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## Are Landlords' Late Payment Fees Enforceable?

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Case Commented On: *19007636 (Re)*, [2020 ABRTDRS 1 \(CanLII\)](#)

Are the late payment charges that some leases provide for and some landlords demand from tenants who are late with the rent enforceable? Do they have to be paid? Like many questions about the law, the answer is “it depends.” Are the late payment charges a penalty? If they are, then they are not enforceable. Are the late payment charges a genuine pre-estimate of the landlord's liquidated damages? If they are, then they are enforceable. I wrote about the distinction between penalties and pre-estimates of liquidated damages in 2017: see [When are Late Payment of Rent Charges in Residential Tenancies Unenforceable?](#) Nevertheless, now seems a good time to bring the issue up again for two reasons. First and most importantly, in the last week in January, Alberta's UCP government changed the payment dates of the Assured Income for the Severely Handicapped (AISH) program and the Income Support program from four business days before a new month to the first day of that new month (or the last business day of the previous month if the first of the month is a holiday or weekend); see [AISH and Income Support payment date change](#). The change takes effect March 1, 2020 although, because March 1 is a Sunday, payments will be mailed or directly deposited on Friday, February 28. With rent due the first of the month for many people, a lot of worry has been expressed about whether landlords will charge for late rent payments. Second, the Residential Tenancies Dispute Resolution Board (RTDRS), which hears the vast majority of the residential landlord and tenant disputes in this province, just published *19007636 (Re)*, a written decision that briefly discusses late rent payment charges. The RTDRS has just started making some of its decisions publicly available, and although the [ABRTDRS CanLII database](#) only contained 39 decisions as of February 3, it includes a relevant 2020 decision.

This post will focus exclusively on the law concerning how to distinguish between late payment charges that are penalties and late payment charges that are pre-estimates of the landlord's damages. There are two earlier Alberta Provincial Court cases that set out the law on this issue, so that, together with the RTDRS decision, means we now have three Alberta landlord and tenant examples to work with, as well as those rules.

### The Law

The law differentiating penalties from pre-estimates of liquidated damages applies to more than late rent payment charges by landlords. It applies to most situations in which a contract specifies an amount to be paid by a party to the contract who fails to keep a promise they made in that contract. An example is a construction contract which specifies an amount due if the contractor fails to complete construction by a specified date.

The leading case appears to be *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, [\[1915\] AC 79](#), [\[1914\] UKHL 1](#), per Lord Dunedin, setting out four rules (at 86-88 AC). That case was relied upon by the Supreme Court of Canada in *Calgary (City) v Janse-Mitchell Construction Co*, [1919 CanLII 48 \(SCC\)](#), 59 SCR 101. The four rules from *Dunlop Pneumatic Tyre* were summarized in more modern language in the 2001 decision of Provincial Court Judge Jerry N. LeGrandeur in *Cracknell v Jeffrey*, [2001 ABPC 11 \(CanLII\)](#) at para 14:

- (1) The sum in question will be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach.
- (2) If the obligation of the promisor is to pay a certain sum of money and it is agreed that if he fails to do so he will pay a larger sum, this larger sum is a penalty.
- (3) If there is only one event on which the sum agreed is to be paid, the sum is liquidated damages.
- (4) If a single lump sum is made payable upon the occurrence of one or more or all of several events, some of which may occasion serious and others only trifling damage, there is a presumption, but no more, that the sum is a penalty. But not necessarily if it is difficult to prove actual loss.

The most important of these four rules in the three Alberta cases discussing landlords' late rent payment charges is the first one. The question is usually whether the late payment charge specified in the lease "is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach."

Another way to understand the difference between penalties and pre-estimates of liquidated damages that has been used in Alberta was also set out in *Dunlop Pneumatic Tyre*. Lord Dunedin stated that "[t]he essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage" (at 86). The phrase "*in terrorem*" – Latin for "into/about fear" – means a legal threat, usually made in order to force someone to act in a certain way without having to sue them. That is not enforceable. What is enforceable is liquidated damages, which are the amount the parties to a contract agree will be the compensation that the injured party can collect for a specified breach of the contract by the other party. If a breach happens, the injured party does not have to prove the damages suffered for that breach but is instead entitled to the agreed-upon, pre-estimated, liquidated compensation.

It does not matter what the contract or lease calls the sum of money. A lease may call it liquidated damages, but it is always up to a court such as the Provincial Court of Alberta or an administrative tribunal such as the RTDRS to determine whether the amount is reasonable in the circumstances and therefore enforceable (*Cracknell* at para 15; *Dunlop Pneumatic Tyre* at 86).

## Examples of the Application of the Law

### 1) *Cracknell v Jeffrey*, [2001 ABPC 11](#)

*Cracknell* was an example of the application of the first of the four rules. In that case, clause 3.0 of the lease provided:

The tenant shall be liable for a service charge in the amount of \$5.00 per day after the 1st of each month for any rent outstanding, for any reason whatsoever, including late payments or cheques returned from the bank regardless of the cause or reason.

And clause 1.0 of Schedule A to the lease added:

Until all rent and NSF charges are paid in full, there will also be a late rental payment assessment of \$5.00 per day for rents not fully paid by the 1st day of the month for any reason, including cheques returned from the bank or late delivery of mail. Any balances over 30 days will be charged at 24% interest per annum and calculated monthly until paid.

Judge LeGrandeur decided quite easily that the \$5.00 per day was exorbitant and clearly a penalty (at para 16). Rent was only \$325 per month, so the \$5 a day charge was a return of 1.6% per day or 46% per month. The penalty applied even if the tenant was only in arrears for \$1. The \$5 charge was therefore “extravagant and unconscionable” when compared to the greatest loss the landlord would actually suffer as a result of the tenant’s late payment (at para 16). The landlord’s claim for \$150 in late payment fees was therefore unenforceable.

### 2) *416566 Alberta Ltd. v Fothergill*, [2017 ABPC 96](#)

*Fothergill* is a second decision by Judge LeGrandeur. It is an example of the first and the second of the four rules. This case involved a mobile home in a mobile home park. Although involving a mobile home usually makes a difference to which law applies, it does not in the case of the penalty or pre-estimate of liquidated damages question.

Again, Judge LeGrandeur held that the late payment fees were not enforceable, primarily because the tenant was not given notice of them. However, Judge LeGrandeur also noted that, even if the tenant had received notice of the charges, they would still be unenforceable (at para 13). The rules of the mobile home park stated that a service charge of \$40 would be added if rent, which was due on the first of the month, was received on the second to fifteenth day of the month, and a second \$40 service charge would be added for rent received after the fifteenth day of the month.

In applying the first of the four rules, Judge LeGrandeur held there was no evidence that the \$40 charges were pre-estimates of the landlord’s damages (at para 15), suggesting that the landlord needed to produce evidence to show why or how the \$40 amount was determined. In fact, the landlord did not claim that the late payments caused him anything other than some

inconvenience (at para 33). Judge LeGrandeur held that, because the \$40 was owed whether the rent was paid one day late or fifteen days late, and the \$80 was owed whether the rent was sixteen or thirty days late, the charge could not be a reasonable pre-estimate of the landlord's damages but was instead extravagant and excessive. It was "intended as a threat and a punitive response to late payment regardless of how long the lateness is" (at para 15). On the other hand, Judge LeGrandeur indicated that a charge of \$40 for being fifteen days late, and a second charge of \$40 for being thirty days late might be enforceable.

Judge LeGrandeur also applied the second rule, which states that if the obligation is to pay a certain sum of money, and it is agreed that payment of that certain sum is not made, a larger sum is due, this larger sum is a penalty. In this case, "the Tenant is obliged to pay a certain amount of money on the first day of each and every month and if that does not occur then he is obliged to pay more to maintain his occupancy of the premises" (at para 15).

### 3) 19007636 (*Re*), [2020 ABRTDRS 1](#)

In this January 2020 decision of Tenancy Dispute Office (TDO) J. Young, only one paragraph – the second last one – is devoted to late rent payment fees. However, that paragraph contains a description of the way the TDOs at the RTDRS handle late payment charges. Their approach is to follow the law, and the two decisions of Judge LeGrandeur are specifically relied upon:

The Residential Tenancy Dispute Resolution Service has a well established approach with respect to late fees. We follow the principle set out in Alberta case law that contractual clauses for penalties will not be enforced if they are determined to be punitive in nature rather than genuine estimates of liquidated damages (at 7).

*19007636 (Re)* involved the lease of a condominium. That lease contained the following clause:

The Tenant will pay a late fee for any and all rent paid after the first at a charge of \$25 a day.

The rent was ten days late and so the landlord claimed \$250. The TDO held that "the incurrance of a \$25 fee every day that rent is late does not obviously have any relationship to any actual loss suffered by the Landlord" (at 7) and therefore the \$25 per day was a penalty and unenforceable. Again, there is at least a suggestion, in saying that the relationship was not "obvious," that the landlord needed to provide some evidence showing the amount was a pre-estimate of the loss the landlord would actually suffer as a result of the tenant's late payment.

## Conclusion

Most standard form leases in use in the province include a promise by the tenant to pay late payment charges. However, just because something is written in a lease does not make it legal or enforceable.

Perhaps no one's March rent will be paid late because the AISH and Income Support payments for March will be deposited or mailed on February 28. Perhaps, if rent is paid late only because of the Alberta government's short-notice change to the dates of direct deposits and mailed payments, no landlords will charge late payment fees. Perhaps there has been enough publicity about this change and its consequences for people receiving AISH and Income Support payments to ensure that everyone is aware of the change and who is responsible for it: see, for example, [AISH recipients upset about lack of consultation on payment-date changes](#) by Michelle Bellefontaine for CBC News; [Confusion follows AISH date change](#) by Jeremy Appel in the Medicine Hat News; [Changed date for disability payments frustrates resident](#) by Jennifer Henderson in *St. Albert Today*; [Payment changes to AISH and Income Support Benefits causing issues for recipients](#) by Allison Bench for Global News.

If rent payments are late in March or subsequent months, the clause in the lease setting out the late payment charges should be examined and compared to the ones found to be unenforceable by Judge LeGrandeur and the RTDRS. Is the amount of the charge "extravagant and unconscionable" in comparison to the landlord's greatest possible loss from the payment being late? Judge LeGrandeur and TDO Young also suggested that the landlord needs to produce the evidence to show the relationship of its late payment charge to its loss, if the relationship is not obvious. For example, is the late payment amount based on what the landlord's bank would charge the landlord if the rent payment was not in the landlord's bank account on the first of the month?

#### **Addendum: [ABRTDRS](#) on CanLII**

Regular readers of my residential tenancy posts will know that I have been wanting to see the RTDRS make at least some of its decisions publicly accessible for quite a few years now. See, for example, [Landlords, Tenants, and Domestic Violence: Landlords' Power to Terminate Residential Tenancies for Acts of Domestic Violence \(and an Argument for Publicly-Accessible RTDRS Reasons for Decisions\)](#). Those readers will have also noted a CanLII citation for an RTDRS decision. With little or no fanfare, the RTDRS has just begun to make some of its decisions publicly accessible. This is a very welcome development: ta-da!

The Director/Administrator of the RTDRS, Patricia Tolppanen, informed me that the intention is to publish every reserved decision that results in written reasons from January 1, 2019 onward. For 2019, that is anticipated to be 45 decisions. This may seem like a small number, but the vast majority of the thousands of RTDRS decisions made each year are written orders with oral reasons given to the parties at the end of the hearing. The Director advised that TDOs normally only reserve their decisions if the dispute includes a large amount of conflicting evidence or involves a complicated legal issue. Only those reserved decisions which can be redacted to ensure the anonymity of the parties will be published. Publication will also depend on RTDRS resources. (And it would be nice if those resources included the ability to add either paragraph or page numbers to the published decisions for ease of reference.)

When the Saskatchewan Office of Residential Tenancies did something similar in August 2016 with its creation of the SKORT database on CanLII, its [news release](#) stated that the change was made to ensure transparency, accountability to the public, and improved access to justice. That

announcement specifically noted that “landlords and tenants will be able to refer to past decisions for guidance on appropriate conduct and avoiding problems.” Now, Albertans can also look forward to greater transparency, accountability to the public, and improved access to justice.

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