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Foreclosing Mortgagees' Liability for Tenants' Security Deposits

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Case Commented On: *CIBC Mortgages Inc v Bello*, 2018 ABQB 176 (CanLII)

This appeal from an order of a Tenancy Dispute Officer of the Residential Tenancy Dispute Resolution Service (RTDRS) is worth noting for several reasons. First, it appears that the question of whether a mortgagee becomes a "landlord" under the *Residential Tenancies Act*, SA 2003, c R-17.1 (*RTA*) upon foreclosing on leased residential premises had not been addressed before. This is an important question for tenants looking to recover their security deposits and for foreclosing mortgagees who have not received those security deposits from their mortgagor. Second, the standard of review to be applied on an appeal from a Tenancy Dispute Officer's order has been controversial within the Court of Queen's Bench of Alberta. Some decisions have held that correctness is the standard, whereas others, including this one, hold that the standard is one of reasonableness. Third, the court's clear statement and elaboration of the purpose of the *RTA* — to address the power imbalance between landlords and tenants — should be helpful to tenants in future cases. Fourth, the decision is a good example of statutory interpretation and eminently suitable for a first year law school course on legislation. Finally, insofar as Tenancy Dispute Officers are not required to give reasons as part of their written orders, the occasional appeals of those orders (which must be accompanied by a transcript of the Tenancy Dispute Officer's oral reasons) offer rare glimpses into the legitimacy of the dispute resolution services provided by the RTDRS.

CIBC Mortgages Inc v Bello is an appeal from a decision of a Tenancy Dispute Officer who had found that CIBC was a "landlord" under the *RTA* and therefore required to pay to the respondent tenants the amount of their security deposit. The tenants had paid their security deposit to their landlord, the owner of a condominium that had been mortgaged to the CIBC. The CIBC foreclosed on that mortgage during the respondents' tenancy and became the registered owner of the condominium before that tenancy came to an end. The tenants applied to the RTDRS, seeking the return of their security deposit from the CIBC. Following its loss in the hearing before the Tenancy Dispute Officer, the CIBC appealed on two questions of law:

> (1) Did the CIBC fall within the definition of "landlord" in section 1(1)(f) of the *RTA*?
> (2) Did the CIBC "acquire the interest of the landlord" under section 47(1) of the *RTA*?

The Tenancy Dispute Officer's Reasons

Justice Rita Khullar (now of the Court of Appeal) summarized the decision of the Tenancy Dispute Officer (at paras 6-7). After confirming that the tenants were entitled to the return of their security deposit, the Tenancy Dispute Officer considered section 47 of the *RTA* which

imposes the security damage obligations of a previous landlord on a "person who acquires the interest of the landlord." In order to interpret that provision, the Tenancy Dispute Officer looked to the definition of "landlord" in section 1(1)(f) of the *RTA* and decided that the CIBC was a landlord under subsection 1(1)(f)(i) because the CIBC was the registered owner of the condominium when the security deposit became payable. As a result, the Tenancy Dispute Officer held that the CIBC had substantially breached its obligations under section 46 of the *RTA* to deliver the security deposit to the tenants. He therefore ordered the CIBC to pay the amount of the security deposit and the tenant's costs of their RTDRS application.

As I mentioned in the introduction to this post, we rarely get to see the Tenancy Dispute Officers' reasons for the orders that they grant to landlords and tenants. We only see them on appeals to the Court of Queen's Bench, which require the appellant to produce a transcript of the hearing (*Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006, sections 23(1)(b)(ii) and 28). And appeals are rare for the reasons outlined in my earlier post, "Expensive, Complex Appeals from Residential Tenancy Dispute Resolution Service Orders".

The reasons of the Tenancy Dispute Officer, as summarized by Justice Khullar, are the sort of reasons that give a reader confidence in the services offered by the RTDRS. Justice Khullar notes (at para 48) that the Tenancy Dispute Officer did not have the benefit of the legal argument and case law that was presented to her, but instead interpreted the legislation "from first principles". She found that the Tenancy Dispute Officer did so reasonably and correctly.

The fact that the RTDRS comes out of this appeal looking good does not, however, detract from the larger point that the reasons for the decisions of the Tenancy Dispute Officers, who hear thousands of RTA disputes each year, are not accessible to the public. In other provinces, the decisions and reasons for those decisions of the equivalent of our RTDRS are made public and easily accessible to achieve accountability, transparency and legitimacy. For further discussion of this point, and why it is important, see 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)".

Standard of Review

The CIBC argued that the standard of review to be applied to the decision of the Tenancy Dispute Officer was correctness, based on the four factors laid out in *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) at para 64. However, Justice Khullar found Justice Topolniski's reasoning about the standard of review for RTDRS appeals in *Greater Edmonton Foundation v Hetland*, 2017 ABQB 430 (CanLII) persuasive (at para 16), and held the standard of review was reasonableness, as had Justice Topolniski in *Hetland*. This conclusion by Justice Khullar was in line with the Supreme Court's direction in *Dunsmuir* that the selection of the standard of review should be guided by precedent. Despite this holding, Justice Khullar not only found the Tenancy Dispute Officer's reasoning and decision reasonable, she also found it to be correct (at para 49).

Why would Justice Khullar hedge somewhat on the standard of review applicable to a decision by a Tenancy Dispute Officer, particularly in light of the precedent in *Hetland* and the

presumption (at para 17) most recently articulated by the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 (CanLII) (at paras 22 – 24) that the standard of review will be reasonableness where a statutory decision-maker applies and interprets its home statute?

One reason might be that the Alberta Court of Appeal has been asserting that the standard of review should be correctness on questions of statutory interpretation where the home legislation provides for a right of appeal on questions of law (for example, *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 (CanLII)), as does the ***Residential Tenancy Dispute Resolution Service Regulation*** in section 23. (As an aside, Justice Khullar refers to this provision as a privative clause (at para 17) but it is more properly described as a statutory right of appeal. Section 21 of the ***Residential Tenancy Dispute Resolution Service Regulation*** *comes closest to being a privative clause in stating the decision of a Tenancy Dispute Officer is binding on the parties to the dispute, but even this provision is the weakest form of privative clause in that it neither states the decision is final nor does it preclude judicial review.)*

Another reason might be that there is something strange about a superior court deferring to statutory interpretation conducted by a Tenancy Dispute Officer on "first principles" and without the benefit of legal argument. Context matters in administrative law, and the bare assertion of a presumption of deference — the reasonableness standard of review — risks overlooking the context or subtle complications that arise in the exercise of statutory power. The presumption of deference still faces regular challenges from those seeking a return to a more contextual review of statutory authority, particularly where it is not readily apparent that the decision-maker has expertise in legal reasoning or statutory interpretation. For example, in their dissenting opinion in *Capilano*, Justices Côté and Brown cautioned that grounding tribunal expertise merely in its institutional setting risks making the presumption of deference irrefutable: "Courts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law" (at para 85).

Yet another reason might be that it is very difficult for a reviewing court to show deference in the absence of reasons provided by the Tenancy Dispute Officer. As noted above, Tenancy Dispute Officers are not required by the legislation to give written reasons for their decisions. The transcript of the hearing will rarely, if ever, provide a reviewing court with an application of statutory interpretation principles necessary as a foundation for deference. As well, the absence of written jurisprudence on how Tenancy Dispute Officers interpret provisions of the *RTA* increases the risk of inconsistent interpretations across different cases. This was one of the arguments put forward by CIBC here to support the standard of correctness.

Grounds of Appeal

(1) Did the CIBC fall within the definition of "landlord" in section 1(1)(f) of the *RTA*?

The relevant provisions of the *RTA* are section 1(1)(f), defining a "landlord," and section 47(1), setting out the rights and duties of new landlords:

> 1(1)(f) "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.

47(1) A person who acquires the interest of a landlord in residential premises has the rights and is subject to the obligations of the previous landlord with respect to a security deposit paid to the previous landlord in respect of the residential premises. (emphasis added)

The CIBC had become the owner of the residential remises rented by the respondents before they vacated those premises. The bank had become the owner on January 28, 2015 by foreclosing on its mortgage on the condominium the respondents were renting and receiving a certificate of title showing the bank to be the registered owner. CIBC did not know that tenants lived in the condominium. The tenants did not know about the foreclosure until after they moved out on February 1, 2015.

CIBC argued that section 1(1)(f)(i) should be read narrowly, so that "owner" only meant the person who originally entered into the residential tenancy agreement.

Justice Khullar relied upon the "modern" approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]": Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983 at 87) (at para 23). She found the phrase "owner of the residential premises" to be very broad, capturing "a wide swath of individuals," and a narrower interpretation would require reading in extra words (at para 24).

Justice Khullar also relied on section 10 of the *Interpretation Act*, RSA 2000, c I-8, which states that enactments should "be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects" (at para 25). *Botar v Mainstreet Equity Corp*, 2012 ABQB 417 (CanLII) at para 2 had held that the object of the *RTA* is to address the power imbalance between landlords and tenants. A narrow reading of "owner" would run counter to that purpose (at para 25).

As a result, Justice Khullar found it was reasonable for the Tenancy Dispute Officer to conclude that CIBC came within the definition of "landlord" in section 1(1)(f)(i).

The Tenancy Dispute Officer also stated that section 1(1)(f)(iii) in the definition of "landlord" also captured the CIBC as a "successor" in title to the original owner. However, the Tenancy Dispute Officer concluded section 1(1)(f)(iii) was "inapplicable" because the bank was within section 1(1)(f)(i) (at para 21). "Inapplicable" seems like an odd way to characterize this point; many landlords will fall within more than one subsection of the definition. Usually one would say that it was "unnecessary" to decide if CIBC was caught by both subsections, but the Tenancy Dispute Officer did decide that the bank was caught by both. The question of the application of section 1(1)(f)(iii) is not commented upon by Justice Khullar.

(2) Did the CIBC "acquire the interest of the landlord" under section 47(1) of the *RTA*?

Justice Khullar then turned to the question of whether the CIBC was caught by section 47(1) as a person who "acquires the interest of a landlord in residential premises." If it was, then the bank would have the same obligation to deliver their security deposit to the respondents as did the previous landlord who actually received that security deposit had under section 46(2)(a).

The CIBC argued that the Tenancy Dispute Officer was wrong to include lenders who became the owners of residential premises through a judicial process such as a foreclosure within the scope of section 47(1). The bank argued that only persons who deliberately and knowingly stepped into the shoes of the original landlord were caught by section 47(1).

The CIBC pointed to residential tenancy legislation in other provinces which specifically makes lenders who become owners of residential premises through foreclosure proceedings liable for security deposits. An example would be section 38(1)(b)(iv)(A) of Saskatchewan's *Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, which defines "new landlord" to include "a mortgagee of the residential property of a former landlord who … acquires title to the residential property by foreclosure or pursuant to a judicial sale of the residential property". Because the *RTA* does not have this type of provision, the CIBC argued that the legislature did not intend to make lenders liable for security deposits.

Justice Khullar found the explicit inclusion of lenders in the CIBC's position in other provinces' legislation to be of limited usefulness in this case, despite the Supreme Court of Canada's endorsement of such legislation as useful interpretive aids in *Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 (CanLII) at paras 57-60. Her main reason for doing so was the lack of consensus among provinces in how to deal with foreclosing mortgagees (at paras 420-43).

Justice Khullar noted that only three previous cases had considered the phrase "acquires the interest of a landlord in residential premises", and they had come to different conclusions (at para 31). After describing each case, Justice Khullar found them to be unhelpful because they all dealt with receiver-managers, who did not become owners of the land as the CIBC had when it foreclosed (at para 35).

With no precedents to consider, Justice Khullar once again relied on the principles of statutory interpretation. In doing so, she found that on a plain reading of section 47(1), all a person had to

do to come within the scope of "acquires the interest of a landlord in residential premises," was to become the owner by taking over the property interest of the previous landlord (at para 38). An interpretation of section 47(1) focused on the purpose of the *RTA* would also lead to the CIBC being seen as a person who "acquires the interest of a landlord in residential premises." In this part of her judgment — a part that should be helpful in future cases — Justice Khullar elaborates on the purpose of the RTA in the context of foreclosures:

> In cases of judicial sales of residences, this power imbalance is exacerbated; the new owner is not obligated to continue the prior residential tenancy agreement, nor to enter into a new residential tenancy agreement with the tenant. The only obligations of a new landlord under the *RTA* are outlined in s 47…. Given the limited protections available to tenants where there is a new landlord, it is important to ensure that a tenant is able to recover her or his security deposit in order to be able to afford to rent a new property. (at para 39)

Justice Khullar also looked at which party — the landlord or the tenant — was in a better position to chase the previous landlord to recover security deposits (at para 40). Not surprisingly, she found the CIBC to be better placed to recover the money, as well as the better loss avoider because a lender can take the possibility of unpaid security deposits into account in their mortgages.

Having thoroughly discussed every point raised by the CIBC — including several minor arguments not summarized here — Justice Khullar concluded that, even though the Tenancy Dispute Officer did not have the benefit of any of the legal arguments or authorities presented by the CIBC to her, the Tenancy Dispute Officer's decision was both reasonable and, if it needed to be, correct (at para 49).

Conclusion

The issue in this appeal was moot because the CIBC did not ask for repayment of the security deposit it had been ordered to pay the respondents (at para 8). Nevertheless, the bank asked that their appeal be heard in order to create a precedent — something that an order of a Tenancy Dispute Officer cannot do because it is not publicly available and does not include reasons. The bank asked that their appeal be heard because the issue of whether lenders who become owners of residential premises through a judicial process such as foreclosure are responsible for tenants' security deposits arises quite often and the RTDRS therefore had need of a precedent when faced with similar situations in the future. Justice Khullar was persuaded by these reasons and noted that scrutiny of a Tenancy Dispute Officer's decision "is in line with the Court's role as an adjudicative body" (at para 9).

The result of this case may not be what the CIBC was hoping for, but the decision does provide that bank and other lenders with certainty on the issue, which is useful in itself. The result is, of course, even better for tenants. Because we now have a publicly available precedent holding that lenders are liable for the return of tenants' security deposits when the lenders become the owners of the residential premises, all tenants — and not just the two in this case — have greater protection.

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