of individuals to have their personal information protected, as well as the need of organizations to collect, use or disclose personal information for purposes that are reasonable (section 3). Organizations are defined to include corporations as well as individuals acting in a commercial capacity, which would include landlords and property managers (see section 1(1)(i)(v)).

Like the *FOIP Act*, *PIPA* does not mention domestic violence explicitly, but it creates obligations for organizations around the collection, use and disclosure of personal information that could be relevant in the domestic violence context. *PIPA* does not apply to personal information in the custody of an organization where the *FOIP Act* applies to that information, or to personal information contained in court files or records, or to personal information that is collected, used or disclosed for personal or domestic purposes (see *PIPA* section 4(3)).

Generally, *PIPA* requires consent of the individual before an organization can collect, use or disclose their personal information (section 7). Organizations may collect, use and disclose personal information "only for purposes that are reasonable" and "only to the extent that is reasonable for meeting the purposes for which the information" is collected, used or disclosed (see sections 11, 16 and 19). An organization may collect, use and disclose personal information about an individual without their consent where a reasonable person would consider that the collection, use or disclosure of the information "is clearly in the interests of the individual and consent of the individual cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent" (sections 14(a), 17(a), 20(a)). Information may also be used or disclosed where reasonable for the purposes of an investigation or a legal proceeding (sections 17(d), 20(f) and (m)) or where necessary to respond to an emergency that threatens the life, health or security of an individual or the public (sections 17(i), 20(g)). Organizations may refuse access to personal information in several circumstances, including where the information was collected for an investigation or legal proceeding (section 24(2)(c)), and must refuse such access where the disclosure of the information could reasonably be expected to threaten the life or security of another individual (section 24(3)).

These provisions create similar obligations and permissions for landlords and property managers with respect to their tenants' personal information as those under the *FOIP Act* in investigative and emergency circumstances, as well as more general authority to collect, use and disclose personal information where reasonable to do so.

In Order P2010-003, 2010 CanLII 98626 (AB OIPC), Adjudicator Wade Riordan Raaflaub considered a case where a housing cooperative shared a complaint letter written by the complainant with another coop member who was the subject of the complaint (the third party). Allegedly, the third party's children had damaged the complainant's car, the third party's husband refused to pay for the damage, and the complainant "then endured verbal abuse from the … family" including "threats of violence" and "threats of being kicked out of the housing cooperative" (at para 26). The complainant wrote to the coop's board of directors to seek help in resolving the situation, and shared information about the car incident, verbal abuse, and two

previous incidents between the parties involving property damage and harm to the complainant's daughter by the third party's children. The Adjudicator held that the letter contained personal information about the complainant and that it had been disclosed contrary to *PIPA*, as the complainant had not given his consent to disclosure nor was disclosure otherwise authorized. It was arguable that the disclosure was "for the purposes of an investigation" under section 20(m) of *PIPA*, given that the definition of "investigation" in *PIPA* section 1(1)(f) includes investigation of a breach of a bylaw (as a type of "enactment"). However, the coop had concluded that the third party did not breach any of its bylaws. The Adjudicator also held that the information involved "essentially personal matters" of property damage and personal injury, falling outside the scope of *PIPA* (at para 46). The fact that the complainant's allegations were well known by other members of the coop did not authorize the disclosure; "personal information does not lose its character as personal information if the information is widely or publicly known" (at para 17). According to the Adjudicator, the coop's "only options were to address the matter without disclosing the Complaint Letter, obtain the Complainant's consent to disclose the Letter, find some other basis (if it existed) for disclosing the Letter without the Complainant's consent, or decline any further involvement once it determined that there was nothing that it could really do" (at para 50).

What are the implications of this case for landlords and property managers in domestic violence situations? Knowledge of personal injury or property damage in a tenancy context cannot always be characterized as information about "essentially personal matters" or, to put it in the language of *PIPA*, as "personal information that is collected, used or disclosed for personal or domestic purposes" such that it is excluded from the scope of *PIPA* under section 4(3). At the very least, this sort of personal information may be used or disclosed where necessary to respond to an emergency that threatens someone's life, health or security (see *PIPA* sections 17(i) and 20(g)). This is a fairly high bar, however. This information can also be disclosed for investigation purposes, provided the investigation meets the definition in *PIPA* section 1(1)(f) (which includes, as noted, breach of a bylaw, or of an enactment or an agreement, such as a lease).

Conclusion

The privacy obligations of landlords and property managers in the domestic violence context are based on several statutes involving both public and private relationships. The specific terms of those statutes should be consulted where landlords and property managers are uncertain about their obligations, but generally, the collection, use and disclosure of personal information about tenants without consent is restricted unless there are circumstances which amount to an emergency or grave risk of harm, or the information is collected, used or disclosed for law enforcement or investigation purposes. Similarly, landlords and property managers can and sometimes must refuse to disclose personal information where these risks are reasonably expected. Landlords and property managers can also consult with lawyers about their obligations without fear of violating privacy legislation.

This analysis show that privacy laws may make it difficult for landlords and property managers to act in a preventative manner, given the need for an emergency. Specific provisions like those in BC, which are based on reducing the risk of domestic violence where it is reasonably likely to occur, should be considered in Alberta under both public and private sector privacy legislation.

The amendment of the *Residential Tenancies Act* was an important step forward in protecting the interests of domestic violence victims in the tenancy context, but more could be done in this respect.

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

By: Jonnette Watson Hamilton

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 Act*, 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

September 8, 2017

Landlords, Tenants, and Domestic Violence: Landlords' Power to Terminate Residential Tenancies for Acts of Domestic Violence (and an Argument for Publicly-Accessible RTDRS Reasons for Decisions)

By: Jonnette Watson Hamilton

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

The report, Domestic Violence: Roles of Landlords and Property Managers (CPLEA report), a research project for the Centre for Public Legal Education Alberta (CPLEA) under the lead of Professor Lois Gander, explores the role that landlords of private rental housing 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*). This post addresses some of the termination issues identified by the landlords and property managers interviewed for the CPLEA report. Some landlords were uncertain about when they could terminate a tenancy for acts of domestic violence, and particularly when they could terminate it on only 24-hours notice (at 44). They also appeared to want more flexibility than is currently provided by the *RTA*. They wanted alternatives to termination of a tenancy, such as the ability to suspend a tenant's tenancy, the ability to convert a tenancy that included a number of co-tenants into one with fewer tenants, and the ability to evict the abuser (at 44). None of those alternatives are currently available to Alberta landlords under the *RTA,* although some may be available to Alberta tenants and occupants under statutes such as the *Protection Against Family Violence Act,* RSA 2000, c P-27 (*PAFVA*), which Professor Jennifer Koshan will explore in a future post. Their absence in the *RTA* contributes to the incidence of homelessness experienced too often by victims of domestic violence: see CPLEA's *The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence*, Final Report, June 2014.

After a brief word about the *RTA*'s organization, I will set out the provisions that allow a landlord to terminate a tenancy and set out three major problems with those provisions. I will elaborate on two of those three problems by discussing: first, how a change in practice to allow reporting decisions of the Residential Tenancy Dispute Resolution Services (RTDRS) would help alleviate the uncertainty inherent in most of those provisions, with reference to the practices in British Columbia and Saskatchewan; and, second, how the *RTA*'s preoccupation with termination of the tenancy, as opposed to termination of the tenancy of individual tenants, is connected to homelessness for victims of domestic violence. Most of the following discussion is devoted to illustrating why making the reasons for the decisions of the RTDRS public would be beneficial in this — and many other — contexts.

Organization

First, a word on the *RTA*'s organization, because the law concerning a landlord's remedies in the context of domestic violence is more complicated than it should be. Both landlords' and tenants' remedies are collected together in Part 3 of the *RTA* (sections 26-42), separate from the provisions outlining their obligations to each other in Part 2 (sections 16-25). This is a common pattern in the residential tenancy legislation in Canada but this separation of obligations from the consequences of failing to meet those obligations is one reason for uncertainty on the part of both landlords and tenants. Their options for remedies are often puzzling. In the Northwest Territories' *Residential Tenancies Act*, RSNWT 1988, c R-5, each individual tenant or landlord obligation is set out in its own section and immediately followed, in the same section, by the possible consequences of breaches of those obligations — a drafting method that makes the law much simpler and easier to understand. The Alberta *RTA*'s complexity is exacerbated by its division of breaches into breaches of the residential tenancy agreement, breaches of the *RTA* and substantial breaches.

Landlords' Termination Provisions

Within Part 3 of the *RTA*, there are four different sections setting out landlords' remedies for different types of tenant breaches and two additional sections setting out landlords' remedies against non-tenants occupying the residential premises. The following provisions are the ones that a landlord might use in a domestic violence situation:

Section 26: The remedies in this provision are available to a landlord for a tenant's breach of their residential tenancy agreement, which may be a written, oral, or implied agreement to rent (section 1(1)(m)). Section 21 of the *RTA* specifies seven covenants or promises that "form part of every residential tenancy agreement" (emphasis added):

(a) To pay the rent when due
(b) To avoid significantly interfering with the rights of the landlord or other tenants in the building
(c) To avoid performing illegal acts or carry on an illegal trade, business or occupation in the residential premises or the building
(d) To avoid endangering other people or property in the residential premises or the building
(e) To avoid doing or allowing someone else to do significant damage to the residential premises or the building
(f) To maintain the residential premises in a reasonably clean condition
(g) To leave the premises when the tenancy expires or is terminated

In situations of domestic violence, the most common breaches are breaches of the promises in section 21 (b) about significant interference, 21(c) about illegal acts, 21(d) about endangering other people or property, and 21 (e) about significant property damage: *The Hidden Homeless* at 38-39. For example, the noise associated with abuse, the repeated presence of police, verbal abuse of the landlord's staff, or threats to neighbours might result in eviction under section 21(b): *The Hidden Homeless* at 38-39; *Herman v Boardwalk Rental Communities*, 2011 ABQB 394 (CanLII); *Beaverbone v Sacco,* 2009 ABQB 529 (CanLII).

The remedies for all of these breaches are only available on application to the RTDRS, the Provincial Court or the Court of Queen's Bench. The landlord may ask for termination of the tenancy, but only if the breach is a "substantial breach." Section 1(1)(p) defines a substantial breach by a tenant to be "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…".

Section 29: The remedies in this provision are available if a tenant's breach of their residential tenancy agreement is a "substantial breach."

The remedy for a substantial breach is termination of the tenancy on 14 days notice.

Section 30: The remedies in this provision are available to a landlord in two situations:

(a) if a tenant is responsible for (by either doing or permitting someone else to do) significant damage to the residential premises, the common areas or the property of which the residential premises and the common areas are a part of, and,
(b) if a tenant has physically assaulted or threatened to physically assault the landlord or another tenant.

The remedy for significant property damage, physical assault or the threat of physical assault is termination of the tenancy on 24 hours notice or an application to the Provincial Court or Court of Queen's Bench to terminate the tenancy.

Section 33: The remedies in this provision are available to a landlord against non-tenants living in the residential premises in cases where the tenant(s) abandoned those premises.

The remedy is a 48-hour notice to vacate.

Section 36: The remedies in this provision are available to a landlord against non-tenants living in residential premises also occupied by one or more tenants, i.e., unwanted guests.

The remedy is a 14-day notice to vacate.

Problems With the Termination Provisions

There are three major problems with the termination provisions. First, several of the most commonly used provisions in situations of domestic violence require "significant" interference or "significant" damage. What interference and damage amounts to "significant" interference or damage? Because significance is a matter of degree, there is uncertainty in all but the most egregious cases about whether conduct has reached that point. However, it is difficult to say how this provision could be made more certain; any synonym for "significant" will be as uncertain because words such as significant or substantial or major or considerable describe the degree of interference or damage. The only practical way to reduce this type of uncertainty is to provide a lot of examples of situations that did and did not amount to "significant" interference or damage.

Second, for the four provisions that provide for termination on notice — sections 29, 30, 33 and 36 — a simple notice to vacate is often not enough to terminate a tenancy: Colleen Underwood,

"Calgary landlord calls for stronger protections after renters trash her property," *Calgary Sun,* 21 August 2017. Some tenants will not move without a court order, if only because it gives them more time to find and save money for their next place.

In each case where a landlord is allowed to serve a notice to vacate, if the tenant or non-tenant does not vacate the landlord can apply to the RTDRS, the Provincial Court, or the Court of Queen's Bench for an order terminating the tenancy and allowing the landlord to recover possession of the residential premises. The RTDRS is the usual choice, if only because it normally only two or three weeks to get an order from them, instead of the months it takes to use the courts. If the tenant or non-tenant still does not leave, then the landlord needs to hire a civil enforcement agency, which has the authority to evict them according to the terms of the court order.

The third major problem is that these termination provisions all terminate the whole tenancy so that the landlord regains possession of the residential premises. They do not allow for termination of the tenancies of individual tenants by either landlords, the RTDRS or the courts. A victim of domestic violence can only hope that a landlord will rent them the same premises or other premises under a new lease.

I will elaborate on the first and third of these problems in the rest of this post.

Making Public the Reasons for RTDRS Decisions

More written court or RTDRS decisions describing the conduct and whether it does or does not amount to "significant" interference or damage would be helpful. The decisions may not be binding on other decision makers in the same court or dispute service, but they would provide examples of what has and has not been judged to be "significant." The more examples, the better the judgments that can be made about whether any particular interference or damage is likely to be seen as "significant."

The majority of *RTA* disputes in Alberta are handled by the RTDRS because of the extra time and money it takes to access the alternatives: the Provincial Court or the Court of Queen's Bench. Service Alberta reports that the RTDRS had a record year in fiscal 2016-2017 with 10,000 applications: Annual Report 2016-2017 at 4. That record year continued the steady and substantial growth seen over the previous two years, with 9,413 applications received in 2015-2016 and 8,647 in 2014-2015: Service Alberta Annual Report 2015-2016 at 9.

Unfortunately, the reasons for the decisions of the Tenancy Dispute Officers who hear and decide all of these thousands of *RTA* disputes are not accessible to the public. The *RTA* itself and the regulations which govern the RTDRS — the *Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006 — do not have much to say about the giving of reasons. Instead, section 5 of the *Regulation* requires the RTDRS to establish rules of practice and procedure for its Tenancy Dispute Officers and the giving of reasons is covered in the RTDRS Rules of Practice and Procedure (August 2017). Section 17.1 of those rules provides:

> After the hearing is concluded, the Tenancy Dispute Officer will provide oral reasons for the decision for the record. If the Tenancy Dispute Officer decides to reserve their decision, they will provide the participating parties with their written reasons for decision within thirty (30) days of the conclusion of the proceedings. (emphasis added)

The usual practice is therefore to give oral reasons to the parties to the dispute at the end of their face-to-face or telephone hearing. Even the reserved written reasons are only made available to the parties.

The Tenancy Dispute Officers are also required by section 9.1 of their Rules to record all hearings, and that recording would include their oral reasons. However, it appears from the Regulations that the recordings of the hearings are only available to parties to appeals who pay for transcription services, given directly to the transcription service by the RTDRS and returned to the RTDRS.

The hearings before the Tenancy Dispute Officer are normally open to the public to attend. Rule 8.7 of the *RTDRS Rules of Practice and Procedure* provides:

> The RTDRS hearings are open to the public, unless the Tenancy Dispute Officer believes there is sufficient reason to deny the public access. While hearings are open to the public, the application files are not. That means that while a member of the public can attend a RTDRS hearing, they will not be given access to the file.

By attending hearings, a person could hear the reasons given for decisions. However, a person would not know before a hearing what issues will be raised in the hearing because application files cannot be accessed. The ability to attend hearings is of little practical use to landlords, tenants, researchers and others.

The result of these rules is that the large amount of information that would be helpful in interpreting the *RTA* and knowing what facts have and have not amounted to "substantial" interference or "substantial" damages, for example, is unavailable to Albertans. In addition, without the transparency of written reasons accessible to all, Albertans cannot have confidence in the decision-making abilities of Tenancy Dispute Officers and the fairness of RTDRS hearings. Other provinces make the reasons for residential tenancy decisions available in order to educate citizens and engender confidence in their dispute resolution services. Both of our neighboring provinces have decision-making bodies similar to Alberta's RTDRS. The British Columbia and Saskatchewan equivalents make public a large number of the decisions of their equivalents of our Tenancy Dispute Officers.

Early in August 2017, the Saskatchewan Office of Residential Tenancies announced it has made 300 hearing decisions from the past three years available on CanLII in the SKORT database, and intended to post approximately ten percent of all decisions made each year: "Office of Residential Tenancies' Decisions Now Available Online". Not all decisions will be reported because it takes time to redact personal information from the decisions before they are posted.

The office explained that the change was made to ensure transparency, accountability to the public, and improved access to justice. The announcement specifically noted that "landlords and tenants will be able to refer to past decisions for guidance on appropriate conduct and avoiding problems."

The British Columbia Office of Housing, Residential Tenancy Branch, has been making the anonymized decisions of its arbitrators (formerly known as dispute resolution officers) available since October 2008 in its own database, searchable by both topic and by keywords. The BC legislation requires that decisions be in writing, be signed and dated, include the reasons for the decision, and be given within 30 days after the proceedings conclude: *Residential Tenancy Act*, SBC 2002, c 78, s 77.

The fairness of the BC Residential Tenancy Branch was relatively recently assessed by the Community Legal Assistance Society in *On Shaky Ground: Fairness at the Residential Tenancy Branch* (October 2013). That report includes an assessment of the quality of decision-making, including transparent reasons for decisions, noting that:

> Ideally, written decisions can promote fair and transparent decision-making by setting out a clear and simple explanation of the reasons behind the decision. Not only do such written decisions help the decision-maker to think through the case and avoid making an arbitrary or unjustifiable decision, they also demonstrate to the parties that the issues have been carefully considered, which reinforces public confidence in the decision-maker (at 41).

The report goes on to note problems with the quality of the arbitrators' reasons after a review that included an analysis of thirty-five of the publicly available decisions on one specific issue. There were no complaints about the accessibility of the British Columbia decisions (but the entire report makes for fascinating reading). In Alberta, such public accountability is almost impossible.

What can landlords and tenants in Saskatchewan and British Columbia find out about the interpretation of their equivalents of Alberta's "significant" interference or damage?
In Saskatchewan, all tenants have a right to freedom from "unreasonable disturbance" by landlords, other tenants or their guests: *Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, section 44; *Residential Tenancies Regulations, 2007*, RRS c R-22.0001 Reg 1, section 6 and statutory condition 7. Examples of "unreasonable" disturbances similar to those commonly found in domestic violence cases were discussed in the following decisions of the Office of Residential Tenancies:

- *T.L. v Stewart Property Holdings Inc*, 2016 SKORT 342 (CanLII), where loud noise and screaming that sounded like people fighting in the apartment of one tenant, over a period of seven to nine days, amounted to unreasonable disturbance of another tenant, who was awarded damages.
- *Regina Housing Authority v E.R.*, 2017 SKORT 60 (CanLII), where a tenancy was terminated because the tenant had adversely affected the quiet enjoyment, safety and physical well-being of other tenants in the building following an incident at 3:00 a.m. that

began as a loud argument in the tenant's apartment and culminated in physical violence which resulted in police arresting the tenant and EMS attending to injuries to the tenant's guest.

- *P.A. Community Housing Society Inc v E.I.*, 2016 SKORT 71 (CanLII), where a tenancy was terminated because the tenant had disturbed or permitted guests to disturb other tenants in adjacent residential premises, following six or seven complaints by those other tenants to the police over a five-month period as a result of fights among the tenant and her grown children and loud parties.

In British Columbia, the wording closest to that of the relevant Alberta provisions is found in section 47(1)(d) of the *Residential Tenancy Act,* SBC 2002, c 78, but section 47(1)(e) about illegal activities, which is much more limited and specific than the Alberta equivalent, is also relevant in the domestic violence context:

> 47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
> . . .
> (d) the tenant or a person permitted on the residential property by the tenant has
> (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
> (iii) put the landlord's property at significant risk;
> (e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
> (i) has caused or is likely to cause damage to the landlord's property,
> (ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
> (iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord; (emphasis added)

A search for "47(1)(d)" and "violence" turned up the following cases (and more), all of which involved tenants opposing landlords' one-month notices to end the tenancies:

- http://www.housing.gov.bc.ca/rtb/decisions/2016/12/122016_Decision6880.pdf, where one incident that did not physically harm anyone did not meet the "significant" or "serious" threshold.
- http://www.housing.gov.bc.ca/rtb/decisions/2009/01/Decision1418_012009.pdf, where a tenant, who had been assaulted by her visitor who was stalking her and against whom she subsequently got a peace bond, nevertheless had her tenancy terminated because of complaints of fighting, yelling, bashing of walls, swearing, loud noise, and people coming and going at varying hours that resulted in the police being called five times and other tenants and their children living in fear of her visitor, who had also assaulted the landlord — even though the conduct of the visitor was found not to be the tenant's fault.

- http://www.housing.gov.bc.ca/rtb/decisions/2010/10/Decision1886_102010.pdf, where a tenant, subject to a court order requiring him to stay away from the rented premises due to an incident of domestic violence, had his tenancy terminated for illegal activity after he was arrested for breaching the court order, and his spouse, who was only an occupant and not a tenant, had her occupancy ended by the termination of the tenancy.
- http://www.housing.gov.bc.ca/rtb/decisions/2011/08/Decision1875_082011.pdf, where termination of the tenancy was justified because other tenants complained of screaming and yelling and troublesome guests, and the police were called more than once.
- http://www.housing.gov.bc.ca/rtb/decisions/2012/04/Decision1331_042012.pdf, where termination of a victim of domestic violence's tenancy was justified after the police were called to the rented premises four times in two months, even though the tenant had a restraining order and her male partner was barred from the rented premises, because she had permitted her male partner to return.
- http://www.housing.gov.bc.ca/rtb/decisions/2013/10/102013_Decision2045.pdf, where one incident of domestic violence between a tenant's guest and his girlfriend that resulted in the arrest of the guest and charges being brought against him was held to "clearly" warrant termination of the tenancy for illegal activity.
- http://www.housing.gov.bc.ca/rtb/decisions/2017/01/012017_Decision6240.pdf, where the conduct of the tenant's boyfriend who, against the landlord's rules but with the tenant's permission, frequently used the tenant's keys to access the building (which housed many vulnerable women) and who, when asked to leave, set off a fire alarm in the middle of the night and smashed seven windows and the patio doors of the tenant's premises with a hockey stick and threatened to kill her, was held to amount to substantial interference, unreasonable disturbance and extraordinary damage to property, all justifying the termination of the tenancy.
- http://www.housing.gov.bc.ca/rtb/decisions/2016/04/042016_Decision6965.pdf, where episodes of fighting between a tenant and her boyfriend that involved lots of swearing and aggressive behavior, including his pounding on the windows and doors of the rented premises so hard that the building shook, that the tenant admitted occurred once every one to four weeks and lasted for ten minutes each time, was found to justify termination of her tenancy.

Assuming that the *RTDRS Rules of Practice and Procedure* are a valid sub-delegation of rule-making authority, an amendment to those *Rules* to require written reasons from the Tenancy Dispute Officers would not require action from the government, but would be a rather easy in-house change to the current practices. Then the will and funds to redact identifying information for some or all of those reasoned decisions so that they could be published would be all that would stand in the way of transparent decision-making, accountability to the public, and improved access to justice for landlords and tenants.

The Inflexibility of Termination of the Tenancy

As previously mentioned, one of the main problems with the *RTA* termination provisions is that they all assume that there is one tenant per residential premises. Remedies for breaches result in the termination of the tenancy — period. Everyone in the residential premises is evicted when the tenancy is terminated, whether they are abuser or victim, tenants or non-tenant residents such

as children. There is no provision in the *RTA* allowing for the termination of the tenancy of only one of the tenants of a residential premises while at the same time providing for its continuation for another or the other tenants of those premises. There is no provision in the *RTA* allowing a court to force a landlord to allow the victimized tenant to stay on. This is the case even if the abuser is the person who breaches the covenant and the abuser is on the premises illegally, for example, in breach of an emergency protection order. However, as Professor Koshan will discuss, those types of protection may be available for victims of domestic violence under the *PAFVA* and other statutes such as the *Family Law Act,* SA 2003, c F-4.5.

Without an order under the *PAFVA* or another statute granting exclusive possession to victims, following termination of the tenancy the landlord may, if they wish to, offer to rent those same premises or different ones back to the tenant victimized by the abusing tenant. However, the landlord does not have to do so under the *RTA*. All a victim of domestic abuse can do is ask for compassion: see *The Hidden Homeless* at 3 and 50. Not all landlords or property managers use their discretion appropriately: *The Hidden Homeless* at 49. Some, but certainly not all, landlords take the easier way and simply terminate the tenancy for every resident of the premises. Getting rid of everyone, whether abuser or victim, removes the problem from the landlord's premises. In buildings with multiple residential premises, it helps ensure the safety of the tenants in the other premises and the landlords' on-site staff — valid concerns discussed in the CPLEA report (at 5).

Several studies have identified a link between domestic violence and homelessness in Alberta, including:

- Kolkman, J. & Ahorra, J. (2012). Understanding tenancy failures and successes: Final research report. Edmonton, AB: Edmonton Social Planning Council and Edmonton Coalition on Housing and Homelessness
- Richter, M. S. & Chaw-Kant, J. (2008). A case study: Retrospective analysis of homeless women in a Canadian city. Women's Health and Urban Life, 7 (1), 7-19
- Tutty, L.,Ogden, C. & Weaver-Dunlop, G. (2008). An environmental scan of strategies to safely house abused women. Final Report to the Calgary Poverty Reduction Coalition. Calgary, AB: RESOLVE Alberta

Many other studies have identified a link between domestic violence and homelessness, especially for women in rental accommodations, in other Canadian jurisdictions and in other countries such as the United States, the United Kingdom and Australia. See Appendix B of *The Hidden Homeless* report for an annotated bibliography of these studies and other literature.

The Hidden Homeless report recommended, among other things (at 9):

- no longer holding the victim responsible for criminal activity on the premises particularly when those are acts of violence against the victim or when they are caused by someone under an EPO or other form of restraining order forbidding them to be on the premises;
- revising the policies with respect to crime-free multi-housing so that the victim is not held responsible for behaviour the victim is unable to influence, let alone control;
- providing the victim with the option of remaining as the tenant of a rental property while evicting the abuser on presentation of evidence confirming the domestic violence.

The implementation of these, and other recommendations, would require amendments to the *RTA* or, preferably, an entirely new statute that could be more easily understood and used by individual tenants and landlords. An amended or new *RTA* should be better coordinated with legislation such as the *PAFVA*. Overlapping statutes contribute to the complexity of residential tenancy law.

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". I have already addressed the question of who is a tenant in "Landlords, Tenants, and Domestic Violence: Who is a 'Tenant' under the *Residential Tenancies Act*?"

In subsequent posts, I will address the power of landlords and tenants to change locks to bar access to residential premises by abusers and the ability of landlords to recover the cost of repairs for damages caused by tenants or their guests — two other issues identified in the CPLEA report. Professor Koshan will address the implications of different forms of no-contact orders for landlords and property managers in a subsequent post, which will include discussion of exclusive possession orders under the *Family Law Act,* SA 2003, c F-4.5 and *Matrimonial Property Act,* RSA 2000, c M-8, allowing for abusive tenants to be evicted while their victims remain in residential premises in some circumstances.

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September 11, 2017

Landlords, Tenants, and Domestic Violence: Clarifying the Implications of Different Protection Orders

By: Jennifer Koshan

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

This is the fourth in a series of blog posts examining some of the legal uncertainties facing landlords and property managers who seek to respond to domestic violence on their premises, as identified in the report Domestic Violence: Roles of Landlords and Property Managers (for earlier posts see here, here and here). The report identified several uncertainties that landlords and property managers have about protection orders: lack of knowledge of emergency protection orders and confusion about various types of no-contact orders (at 14), and lack of clarity about how and when tenants may apply for these types of orders (at 45). This post will address these issues, highlighting the differences between various types of no-contact orders provided for by statute and common law and the implications of these different types of orders for landlords, property managers and tenants. It will also include some recommendations for reform of the law around protection orders in Alberta. A more specific issue – when landlords or tenants may change locks in response to these orders – will be dealt with in a subsequent post by Professor Jonnette Watson Hamilton.

Civil Protection Order Legislation – The *Protection Against Family Violence Act*

Alberta's *Protection Against Family Violence Act,* RSA 2000, c P-27 (*PAFVA*), was enacted in 1999 specifically for the purpose of making no contact orders more accessible to victims of family violence (see Alberta Law Reform Institute, Protection Against Domestic Abuse (Report No. 74) (Edmonton: ALRI, 1997) at 1). Although this legislation is more recent than the laws that allow for other forms of no-contact orders to be made, I will deal with it first because it is the most detailed and explicit of the laws providing for no-contact orders and their impact on property interests.

The *PAFVA* enables "family members" to obtain emergency protection orders (EPOs) on an *ex parte* basis (i.e. without notice to the respondent) in circumstances where "family violence" has occurred, the claimant "has reason to believe that the respondent will continue or resume carrying out family violence", and "by reason of seriousness or urgency, the order should be granted to provide for the immediate protection of the claimant and other family members who reside with the claimant" (section 2). Queen's Bench Protection Orders ("QBPOs") are available on an application to the Court of Queen's Bench, when a justice determines that the claimant has been the subject of family violence (section 4).

Family relationships covered by the definition of "family member" in the *PAFVA* include current and former spouses, adult interdependent partners, others residing (or formerly residing) in intimate relationships, persons who are parents of one or more children, regardless of whether they have ever lived together, persons who reside together where one of them has care and custody over the other under a court order, and generally, those related to each other by blood, marriage, adoption, or adult interdependent relationships, as well as children in the care and custody of the above persons (*PAFVA* section 1(1)(d)). The *PAFVA* definition of family member does not include persons who are in intimate relationships but do not reside together – e.g. those in dating relationships. In *Lenz v Sculptoreanu,* 2016 ABCA 111 (CanLII), the Alberta Court of Appeal held that the *PAFVA*:

> was designed and intended to address one subset of abusive relationships – violence among prescribed family members – whereas common law restraining orders are available for broader forms of abusive relationships. The *Act* is a specially designed instrument that seriously abridges the liberty of persons, and its application should be restricted to its intended familial context. (at para 30; see also my post on this case here)

The *PAFVA*'s narrow focus on defined "family members" differs from civil protection legislation in some other provinces and territories. For example, Manitoba's *Domestic Violence and Stalking Act*, CCSM c D93 and Nunavut's *Family Abuse Intervention Act*, SNu 2006, c 18 both cover persons in dating relationships, whether or not they have ever lived together. Recommendations have been made to expand the scope of Alberta's *PAFVA* in a similar way, but so far these recommendations have not been accepted (see Leslie Tutty et al, Alberta's Protection Against Family Violence Act: A summative evaluation (Calgary: RESOLVE Alberta, 2005) at 31; Lana Wells et al, How Public Policy and Legislation Can Support the Prevention of Domestic Violence in Alberta (Calgary: Shift: The Project to End Domestic Violence, 2012) at 39).

Under the *PAFVA*, "family violence" is defined to include acts, omissions, and threats to cause injury or property damage that intimidate or harm family members, as well as physical confinement, sexual abuse and stalking (section 1(1)(e)). Unlike the civil protection order legislation in some other Canadian jurisdictions (see e.g. BC, Manitoba, and Nunavut), and contrary to the recommendation of the Alberta Law Reform Institute (Protection Against Domestic Abuse at 54-55), the *PAFVA* does not include emotional or financial abuse in its definition of family violence. Recommendations have also been made to expand the scope of the *PAFVA* to include these forms of abuse, but have not yet been adopted (see Tutty et al at 30; Wells et al at 38-39).

Importantly, the definitions of "family violence" and "family member" in the *PAFVA* are narrower than the corresponding definitions in the amendments to the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*). Part 4.1 of the *RTA* uses the term "domestic violence", which does include psychological and emotional abuse (see section 47.2(2)). It also includes those living in dating relationships, regardless of whether they have lived together at any time, as well as those in spousal, adult interdependent partner, parental, family, and caregiving relationships (section 47.2(1)). This means that some tenants will be eligible to end their tenancies early under section 47.3 of the *RTA* even if they do not qualify for EPOs or QBPOs under the *PAFVA*. At the same

time, where a tenant does obtain an EPO or QBPO under the *PAFVA*, this can be used as evidence of "domestic violence" under section 47.4(2)) of the *RTA* (as can restraining orders, peace bonds and similar court orders restraining the perpetrator from contacting the victim).

In terms of process, EPOs can be granted by provincial court judges and justices of the peace on an application by the victim in person or by someone on her behalf (e.g. peace officers) by telecommunication, without notice to the respondent (*PAFVA* sections 2(1), 6; *Protection Against Family Violence Regulation*, Alta Reg 80/1999, sections 3, 4(2)). The person hearing the application must consider several factors, and those that might be of particular interest to landlords and property managers include:

- the history of family violence by the respondent,
- the existence of immediate danger to persons or property,
- the best interests of the claimant and her child(ren), and
- the claimant's need for a safe environment to arrange for longer-term protection from family violence. (*PAFVA* section 2(2))

Circumstances that do not preclude granting an EPO include that:

- a no-contact order has been granted previously and has been complied with,
- the respondent is temporarily absent from the residence at the time of the application,
- the claimant is temporarily residing in an emergency shelter or other safe place, and
- the claimant has previously returned to the residence and lived with the respondent after occurrences of family violence. (section 2(2.1))

Where an EPO is granted, it must be served on the respondent as soon as reasonably possible by a peace officer or another person that the judge directs (*PAFVA Regulation*, section 7), and only takes effect upon service (*PAFVA* section 5(1)). If it is impractical for the respondent to be personally served, an application may be made for substitutional service, which could permit service to be made on a person living with the respondent or by leaving the order at the respondent's place of residence, amongst other options (*PAFVA Regulation*, section 8).

Because they are granted without notice to the respondent, EPOs must be reviewed by a justice of the Court of Queen's Bench within 9 working days after the granting of the EPO (*PAFVA* section 2(6)). At the QB hearing, the EPO can be revoked, confirmed, or replaced with a QBPO (section 3(4)). An oral hearing may be directed at this stage, and it is possible that a landlord or property manager with knowledge of the family violence might be called upon to testify.

Under the *PAFVA*, protection orders (both EPOs and QBPOs) can be made for up to one year (and can be extended; see section 7). EPOs may provide for a number of conditions, including:

- no contact or communication with the victim of family violence and her children, including indirect communication through a third party,
- non-attendance at various places (such as her workplace or home, or the children's school),

- exclusive occupation of the residence for a specified period, "regardless of whether the residence is jointly owned or leased by the parties or solely owned or leased by one of the parties",
- an order directing a peace officer to remove the respondent from the residence,
- an order directing a peace officer to accompany a specified person to the residence to supervise the removal of personal belongings,
- the seizure and storage of weapons where they have been used or threatened to be used to commit family violence, and
- any other provision considered necessary to provide for the immediate protection of the claimant. (*PAFVA* sections 2(3) and (3.1)), emphasis added)

QBPOs may provide for all of these conditions as well, in addition to some other conditions relevant to residential tenancies:

- requiring that the respondent pay the claimant's moving and accommodation expenses,
- restraining either party from taking, converting, damaging or otherwise dealing with property the other party may have an interest in,
- granting either party "temporary possession of specified personal property, including a vehicle, cheque-book, bank cards, children's clothing, medical insurance cards, identification documents, keys or other necessary personal effects", and
- any other provision that the Court considers appropriate. (section 4(2))

Under the *PAFVA*, exclusive occupation orders made as a condition of EPOs or QBPOs do not affect title or ownership interests in property (section 9(1)), and leases are dealt with as follows:

> **s 9(2)** Where a residence is leased by a respondent under an oral, written or implied agreement and a claimant who is not a party to the lease is granted exclusive occupation of that residence, no landlord may evict the claimant solely on the basis that the claimant is not a party to the lease.
>
> **(3)** On the request of a claimant mentioned in subsection (2), the landlord must advise the claimant of the status of the lease and serve the claimant with notice of any claim against the respondent arising from the lease, and the claimant, at the claimant's option, may assume the responsibilities of the respondent under the lease. (emphasis added)

Section 9(2) and (3) thus provide a claimant who has an exclusive occupation order with a limited right not to be evicted simply because they are not a party to the lease, and to take over the lease from the respondent in these circumstances. There is no case law where these sections have been interpreted and applied, but they would appear to give claimants with exclusive occupation orders the ability to remain in the premises as a "tenant" with all of the rights and responsibilities that status entails. Professor Watson Hamilton will review the implications of this section for issues such as changing locks and the payment of rent in her forthcoming post.

Another potentially important provision for landlords and property managers, which again has not been subject to judicial interpretation and appears to be rarely used, is *PAFVA* section 10 allowing for warrants permitting entry. Under this section, a warrant may be issued by a judge

following an application by a peace officer, without notice to the respondent, where there are reasonable and probable grounds to believe that a family member may have been the subject of family violence, will be found at the place to be searched, and the person who provided the information has been refused access to the family member. If granted, the warrant permits the person named in it to enter the place named in the warrant, search for, assist and/or examine the family member, and with the person's consent, remove them from the premises.

Pursuant to an amendment made in 2011, the *PAFVA* now creates an explicit offence for failing to comply with a protection order and allows peace officers to arrest without warrant a person whom they reasonably believe to have breached a protection order (sections 13.1, 13.2).

In their evaluation of the *PAFVA* completed in 2005, Tutty et al analyzed data collected from court files with respect to the use of the *PAFVA* from 2002 to 2004. Amongst the findings of this study that may be of interest to landlords and property managers:

- Claimants under the *PAFVA* were predominantly female (92.1%), and respondents were primarily male (94.5%).
- Of the intimate relationships with children associated with them, most applications (75.6%) requested that the order cover the children.
- In a majority of files (85.7%) the respondent had not been charged criminally for the same matter(s) at the time of the EPO application.
- Almost all of the cases (90%) included evidence of previous incidents of violence before the circumstances that were the subject of the EPO application.

Another evaluation is planned of the *PAFVA*, and I will post a comment to ABlawg with more details when they are available.

Common Law Restraining Orders

As noted above, one of the motivations behind the *PAFVA* was to make it easier for victims of family violence to obtain emergency protection than the previous system of common law restraining orders had allowed for. Nevertheless, the practice of issuing restraining orders in circumstances of family violence has not disappeared. This may be explained by the fact that, while an application for a restraining order is more cumbersome and less immediate than an EPO application because it must be made to a superior court (i.e. the Court of Queen's Bench), restraining orders can be made in circumstances that are broader than those in which EPOs and QBPOs can be granted under the *PAFVA*.

Restraining orders are made pursuant to the inherent jurisdiction of superior courts, which is confirmed in section 8 of the *Judicature Act*, RSA 2000, c J-2. Section 13(2) of the *Judicature Act,* which provides for the granting of injunctions, has also been seen as providing superior courts with jurisdiction to grant restraining orders (see *RP v RV,* 2012 ABQB 353 (CanLII)). This means that judges hearing restraining order applications are not restricted to granting orders to "family members" in circumstances of "family violence" as defined in the *PAFVA.* In *Lenz v Sculptoreanu, supra* at paras 25-30, the Court of Appeal noted that restraining orders are available to those in dating relationships, who are not covered by the *PAFVA*. In *Boychuk v Boychuk*, 2017 ABQB 428 (CanLII), Justice Veit held that not only are restraining orders

available in situations where the applicant has a reasonable and legitimate fear for her safety or that of her children or property, they are also available where the conduct of the respondent threatens the applicant's reputation or privacy, based on a "right to be free from vexatious or harassing conduct" (at para 37; see also *ATC v NS*, 2014 ABQB 132 (CanLII), granting mutual restraining orders to former intimate partners based on threats to each other's reputations).

Like EPOs, restraining orders can also be obtained *ex parte* in urgent circumstances, by filing an originating application with the Court of Queen's Bench or, if a proceeding has already been commenced, by filing a family application (see *Alberta Rules of Court*, Alta Reg 124/2010, rule 12.33(1)). The application must be accompanied by an affidavit or, in the case of an *ex parte* application, by Form FL-14 (Application for a Restraining Order Without Notice in a Family Law Situation (rule 12.33(2))).

Because restraining orders are based on the court's inherent jurisdiction, the conditions that a court might make pursuant to such an order are open-ended. Presumably these could include conditions related to residential tenancies if they were connected to the facts of the case and the grounds for the order. Restraining orders may also include conditions for arrest upon breach of the order, and breaches are considered criminal offences under section 127 of the *Criminal Code*, RSC 1985, c C-46, which creates the offence of disobeying a court order without lawful excuse where no other punishment is expressly provided by law.

Family Law Orders

Exclusive Possession Orders

The *Family Law Act,* SA 2003, c F-4.5 (*FLA*), allows for exclusive possession orders to be made in relation to the family home as part of an order providing for child or spousal support, and can include an order evicting a spouse or adult interdependent partner and restraining them "from entering or attending at or near the family home" (section 68(1)). Under section 67(1), "family home" is defined as property:

> (a) that is owned or leased by one or both spouses or adult interdependent partners,
> (b) that is or has been occupied by the spouses or adult interdependent partners as their home, and
> (c) that is
>
> > (i) a house, or part of a house, that is a self-contained dwelling unit,
> > (ii) part of business premises used as living accommodation,
> > (iii) a mobile home,
> > (iv) a residential unit as defined in the Condominium Property Act, or
> > (v) a suite. (emphasis added)

Factors relevant to whether an exclusive possession order should be made are enumerated in section 69:

- the availability of other accommodation within the means of both the spouses or adult interdependent partners,

- the needs of any children residing in the family home,
- the financial position of each of the spouses or adult interdependent partners,
- any order made by a court with respect to the property or the support or maintenance of one or both of the spouses or adult interdependent partners, and
- any restrictions or conditions of any lease involving the family home, if applicable.

Although family violence is not explicitly set out as a factor, it is relevant to the best interests of any child (see section 18(2)(b)(vi)), which might bring family violence in as a relevant factor under "the needs of any children residing in the family home".

Exclusive possession orders under the *FLA* have effect notwithstanding a subsequent order in favour of one of the spouses or adult interdependent partners for the disposition of the family home (section 70). These orders may be registered with the Registrar of Land Titles, including in the case of leases that are for longer than three years (section 71(1)(b)). Under section 72 of the *FLA*, "If a family home is leased by one or both of the spouses or adult interdependent partners under an oral or written lease and the court makes an order giving possession of the family home to one spouse or adult interdependent partner, that spouse or adult interdependent partner is deemed to be the tenant for the purposes of the lease" (emphasis added). This provision is even clearer than the *PAFVA* that the party obtaining an exclusive possession order becomes a tenant, leading to corresponding rights and obligations under the *RTA* that Professor Watson Hamilton will discuss.

Almost identical provisions allowing for exclusive possession orders for the "matrimonial home", evicting and restraining spouses, providing for the precedence and registration of such orders, and deeming spouses as tenants exist in the *Matrimonial Property Act,* RSA 2000, c M-8 (*MPA*) (see sections 1(c), 19, 21, 22 and 24). Both Acts also provide for exclusive possession orders for household goods; see *FLA* section 73 and *MPA* section 25.

Only the Court of Queen's Bench has jurisdiction to make exclusive possession orders under the *FLA* and *MPA*. The main difference between the Acts is that the *MPA* only applies to spouses who are or were married, whereas the *FLA* applies more broadly to former spouses and adult interdependent partners.

There is no reported case law applying these provisions in circumstances relevant to domestic violence or residential tenancies.

No-Contact Orders

Alberta's child protection legislation, the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 (*CYFEA*), allows for restraining orders to be made in circumstances where a child has been apprehended or made subject to a supervision order or temporary or permanent guardianship order, and where there are reasonable and probable grounds to believe that a person has or is likely to physically or emotionally injure or sexually abuse the child (section 30). Emotional injury is defined to include "exposure to domestic violence or severe domestic disharmony" (section 3(a)(ii)(C)). Applications for a restraining order in this context are made by a designated director under the *CYFEA* to the Court of Queen's Bench, and can include

conditions restraining the person from residing with, contacting or associating with the child, and prescribing contributions to be made for the maintenance of the child (section 30(1) and (3)). This type of no-contact order could be relevant in a residential tenancy situation where the child remains with one of their parents under a supervision order, and the other parent is restrained from contacting the child.

Criminal Code No-Contact Orders

Peace Bonds

Peace bonds are another form of no-contact order, available under section 810 of the *Criminal Code* in circumstances where the applicant fears on reasonable grounds that another person "will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property". Applications for a peace bond involve laying an information before a justice of the peace, who can hear the application or refer it to a summary conviction court for hearing. Peace bonds are granted in the form of a recognizance, with or without sureties, under which the defendant is required "to keep the peace and be of good behaviour for a period of not more than 12 months" (section 810(3)). Other "reasonable conditions … desirable to secure the good conduct of the defendant" can be added to the recognizance, and under subsection (3.2), the justice or summary conviction court "shall consider whether it is desirable, in the interests of the safety" of the defendant's spouse, common-law partner or child, to add to the recognizance either or both of these conditions:

> **(a)** prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be, is regularly found; and
>
> **(b)** prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or common-law partner or child, as the case may be.

There are also provisions for peace bonds in the *Criminal Code* for other specific circumstances: fear of forced marriage or marriage under the age of 16 years (section 810.02), fear of commission of a sexual offence (section 810.1), and fear of commission of a serious personal injury offence (section 810.2).

It is common practice for peace bonds to be used in some domestic violence courts in Alberta where the defendant has been charged with a domestic violence-related offence that is relatively minor and there is a low risk of reoffending, if he is willing to accept responsibility for the offence and undergo counselling (see e.g. Leslie Tutty and Jennifer Koshan, "Calgary's Specialized Domestic Violence Court: An Evaluation of a Unique Model" (2013) 50 Alberta Law Review 731 at 745).

Bail/Sentencing Orders

The *Criminal Code* also allows no-communication and no-attendance orders to be made as a condition of the release of an accused person on bail (see sections 499(2), 503(2.1), 515(4) and (4.2), 522) and as a condition of a probation order made when a person is sentenced for a domestic violence-related offence (see section 732.1).

There are no specific provisions in the *Criminal Code* dealing with the impact on residential tenancies of peace bonds or bail/sentencing orders providing for no contact and/or no attendance at the family residence.

Concluding Remarks

This post shows that there is good reason for landlords and property managers to be confused about the various forms of no-contact orders and their impact on residential tenancies. There is currently a hodgepodge of different types of protection orders that are available in domestic violence cases, with differing implications for residential tenancies – sometimes explicit and sometimes implicit. Landlords and property managers are also restricted in their ability to obtain information about whether tenants have protection orders and of what type, in light of privacy protections in the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 and *Personal Information Protection Act*, SA 2003, c P-6.5 (see my earlier post Landlords, Tenants, and Domestic Violence: Clarifying Privacy Issues).

As a practical matter, victims of domestic violence who are granted protection orders providing for conditions such as exclusive occupation or possession of the family home should advise their landlords of such, and preferably provide them with a copy of the order, particularly if they wish to change the locks or make arrangements to take over the residential tenancy agreement. Professor Jonnette Watson Hamilton's forthcoming post will look at these issues in more detail.

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September 12, 2017

Landlords, Tenants, and Domestic Violence: Changing Locks and Barring Access

By: Jonnette Watson Hamilton

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

This is the fifth in a series of blog posts examining some of the legal uncertainties facing landlords and property managers who seek to respond to domestic violence on their premises, as identified in the Centre for Public Legal Education Alberta (CPLEA) report on Domestic Violence: Roles of Landlords and Property Managers. For earlier posts see here, here, here and here. Among other problems, the CPLEA report identified the confusion landlords and tenants have about the implications of various protection orders for requests from a victim of domestic violence to have the locks changed (at 45). In addition, both landlords and tenants would like more power to change locks and bar access to perpetrators (at 45). This post will look at the issue of changing locks and barring access from the perspective of the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*). It relies on my earlier discussion in "Who is a 'Tenant' under the Residential Tenancies Act?" because the answer under the *RTA* to who has a right to keys and access to the residential premises is whoever has the status of "landlord" or "tenant". However, the answer based on the *RTA* is affected by the various protection orders that victims of domestic violence may obtain. These orders are touched on in this post but were explained in more detail by Professor Jennifer Koshan in "Landlords, Tenants, and Domestic Violence: Clarifying the Implications of Different Protection Orders". This post focuses on the poor fit between the *RTA* and the statutes authorizing protection orders.

To repeat, the basic *RTA* answer to the question of who can have access to residential premises and who can change or add to locks is an easy one: those with the status of "landlord" or "tenant" under the *RTA*. Section 16(b) sets out the landlord's promise to allow every tenant possession of their residential premises:

> 16 The following covenants of the landlord form part of every residential tenancy agreement:
> . . .
> (b) that, subject to section 23 [about the landlord's ability to enter the tenant's premises], 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; (emphasis added)

The governing provision for locks and other external security devices is section 24:

> 24(1) Neither a tenant nor a landlord shall add to or change locks on doors giving access to residential premises or to the property of which the residential premises form a part without the consent of the other party.
>
> (2) Notwithstanding subsection (1), a landlord may add to or change locks on doors giving access to residential premises or to the property of which the residential premises form a part if a key is made available to the tenant as soon as the addition or change is made.
>
> (3) Subsection (1) does not apply to the installation by a tenant of a security device that
>
> (a) is capable of being put into effect only while a person is inside the residential premises, and
> (b) can be installed and removed without damage to the premises or will remain affixed to the premises and become the property of the landlord when the tenancy is terminated.
>
> (4) Where a tenant adds to or changes a lock in accordance with subsection (1) the tenant shall make a key available to the landlord as soon as the addition or change is made. (emphasis added)

Therefore, under the *RTA,* tenants need the consent of landlords to change or add to locks and thus physically bar access. Landlords can act unilaterally, but only if they immediately make a key available to the tenants — all of the tenants of the particular residential premises. There is a minor exception for security devices that can only be operated from inside the premises, such as chain door guards.

As a result of these provisions, neither the victim of domestic violence nor the landlord can change or add to the locks and thus bar physical access to the residential premises in order to ensure the victim's safety if the perpetrator is a tenant. If the perpetrator is not a tenant, the victim is able to change locks, if she gets the consent of the landlord, and able to insist on the exclusion of the perpetrator. However, regardless of whether the victim is also a tenant or not, the perpetrator who is a tenant is entitled to keys and to access unless the victim has a protection order with a condition for exclusive possession of the residential premises under the *Protection Against Family Violence Act,* RSA 2000, c P-27 (*PAFVA*) or other legislation discussed by Professor Koshan.

Under the *PAFVA*, a court can grant the victim of domestic violence exclusive occupation of a residence for a specified period, "regardless of whether the residence is jointly owned or leased by the parties or solely owned or leased by one of the parties": sections 2(3)(c) and 4(2)(c). Unfortunately, that is almost all the *PAFVA* says. It says nothing specific about rent (although a perpetrator can be ordered to pay a victim's "accommodation expenses" under section 4(2) of the *PAVFA*), security deposits or changing locks, all important practical matters in the domestic violence context.

Nevertheless, protection orders grant exclusive possession. Once the victim is granted exclusive possession under a protection or other court order for a specified period of time, then during that period of time the perpetrator would almost certainly have no right to a key or access to the residential premises, regardless of what the *RTA* says.

I say "almost certainly" for two reasons. First, the longer-term protection orders granted by the Court of Queen's Bench under the *PAFVA* (QBPOs) can say something about keys. Those orders can grant either party "temporary possession of specified personal property, including . . . keys or other necessary personal effects": section 4(2) (emphasis added). Unfortunately, by not including a similar provision for very short-term emergency protection orders (EPOs) — the orders in force in the critical first few days — the *PAFVA* creates unnecessary uncertainty about who can keep or obtain keys for external doors and windows during that initial period of time. However, an EPO that grants exclusive possession of residential premises to the victim grants the victim the ability to remain in the premises and bar access to the perpetrator, which logically includes the ability to change or add to locks and other security devices.

It is also open to courts to grant additional specific conditions in EPOs and QBPOs that deal with locks as well as keys. For example, section 2(3)(g) of the *PAFVA* provides that a judge can include in an EPO any other provision considered necessary to provide for the immediate protection of the claimant. That could include possession of keys or the authority to change locks, with or without the landlord's consent.

Second, section 9(3) of the *PAFVA* provides:

> (3) On the request of a claimant mentioned in subsection (2) [i.e., a victim of domestic violence who is not a party to the lease] the landlord must advise the claimant of the status of the lease and serve the claimant with notice of any claim against the respondent [the perpetrator] arising from the lease, and the claimant, at the claimant's option, may assume the responsibilities of the respondent under the lease. (emphasis added)

"Assume" usually means to take over another person's rights and/or obligations, to step into their shoes, to be a substitute. The other person is replaced and no longer has those rights or responsibilities.

The choice is entirely the victim's under section 9(3) *PAVFA.* Why would a victim take over the responsibilities of the perpetrator under a residential tenancy agreement? They should not do so if rent was owed, or if there was significant damage to the residential premises, or they do not have enough money for a new security deposit. They might do so if rent was up to date, there was no damage to the property, and they had the money for a new security deposit. The purpose of the section 9(3) requirement that a landlord advise the victim of the "status" of the lease and of claims against the perpetrator is to alert the victim to these outstanding obligations so an informed choice can be made.

There are three obvious problems with section 9(3). First, given how broad the definition of tenant is and how it does not require a person's signature to be on a written lease, many victims

who lived in the residential premises will have been co-tenants with the perpetrator of the violence. That means they will not have a choice about assuming the responsibilities of the perpetrator. Section 9(3) does not help them avoid the responsibility for any rent the perpetrator did not pay and for any damage the perpetrator did that the *RTA* imposes on them as tenants.

The second is that section 9(3) only says that a victim who is not a party to a lease has a choice to assume the perpetrator's responsibilities under the lease. It says nothing about assuming their rights, such as the right to change the locks with the landlord's consent, or the right to stay in the residential premises until they decide to leave or one of the conditions allowing a landlord to terminate the lease applies.

The third is that section 9(3) does not say what happens to the security deposit paid by the perpetrator. If the victim assumes the perpetrator's responsibilities, it seems logical that the victim takes over the obligation to provide a security deposit. If that is the case, then the landlord would have to return the existing security deposit to the perpetrator or account for deductions made from the security deposit for the costs of cleaning or damage or rent unpaid: section 46 *RTA*.

The relevant provisions of the *Family Law Act*, SA 2003, c F-4.5 and the *Matrimonial Property Act*, RSA 2000, c M-8, are much clearer than section 9(3) of the *PAVFA*. Section 72 of the *Family Law Act* states:

> 72 If a family home is leased by one or both of the spouses or adult interdependent partners under an oral or written lease and the court makes an order giving possession of the family home to one spouse or adult interdependent partner, that spouse or adult interdependent partner is deemed to be the tenant for the purposes of the lease. (emphasis added)

Section 24 of the *Matrimonial Property Act* says essentially the same thing for married persons granted exclusive possession orders under that Act:

> 24 If a matrimonial home is leased by one or both of the spouses under an oral or written lease and the Court makes an order giving possession of the matrimonial home to one spouse, that spouse is deemed to be the tenant for the purposes of the lease. (emphasis added)

Although clearer than the *PAFVA*, the *Family Law Act* and *Matrimonial Property Act* are less protective of victims because they do not give a victim any choice about assuming responsibilities under the residential tenancy. Their orders granting the victim exclusive possession automatically deem the victim to be a tenant, and so the victim becomes responsible for the rent, damages, security deposit and other responsibilities of a tenant after the date of the order.

Annoyingly, section 72 of the *Family Law Act* and section 24 of the *Matrimonial Property Act* use different terminology than the *RTA*, talking about "leases" instead of "residential tenancy agreements" and referring to "oral or written leases" when the *RTA* includes "written, oral or

implied agreements". Thus, the coverage of the *Family Law Act* and *Matrimonial Property Act* is broader than that of the *RTA* because they do not exclude the types of leases excluded by section 2(2) of the *RTA*. They are also narrower because they do exclude implied agreements to lease, and implied agreements are a common way that victims of domestic violence who are not parties to a written agreement attain the status of tenant — see "Who is a "Tenant" under the Residential Tenancies Act?".

There are other open questions about how the *RTA* is affected by the different protection orders, particularly when the perpetrator was a tenant or co-tenant of the residential premises at the time a protection order was made that granted the victim exclusive possession of those premises.

Those questions include:

- Does the victim of domestic violence need the consent of the landlord to change the locks?
- Is the perpetrator still a "tenant" under the *RTA*?
- Is the perpetrator still responsible for the rent?
- Does the landlord have to return the security deposit to the perpetrator?

None of these issues are dealt with in any of the legislation. Nonetheless, if a court order such as an EPO or QBPO addresses any of those issues, the court order's handling of them should prevail. In any event, a landlord should have a good faith defence based on the court order against any claims or complaints by a perpetrator.

In her e-book "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", 2017 CanLIIDocs 2, Linda Neilson recommends that judges consider including the following in protection orders:

> prohibitions on financial harassment and intimidation — for example, prohibitions on cancelling essential services (electricity, phone, heating) to the home occupied by the targeted person, provisions requiring payment of rent or mortgage, prohibitions on conduct designed to destroy the targeted person's credit rating, prohibitions on use of credit cards and on increasing or defaulting on loans. (section 9.2.2.9, emphasis added)

This type of condition could be included in EPOs and QBPOS pursuant to the general provisions allowing judges to make other appropriate conditions. With respect to EPOs, however, there may be a question of whether a condition regarding payment of rent would be "necessary to provide for the immediate protection of the claimant". This is especially so because financial abuse is not included in the definition of family violence under the *PAFVA*.

However, what happens if the court order is silent about things like who is a tenant, consent of the landlord to changing the locks, who is responsible to pay the rent, and what happens to the security deposit?

Does the victim of domestic violence with a protection order granting exclusive possession need the consent of the landlord to change the locks? Unless the court order itself says something about changing the locks, it would seem that section 24(1) of the *RTA* would prevail. The landlord's consent would be required. There is nothing in the *PAFVA* or any of the other statutes that overlaps with or contradicts the rule in section 24(1) of the *RTA*.
It should be recalled that exclusive possession orders under the *Family Law Act* and the *Matrimonial Property Act* may be made in a wide variety of circumstances related to the breakdown of a spousal or marriage relationship, not only in situations where there has been domestic violence, so the aim of these statutes is not to protect victims of domestic violence by, for example, facilitating the change of locks (although that may be a consequence of the deeming provisions).

Is the perpetrator who was a tenant or co-tenant at the time a protection order granting exclusive possession to the victim was made, still a "tenant" under the *RTA*? Being granted exclusive possession is not the same thing as becoming the sole tenant, whether by taking the place of the perpetrator on the residential tenancy agreement, if the perpetrator was the sole tenant, or, if the parties are co-tenants, by having the perpetrator's tenancy terminated. That is why section 72 of the *Family Law Act* and section 24 of the *Matrimonial Property Act* separately "deemed" someone granted exclusive possession to be a tenant. That is also why section 9(3) of the *PAFVA* gives victims granted exclusive possession the option to step into the shoes of the tenant; it does not happen automatically with a grant of exclusive possession.

With an EPO or QBPO, it would seem that the perpetrator remains a tenant if the *PAFVA* and the *RTA* are read together — unless the victim with the protection order granting exclusive possession of the residential premises is not a tenant and chooses to assume the responsibilities of the tenant under section 9(3) of the *PAVFA*.

Being deemed a tenant under the *Family Law Act* or the *Matrimonial Property Act* would not have the same effect because deeming someone a tenant is not the same as having them assume the tenant's responsibilities. The victim and the perpetrator might be co-tenants who are jointly responsible under the *RTA*, if the perpetrator was a tenant before the victim was deemed to be a tenant. Both the *Family Law Act* and the *Matrimonial Property Act* are silent about the status of a perpetrator who was a tenant or co-tenant at the time an order granting exclusive possession to the victim was made, so it is likely the perpetrator will continue to be a tenant. The perpetrator's right to possess the premises is altered by the exclusive possession order, but unless the order itself says otherwise, nothing in those statutes alters the perpetrator's responsibilities as a tenant to pay rent, provide a security deposit, etc.

If a victim with a protection order granting exclusive possession of the residential premises is not a tenant and does not choose to assume the responsibilities of the tenant under section 9(3) of the *PAVFA,* then the perpetrator will still have all of the responsibilities of a tenant, even though out of possession. This would include the responsibility to pay rent, to provide a security deposit, etc.

If a victim with a protection order granting exclusive possession of the residential premises is a tenant, the victim has no choice. The victim will continue to have the responsibilities of a tenant.

If the victim is a co-tenant with the perpetrator, then both will be responsible for such things such as the rent and damages to the premises. The victim and perpetrator will likely be jointly and severally responsible, meaning the landlord can go after one or the other or both — "likely" because the *RTA* does not contemplate co-tenants and so says nothing about how liability is shared.

If the perpetrator who is excluded from the residential premises is still a tenant, is the perpetrator liable to pay the rent and perform other obligations under the residential tenancy agreement? The likely answer under the *RTA* is "yes." The perpetrator is still a tenant and a tenant must pay rent: section 21(a) of the *RTA*. Unless the court order dealt with the payment of rent, there is no conflict between the *RTA* and either the *PAFVA, Family Law Act* or *Matrimonial Property Act* because the latter three statutes are silent, so the *RTA* prevails.

It should not be so difficult to determine what the law's answer is to simple questions such as:

- Does the victim of domestic violence with a protection order need the consent of the landlord to change the locks?
- Is the perpetrator who was a tenant before the protection order still a "tenant" under the *RTA* if a protection order excludes him from possession of the residential premises?
- Is the perpetrator who was a tenant before the protection order still responsible for the rent under the *RTA* if a protection order excludes him from possession of the residential premises?
- Is the perpetrator who was a tenant before the protection order still responsible for the security deposit?

There do not appear to be any provisions in the residential tenancy statutes of other Canadian provinces or territories that answer any of the questions this post has raised. However, there are other jurisdictions (e.g., Oregon and South Australia) which have legislation that provides answers, answers such as:

- The victim of domestic violence who is granted exclusive possession of residential premises can change external door or window locks without the landlord's consent if they have a court order that excludes a tenant from the residential premises.
- The abusing tenant excluded from the residential premises is jointly responsible for the rent and any damages to the residential premises until their tenancy ends.
- The abusing tenant excluded from the residential premises is not entitled to the return of their security deposit before the tenancy ends.

In Alberta, it would be better to amend the *PAFVA* and the other legislation under which exclusive possession of residential premises can be granted rather than amend the *RTA*, because what is needed is a comprehensive list of matters to be considered by the parties and the courts in granting a protection order, or at least the QBPOs. The court, lawyers and parties are probably more likely to look at the domestic violence and family law statutes, rather than the *RTA*. If section 4 of the *PAFVA* was amended to list these sorts of practical matters as things to be addressed, then a victim of domestic violence would have a protection order to show the landlord and that protection order would say whether the landlord's consent was needed to change the

locks, who was responsible for the rent, whether the security deposit had to be returned, and who should pay for damages. An amendment that offers landlords immunity from liability for acts such as failing to return a security deposit to a tenant who is a perpetrator or failing to deliver the keys to new locks to a tenant who is a perpetrator, if they act in good faith, should also be considered.

However, as Professor Koshan pointed out in "Landlords, Tenants, and Domestic Violence: Clarifying the Implications of Different Protection Orders", there is currently a hodgepodge of different types of protection orders with differing implications for residential tenancies, so a lot of amendments would be required. That suggests it would be better to amend the *RTA*, to gather together all the implications of exclusive possession orders for residential tenancies in one place. Amending the *RTA* would provide the certainty that landlords are seeking. Nevertheless, amendments to the *PAFVA* and the other legislation under which exclusive possession of residential premises can be granted seems to be the better way to go, as they should provide better access to the relevant law for victims of domestic violence and those assisting them. The *RTA* could be amended to provide that orders made under the *PAFVA* and the other statutes prevail when the terms of those orders or statutory provisions conflict with provisions of the *RTA*.

The 2016 amendments to the *RTA* that were made by the Residential Tenancies (Safer Spaces for Victims of Domestic Violence) Amendment Act, 2015, made it easier for victims of domestic violence to leave rented residential premises by providing for early termination: see "The Residential Tenancies Act and Domestic Violence: Facilitating Flight?". But the *RTA* and the *PAFVA* do not make it easy for a victim to stay, given their lack of clarity on the issues raised here. This is unfortunate, because staying may be the best practical option for the victim and family.

This post may be cited as: Jonnette Watson Hamilton "Landlords, Tenants, and Domestic Violence: Changing Locks and Barring Access" (12 September, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/09/Blog_JWH_Change_Locks.pdf

September 13, 2017

Landlords, Tenants, and Domestic Violence: Liability for Damage to Residential Premises

By: Jonnette Watson Hamilton

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

This is the sixth and last in a series of blog posts on "Landlords, Tenants, and Domestic Violence", examining some of the legal uncertainties facing landlords and property managers who seek to respond to domestic violence on their premises, as identified in the Centre for Public Legal Education Alberta (CPLEA) report on Domestic Violence: Roles of Landlords and Property Managers. That report recommends that "further consideration should be given to ways that the law impedes or assists landlords in accommodating the needs of their tenants who are experiencing domestic violence" (at 9). Even landlords who are motivated to help improve the circumstances of victims of domestic violence are worried about recovering the costs of repairing damage to their property by the perpetrators of domestic violence when the security deposit is not enough (CPLEA report at 8, 45). But, in an example of the further victimization of too many of the victims of domestic violence, the CPLEA June 2014 report entitled "The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence" noted that "it is often the victim that the landlord pursues for overdue rent and damages" (at 5, 34, 38) — damages caused by the perpetrator of the violence. This post will discuss the interaction between the provisions in the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*) governing security deposits and compensation for property damage and the *Protection Against Family Violence Act,* RSA 2000, c P-27 (*PAFVA*), the *Family Law Act*, SA 2003, c F-4.5 and the *Matrimonial Property Act*, RSA 2000, c M-8. The more general implications of those and other sources of protection orders in this context are discussed by Professor Jennifer Koshan in "Clarifying the Implications of Different Protection Orders". Some of the points in this post rely upon or repeat issues raised in my "Landlords, Tenants, and Domestic Violence: Who is a Tenant?" and "Landlords, Tenants, and Domestic Violence: Changing Locks and Barring Access" posts. This post will first set out the general rule about responsibility for damages to the residential premises, noting the likely areas of uncertainty. Next, I will discuss security deposits before turning to responsibility for damage that exceeds the amount of a security deposit. I will end with a few suggestions for reform.

The General Rule about Responsibility for Damages to the Residential Premises

Generally speaking, a tenant is required to repair damage to the residential premises or the building's common areas if that damage is the tenant's fault. In the *RTA*, this obligation is found in section 21:

> 21 The following covenants of the tenant form part of every residential tenancy agreement:
> . . .
> (e) that the tenant will not do or permit significant damage to the premises, the common areas or the property of which they form a part; (emphasis added)

Breach of the section 21(e) obligation will allow the landlord to sue for compensation under section 26 *RTA*:

> 26(1) 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:
> . . .
> (d) recovery of damages resulting from the breach.

Like the other rights and responsibilities discussed in this series, the responsibility for not damaging the residential premises — and for compensating the landlord for any damage done in breach of this covenant under section 26 *RTA* — is part of being a "tenant".

Note that a tenant is responsible for more than their own actions. Section 21(e) *RTA* makes a tenant responsible for permitting damage without specifying whose conduct the tenant is responsible for. The tenant's obligation therefore seems broader than the equivalent clauses in some other provinces because they do specify and limit whose conduct is included. But section 21(e) *RTA* is also narrower than the equivalent provisions in some other provinces because the tenant is only responsible for "significant" damage, rather than simply "damage". For the equivalent provisions in some other provinces, see:

- British Columbia's *Residential Tenancy Act*, SBC 2002, c 78, section 32(3) and Saskatchewan's *Residential Tenancies Act*, *2006*, SS 2006, c R-22.0001, section 49(6), both of which make a tenant responsible for damage "caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant" (emphasis added)
- The Northwest Territories' *Residential Tenancies Act*, RSNWT 1988, c R-5, section 42(1) is very similar, making the tenant liable for damage "caused by the wilful or negligent conduct of the tenant or persons who are permitted on the premises by the tenant" (emphasis added)
- Nova Scotia's *Residential Tenancies Act*, RSNS 1989, c 401, section 9(1), statutory condition 6, is also similar, making the tenant responsible for "the repair of damage caused by wilful or negligent act of the tenant or of any person whom the tenant permits on the premises" (emphasis added)
- Ontario's *Residential Tenancies Act, 2006,* SO 2006, c 17, section 34, is more specific, making a tenant responsible for the repair "of undue damage to the rental unit or residential complex caused by the wilful or negligent conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant" (emphasis added).

The main point is that a "tenant" is responsible for the conduct of others under the *RTA*. So, once again, the status of the "tenant" is the key issue under the *RTA* — and as my post on "Who is a Tenant" argued, the status of "tenant" extends to a lot more people than most landlords and tenants realize because a written lease is not required to make a person a tenant. If victims of domestic violence are not tenants, then the victims are responsible only for their own conduct (subject to any general rules about vicarious liability).
The issue of whether a tenant has "permitted" damage under section 21(e) could be a contentious one. My post, "Landlords, Tenants, and Domestic Violence: Landlords' Power to Terminate Residential Tenancies for Acts of Domestic Violence (and an Argument for Publicly-Accessible RTDRS Reasons for Decisions)", noted a few situations in which the question of "permission" was raised in the context of actions to terminate tenancies, such as:

- This decision, where termination of the tenancy of a victim of domestic violence was justified after the police were called to the rented premises four times in two months, even though the tenant had a restraining order and her male partner was barred from the rented premises, because she had permitted her male partner to return.
- This decision, where a tenant, who had been assaulted by her visitor who was stalking her and against whom she subsequently got a peace bond, nevertheless had her tenancy terminated because of complaints of fighting, yelling, bashing of walls, swearing, loud noise, and people coming and going at varying hours that resulted in the police being called five times and other tenants and their children living in fear of her visitor, who had also assaulted the landlord — even though the conduct of the visitor was found not to be the tenant's fault.

In addition to uncertainty around whether a tenant has permitted damage to residential premises, there is also uncertainty around whether any damage is "significant damage" as it must be for there to be a breach of section 21(e). This is a question of degree, and will depend on the facts in each case.

Security Deposits

A security deposit, also known more informally as a damage deposit, is a guarantee of a tenant's performance of their obligations, including the obligation under section 21(e) *RTA* not to do significant damage. A security deposit is a one-time, refundable payment that cannot be more than one month's rent: section 43(1) *RTA*. A landlord must place a security deposit in a trust account and the money stays in the trust account (usually) until the tenancy expires or is terminated: sections 44, 45 *RTA*.

A landlord can use the security deposit to reimburse itself if the landlord has a valid reason to do so: section 46 *RTA*. For example, a landlord can keep all or part of a security deposit if the tenant has damaged the property, but only if the landlord has completed the move-in and move-out inspection reports: section 46(6) *RTA*. It is an offence under the *RTA* for a landlord to keep money from the security deposit for property damage and cleaning costs if the inspection reports were not completed: section 60(1)(a) *RTA*. However, while a landlord cannot deduct for damages or cleaning costs from the security deposit without the inspection reports, it can still use the

security deposit to cover other things, such as unpaid rent, and it can sue the tenant(s) to recover the costs of repairing significant damage: section 26 *RTA*. If the costs of repair exceed the amount of the security deposit, a landlord can sue the tenant(s) to recover the excess.
I have already dealt with the impact of several of the statutes under which orders of exclusive possession are available on security deposits: see "Changing Locks and Barring Access". To briefly summarize:

- The *PAFVA*, which allows for protection orders granting exclusive possession to residential premises under section 2 and 4, says nothing about security deposits.
- Section 9(3) *PAFVA*, which allows a victim who was not a tenant to choose to "assume the responsibilities of the [perpetrator] under the lease", says nothing about what happens to the perpetrator's security deposit if the victim assumes the lease.
- It is likely that, if the victim assumes the responsibilities under the lease pursuant to section 9(3) *PAVFA*, the landlord would have to return the existing security deposit to the perpetrator or account to the perpetrator for deductions made from the security deposit for the costs of cleaning or damage or rent unpaid: section 46 *RTA*.
- It is likely that, if the victim assumes the responsibilities under the lease pursuant to section 9(3) *PAVFA*, the victim will need to pay the landlord a security deposit.
- If the victim was a co-tenant or decides not to assume the responsibilities of the perpetrator pursuant to section 9(3) *PAFVA*, then it is likely the landlord does not have to return the perpetrator's security deposit because the perpetrator continues as a tenant.
- If the victim is granted an order of exclusive possession under section 68 of the *Family Law Act* or section 19 of the *Matrimonial Property Act,* the victim likely becomes responsible for the security deposit after the date of the order because those statutes say the victim is "deemed to be the tenant for the purposes of the lease" (FLA section 72 and MPA section 24).
- After an order of exclusive possession under section 69 of the *Family Law Act* or section 19 of the *Matrimonial Property Act,* the victim and the perpetrator will likely be co-tenants who are jointly responsible for the security deposit if the perpetrator was a tenant before the victim was deemed to be a tenant.

A lot of uncertainty about the impact of these statutes remains because there is no case law on these issues. Perhaps relevant decisions have been made by the Residential Tenancies Dispute Resolution Service (RTDRS), but their decisions are not accessible.

My opinions about the impact of protection orders on security deposits rely a lot on the distinction between being a tenant under the *RTA* and having exclusive possession of the residential premises. At common law that would have been a preposterous distinction because exclusive possession is essential to a tenancy at common law: see "*Street v Mountford* Applied to Decide: A Residential Tenancy Agreement or a Licence?"

It must be admitted that the *RTA* blurs that distinction and creates uncertainty about whether a landlord can keep a perpetrator's security deposit if the perpetrator is excluded from the residential premises. Section 46 deals with the return of security deposits and subsection 46(2) states that the landlord must return the security deposit or the balance if deductions were made "within 10 days after the day on which the tenant gives up possession of the residential premises

…" (emphasis added). This seems to tie return of the security deposit to loss of possession, and not to the status of tenant.

However, the *RTA* in other sections contemplates that the return of a security deposit is triggered by the expiration or termination of the tenancy. For example, section 46(1)(c) defines "security deposit" to include "any amount owing to the tenant as interest under section 45 at the time of the expiration or termination of the tenancy" (emphasis added). Section 46(1)(c) is referring to a provision in section 45 that allows a landlord and tenant to agree that interest need not be paid annually but may "be paid to the tenant on the expiration or termination of the tenancy": section 45(2) (emphasis added). Section 44(6), which deals with the records that a landlord must keep, states that a landlord must keep security deposit records "for at least 3 years after the expiration or termination of the tenancy to which they relate" (emphasis added).

Therefore, in the context of the entire statute, and despite the infelicitous wording of section 46(2), it would seem the better interpretation is that a tenant who had paid a security deposit and who was subsequently excluded from possession by a protection order, is not entitled to have the security deposit returned as long as the perpetrator is still a tenant.

Responsibility for Damage that Exceeds the Amount of a Security Deposit

The question of who is responsible for and can be sued for damage to the residential premises that costs more to repair than the value of the security deposit is basically answered in the first section of this post on the general rule about responsibility for damages. Once again, the status of "tenant" is key.

A tenant can be sued under section 26(1)(d) if the tenant commits a breach of a residential tenancy agreement, such as a breach of section 21(e) that requires "that the tenant will not do or permit significant damage to the premises, the common areas or the property of which they form a part" (emphasis added). So, a landlord can sue a tenant for the difference. Whether that is a worthwhile course of action depends on whether the tenant can be located and whether the tenant has a job, bank account, assets, etc. from out of which a judgment could be paid.

A landlord can also sue the perpetrator of the damage to the residential premises. This will usually involve the intentional tort of trespass, a common law action that protects both real and personal property rights. Again, whether suing the perpetrator is a worthwhile course of action depends on whether the perpetrator can be located and whether the perpetrator has a job, bank account, assets, etc. from out of which a judgment could be paid.

It is not hard to imagine that landlords will often bear the cost of repairs of damage to residential premises. That is why recovery of the costs to repair damages was a landlord concern in the CPLEA report.

Suggestions for Reform

There are two main problems with the current law. First, the victim of domestic violence is held responsible for damage the victim did not cause. As noted in CPLEA's earlier report *The Hidden*

Homeless: Residential Tenancies Issues of Victims of Domestic Violence (at 9), this seems particularly unfair when the damage was caused by a perpetrator under a protection order or other form of restraining order that excludes them from the residential premises.
Some jurisdictions no longer hold victims responsible in such circumstances. Among other recent reforms in South Australia (and other jurisdictions in that country), the *Residential Tenancies (Domestic Violence Protections) Amendment Act 2015*, the equivalent of our RTDRS and courts can decide that one or more but not all tenants are liable to compensate the landlord for damages, so that the victim is not required to pay, either out of the security deposit or otherwise. They can also allow the equivalent of the RTDRS or the courts to split the security deposit. States such as Oregon relieve victims of domestic violence from liability for property damage caused by a perpetrator during a domestic violence incident and impose liability on the perpetrator.

The second problem is that landlords too often end up paying for the repairs to damages caused by the perpetrator. Landlords, who are private parties and owners of private property — and usually innocent bystanders — are forced to bear the costs in order to rent out their property again. Not all landlords are large and rich corporations with multiple properties. Some landlords are low-income individuals renting out a portion of their house to make ends meet.

If both victims of violence and landlords experience financial hardship as a result of bearing the burden of making good the damage done by perpetrators, it is appropriate to ask whether that burden should be relieved by the public. As Professor Koshan and I argued previously in "The Residential Tenancies Act and Domestic Violence: Facilitating Flight?" in connection with the financial burden of early termination:

> Domestic violence is a public issue and responsibility, which for too long was relegated to the private realm and ignored by the law. We no longer dismiss domestic violence as a matter between private parties, and our collective responsibility should extend to the financial costs of dealing with domestic violence in tenancy situations.

This post may be cited as: Jonnette Watson Hamilton "Landlords, Tenants, and Domestic Violence: Liability for Damage to Residential Premises" (13 September, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/09/Blog_JWH_Landlord_Tenant_Liability.pdf

October 30, 2017

Landlords, Tenants, and Domestic Violence: The *Family Homes on Reserves and Matrimonial Interests or Rights Act*

By: Elysa Darling

Legislation Commented On: *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20

This blog post accompanies a series of posts written by Jonnette Watson Hamilton and Jennifer Koshan on Landlords, Tenants and Domestic Violence. The series examines the legal uncertainties facing landlords and property managers seeking to respond to domestic violence involving their tenants, as identified in the Centre for Public Legal Education Alberta (CPLEA) report on Domestic Violence: Roles of Landlords and Property Managers.

As section 91(24) of the *Constitution Act, 1867,* 30 & 31 Vict, c 3, places "Indians and Lands reserved for Indians" within federal jurisdiction, provincial laws regarding leases and matrimonial property are inapplicable on designated reserve land (for more details on the inapplicability of provincial regulations on reserve in a lease context, see here). The *Indian Act,* RSC 1985, c I-5, does not, however, provide for any laws dealing with matrimonial real property on reserve lands. As a result, indigenous persons and communities were left without any recourse regarding property (owned or leased) upon the death of a spouse or the breakdown of a marriage or common-law relationship. The federal government sought to fill this gap in 2013 with the passage of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 (*FHRMIRA*). This Act governs the actions of tenants and landlords dealing with domestic violence in reserve communities.

This post will briefly address the unique circumstances in which the *FHRMIRA* came to be, and then provide an overview and critique of several provisions: section 7 (exemption for First Nations wishing to enact their own matrimonial real property (MRP) laws), sections 16-19 (emergency protection orders), section 20 (exclusive possession orders), and section 26 (leases). Findings from the March 2017 Centre of Excellence for Matrimonial Real Property Report (COEMRP Report) will also be commented on. This post will not examine the numerous indigenous communities that may have adopted MRP Laws under their Land Codes or self-government agreements.

Case Law – Inapplicability of Provincial Legislation On-Reserve

The legislative gap in the *Indian Act* resulted in inequitable consequences for indigenous women residing on-reserve, already a severely marginalized population. The combination of the lack of federal domestic violence remedies on reserves and the potential inapplicability of provincial legislation providing for no-contact orders put indigenous women in a uniquely precarious and dangerous situation. Indigenous women are twice as likely as non-indigenous women to

experience family violence (Family Violence in Canada: A statistical profile 2014, 4). This problem is exacerbated by the remote location of many reserves, and the access to justice issues faced by these communities (Male Partner Violence Against Aboriginal Women in Canada, 68). These problems contribute to a sobering statistic: indigenous women are eight times more likely than non-indigenous women to be killed by their partners (Male Partner Violence Against Aboriginal Women, 66).

The Supreme Court of Canada examined the consequences of this legislative gap in *Derrickson v Derrickson*, [1986] 1 SCR 285, 1986 CanLII 56 (SCC) and *Paul v Paul*, [1986] 1 SCR 306, 1986 CanLII 57 (SCC). In *Derrickson,* the Supreme Court considered whether the provisions in British Columbia's *Family Relations Act,* RSBC 1996, c 128, concerning the right to ownership and possession of immovable property applied to reserve lands (para 43). Applying the interjurisdictional immunity doctrine, the Court held that the provincial Act could not apply because the right to possession of lands touches on the "very essence" of federal authority under the *Indian Act* (para 41). As a result of the finding that the *Family Relations Act* could not apply, Mrs. Derrickson was not entitled to half of the net family assets, as she would have been had the home been off-reserve (para 41). More broadly, the Court held that provincial laws could not substitute for the lack of matrimonial real property provisions in the federal *Indian Act* (para 96).

In *Paul,* the plaintiff applied under s 77 of British Columbia's *Family Relations Act* for an exclusive possession order for herself and the three children of the marriage (para 13). The Supreme Court examined section 88 of the *Indian Act,* which states that provincial laws of general application can apply on-reserve to the extent that they are consistent with the provisions in the *Indian Act* (para 12). The Court found that section 77 of the *Family Relations Act* was inconsistent with section 20 of the *Indian Act,* which gives band councils (subject to the Minister's approval) control over allotments of reserve land (para 7). As a result, provisions in the *Family Relations Act* that would allow Mrs. Paul interim exclusive occupation of the home were blocked by section 20, which prevented any alteration to Mr. Paul's entitlement to the allotment (para 13).

It is unclear whether provincial domestic violence legislation such as Alberta's *Protection Against Family Violence Act,* RSA 2000, c P-27 (*PAFVA*) can apply on First Nations reserves, as there is currently no case law in this area. *Derrickson* and *Paul* suggest that orders made under the *PAFVA* that provide for exclusive possession in relation to property on-reserve would likely be inapplicable. Although the continued application of the interjurisdictional immunity doctrine to section 91(24) powers was called into question in *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 (CanLII), there have been recent decisions restricting *Tsilhqot'in* to the Aboriginal title context and applying interjurisdictional immunity to reserve lands (see here).

Nearly three decades after the rulings in *Derrickson* and *Paul,* the *FHRMIRA* was put in place to address the lack of federal legislation and legal vacuum in this critical area.

Filling the Gap: The *Family Homes on Reserves and Matrimonial Rights or Interests Act*

The *FHRMIRA* applies to married couples and common-law partners living on-reserve when at least one person is a First Nation member or an Indian (as defined by section 6 of the *Indian*

Act). The provisional federal rules provide for basic rights and protections to individuals on-reserve during a marriage or common-law relationship (*FHRMIRA,* section 6) in the event of a relationship breakdown, and on the death of a spouse or common-law partner (Indigenous and Northern Affairs Canada).

Section 7 – Power to Enact First Nation Laws

Section 7 allows First Nations to opt out of the *FHRMIRA* by providing a process to establish their own matrimonial real property laws (MRP Laws). Until a First Nation passes such laws, the provisional rules set out in the *FHRMIRA* apply (*FHRMIRA,* section 12(1)). In conjunction with *FHRMIRA,* Parliament provided $5 million of funding for the Centre of Excellence for Matrimonial Real Property (COEMRP) over a five-year period to assist in drafting and implementing laws (Canadian Human Rights Commission Annual Report 2013, 31).

There are currently eleven First Nations in Canada who have enacted MRP Laws under the *FHRMIRA* (1 each in British Columbia, Quebec, and the Northwest Territories, 3 in Ontario, and 6 in Nova Scotia). In its Report, the COEMRP noted a number of difficulties these communities experienced in drafting the MRP Laws. In general, the community members reported a persistent lack of knowledge (COEMRP Report, 25). For example, few knew of the MRP Laws, what their rights were, or how to access them (COEMRP Report, 19). Lack of financial resources was the most commonly cited reason for failing to implement MRP Laws, even in communities that had drafted them (COEMRP Report, 19). Unfortunately, communities were unable to connect with other local stakeholders in order to further their implementation efforts. Many people quoted in the Report expressed disappointment that their efforts to educate stakeholders and obtain support had not met with any success (COEMRP Report, 24). Many communities provided their MRP Laws to local police (either the First Nation's police force, the RCMP or the local police force) and reached out to local courts and the provincial attorney general, but received no response (COEMRP Report, 24). If the communities with the institutional capacity and assistance of the COEMRP to enact their own MRP Laws are facing these hurdles, it is likely that the rights of individuals in communities governed by the *FHRMIRA* are being overlooked.

Section 16 – Order of Designated Judge for Emergency Protection Order

Section 16(1) provides that an *ex parte* application for an emergency protection order can be made before a designated judge. The judge may make an emergency order if they are satisfied that family violence has occurred and that "the order should be made without delay, because of the seriousness or urgency of the situation, to ensure the immediate protection of the person who is at risk of harm or property that is at risk of damage" (*FHRMIRA,* section 16(1)(b)).

Similar to the *PAFVA,* a peace officer or other person may make the application on behalf of the applicant (*FHRMIRA*, section 16(3)). Section 16(4) sets out the factors a designated judge may consider, including (but not limited to):

1. The history and nature of the family violence;
2. The existence of immediate danger to the person who is at risk of harm or property that is at risk of damage;

3. The best interests of any child in the charge of either spouse or common-law partner; and
4. Whether a person, other than the spouses or common-law partners, holds an interest in, or right to reside in, the family home.

An emergency protection order can last for up to 90 days (*FHRMIRA,* section 16(1)) and may provide for a number of conditions dealing with the matrimonial home, such as:

1. A provision granting the applicant exclusive occupation of the family home (16(5)(a));
2. A provision requiring the applicant's spouse or common-law partner to vacate the home and prohibit them from re-entering (16(5)(b)); and
3. A provision directing a peace officer to remove the applicant's spouse or common-law partner and any specified person who habitually resides in the family home from the family home (16(5)(d)).

Section 2(1) of *FHRMIRA* defines "designated judge" as a person authorized by the lieutenant governor in council of the province to act as a designated judge. This can include a justice of the peace appointed by the lieutenant governor, a judge of the superior court in the province, or a judge of a court established under the laws of the province (*FHRMIRA,* section 2(1)). The COEMRP speculates that: "the possibility of designating judges from various levels of court ensures that applicants in each province and territory have access to existing provincial or territorial frameworks" (*FHRMIRA* Clause-by-Clause Analysis, 4).

Unfortunately only three provinces have designated judges to date: New Brunswick, Prince Edward Island and Nova Scotia (see here and here). This means that for the rest of the country, the sections pertaining to emergency protection orders are essentially useless, as there is no authority empowered to grant them. The COEMRP Report indicates that this is a huge source of frustration for communities:

> …most First Nations noted disappointment that no judge had been appointed in their province, so as to prevent the possibility of an issuance of emergency protection orders. This omission has the effect of rendering a very important part of the MRP Laws – the power to protect families in cases of violence – useless. There was also confusion as to why FHRMIRA was drafted such as to require a designation of a specific judge for this purpose. (COEMRP Report, 24)

Without a designated judge, victims of domestic violence have substantially less recourse against perpetrators if they live on-reserve than if they do not. The inaction on the part of the provinces in not providing designated judges significantly diminishes a victim's ability to utilize the justice system, even before one factors in the additional access to justice barriers faced by indigenous peoples.

Section 20 – Court Order for Exclusive Occupation Order

Section 20(1) of the *FHRMIRA* provides for the possibility of exclusive occupation orders on-reserve. It states:

> A court may, on application by a spouse or common-law partner whether or not that person is a First Nation member or an Indian, order that the applicant be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies.

Applications under section 20 do not require a designated judge, but the *FHRMIRA*'s definition of "Court" requires that this application be heard in a superior court, for example the Court of Queen's Bench of Alberta (*FHRMIRA* section 2, *Divorce Act,* RSC 1985, c 3 (2nd Supp), section 2(1)). As discussed earlier, applicants residing on-reserve experience significant access to justice challenges, such as lack of resources and legal knowledge. In addition, more remote reserves are often located great distances from judicial centers. Requiring exclusive occupation order applications to be heard solely by superior courts, with their more complex procedures and fewer locations, exacerbates these issues.

Section 26 – Leases

Section 26 deals with a victim's rights to a leased family home. It states that anyone who is granted exclusive occupation of the family home under sections 16-18, 20 or 21 is bound by the lease on the family home during the period of the order. This is true even if that person is not a named lessee (*FHRMIRA,* section 26).

This provision is helpful in that it secures the rights of the landlord, the original lessee, and the person deemed to be the lessee. In practice however, this provision may operate to hold victims of domestic violence responsible for overdue rent and damages caused by the perpetrator (as discussed by Jonnette Watson Hamilton with respect to similar provincial legislation here).

Elevated poverty rates and unemployment levels on reserves means that victims are often less able to withstand these financial blows than those living off-reserve. In addition, chronic housing shortages on reserves across Canada mean that victims are less able to seek housing alternatives, even when this might be a preferable outcome to remaining in a family home subject to overdue rent or damage charges.

Conclusion

Applications of the provisions of *FHRMIRA* discussed in this post are extremely problematic for several reasons. The first and most damning issue is the lack of designated judges for emergency orders. Second, the communities surveyed in the COEMRP Report note that they have received "no funding to help with any implementation, training or education initiatives following approval of the MRP Law" (COEMRP Report, 19). If this is a problem for First Nations who have the financial assistance of the COEMRP, it can only be assumed that communities left to navigate the *FHRMIRA* on their own are experiencing the same issues around education and implementation. This is reflected in the lack of case law surrounding the *FHRMIRA*. To date, there have been few judicial interpretations of *FHRMIRA*, and no exclusive occupation or emergency protection orders have been granted (COEMRP Report, 19).

Successful implementation of the *FHRMIRA* is also thwarted by persistent access to justice issues experienced on-reserve. Implementation is stifled by a lack of accessibility to the court system and perceived jurisdictional issues for peace officers, RCMP, and police services. Their

absence on reserve makes enforcing orders difficult, as the likelihood of deterrence is reduced when enforcement is perceived as unlikely.

Finally, a persistent distrust of the police and justice system continues to prevent indigenous peoples from seeking redress from the justice system. As one community reported, a mother fearing for the protection of her children in a violent home would "not trust that she could disclose information about violence to the courts, because the very fact that there was violence could be enough to justify removal of her children" (COEMRP Report, 10). This historical lack of trust, entrenched in indigenous communities' experiences with the criminal and child welfare systems, requires significant attention and resources in order to make this legislation accessible.

While this is not a simple issue to address, provinces could make a decent start by appointing designated judges under *FHRMIRA*, educating reserve residents, police, and social services about its provisions, and allocating enough money to ensure that those who need orders have help applying for them, and those who have obtained orders can have them enforced.

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