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Need for Law Reform: Residential Tenancies and Electronic Communication

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Legislation Commented On: *Residential Tenancies Act*, SA 2004, c R-17.1

The Public Interest Law Clinic has an ongoing law reform project file on residential tenancies. During the Winter 2024 semester, the Clinic conducted legal research on electronic communication between landlords and tenants in residential tenancies. The Alberta Law Reform Institute is in the preliminary stages of exploring a law reform project on the *Residential Tenancies Act*, SA 2004, c R-17.1 (the Act). The Clinic's research confirms there is a need for legislative amendments on using electronic communication to serve notices under the Act.

Introduction

Residential tenancies law affects many people in Alberta. Approximately a quarter (28.5 percent) of Alberta households rent their home. Tenants are more likely to be in housing need than owners, with 34 percent of tenant households in housing need compared to 16 percent of owner households. Tenants are also more likely to be in core housing need, with 20.7 percent of tenants compared to 5.6 percent of homeowners in core housing need (see Statistics Canada "Housing indicators by tenure: Canada, provinces and territories, census divisions and census subdivisions"). "Housing need" refers to a household that spends more than 30 percent of their before-tax income on housing costs. "Core housing need" refers to households that, on top of housing need, are paying for inadequate or unsuitable housing. Inadequate housing requires major repairs, while unsuitable housing does not meet National Occupancy Standards for number of bedrooms based on family composition (see Alberta Seniors and Housing, "Stronger Foundations: Alberta's 10-year strategy to improve and expand affordable housing (2021)" at 23). Tenants come from all walks of life, but marginalized or vulnerable people are disproportionately tenants rather than homeowners. Among others, newcomers to Canada, those with lower income, and young people are often tenants.

Problems with residential tenancies can have big impacts. For tenants, it may mean they do not feel comfortable or secure in their home or they may be at risk of losing their home. Loss of a home often leads to problems such as the disruption of community ties, stigmatization, and struggles with maintaining or finding employment, among others. For landlords, it may mean loss or damage to property, financial problems, debt, foreclosure, and sometimes risks to personal safety.

The current rental market makes the impacts of residential tenancies law a particularly important consideration. Across Alberta, there is a rental unit vacancy rate of 2.1 percent, and in cities like Calgary it is as low as 1.4 percent (see Canada Mortgage and Housing Corporation, "Rental Market Survey Data Tables (Alberta 2023)"). From July 2022 to 2023, Alberta saw a population increase

of 4.3 percent, the highest across Canada (see here). A low vacancy rate, coupled with the increase of Alberta's population, amplifies the problems associated with the loss of housing for tenants. This is particularly true for tenants in precarious financial situations, given average rents across the province increased by 16.8 percent in 2022 and another 15.6 percent in 2023 (see here).

Stressors and systemic issues in the rental housing market inevitably leads to an uptick in engagement of legal entitlements under the Act, many of which require the service of a prescribed notice either by a landlord or a tenant. There are several types of notices in the Act, including: Notice to Terminate a tenancy, Notice to Vacate a premise, Notice of Rent Increase, and Notice of Application to adjudicate a dispute. In addition to these notices, the Act explicitly refers to other instances of communication between a landlord and a tenant. Service and receipt of notice, or communication generally between a landlord and tenant, is a common issue in residential tenancies disputes (see "Setting Aside Residential Tenancy Dispute Resolution Service Orders for Problems with Service: It Can't Be Done").

The Act generally requires physical service, either personally or by registered mail, as set out in section 57:

> 57(1) Subject to this section, a notice, order or document under this Act must be served personally or by registered mail.
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> (2) For the purpose of service by registered mail,
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> (a) a tenant's address is the address of the residential premises rented by the tenant, and
> (b) a landlord's address is the address at which rent is payable or the address in the notice of landlord served or posted under section 18 or 47(2).
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> (3) If a landlord is unable to effect service on a tenant by reason of the tenant's absence from the premises or by reason of the tenant's evading service, service may be effected
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> (a) on any adult person who apparently resides with the tenant, or
> (b) by posting the notice, order or document in a conspicuous place on some part of the premises.
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> (4) If a landlord is unable to effect service on a person referred to in section 33 or 36 by reason of the person's absence from the premises or by reason of the person's evading service, service may be effected by posting the notice in a conspicuous place on some part of the premises.
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> (5) If a landlord is unable to effect service on a tenant or a person referred to in section 33 or 36 by any means referred to in subsections (1) to (4) or if a tenant is unable to effect service on the landlord personally or by registered mail, the landlord or tenant may effect service of the notice, order or document by sending it by electronic means that will result in a printed copy of the notice, order or document being received by an

electronic device that is situated in the residential premises or at the landlord's address, as the case may be.

(6) This section does not apply to service governed by the rules or practice of a court.

(7) If a landlord or tenant is a corporation, a notice, order or document may be served in the manner permitted under section 308 of the Companies Act, section 347 of the Cooperatives Act or section 256 of the Business Corporations Act, as the case may be.

Note that section 57 only allows for alternative means of service (e.g. posting notice on a door) if a person is unable to effect service by either personal service or registered mail. Moreover, the Act does not contemplate service by electronic means other than in section 57(5), which is both restrictive and unclear.

Although there is no data or other empirical research on how landlords and tenants communicate with each other, it is evident from anecdotal observation and references in adjudication decisions that many communicate by text, email, or other electronic communication. The Act fails to accommodate or reflect this.

Electronic communication has arisen as an issue in disputes between landlords and tenants, heard by courts and by tenancy dispute officers with the Residential Tenancy Dispute Resolution Service (RTDRS). In what follows, we examine these references in relation to three categories of notice: (1) notices of application to a court or RTDRS; (2) other notices and communication under the Act; (3) notices and exchange of documents within an RTDRS adjudication.

The upshot of our review is that electronic communication has been accepted as a means of communication and service of documents between landlords and tenants, even though the Act does not contemplate it. The absence of legislated requirements raises uncertainty over aspects of electronic communication, such as:

- Do the parties have to agree in advance that electronic communication will be accepted for service of documents?
- Is there a specified address or number that the communication must be sent to?
- Does receipt have to be acknowledged? And if so, how is it acknowledged? What evidence is required to confirm receipt?
- In the absence of an acknowledgement, when is receipt deemed to have occurred?
- How is the signature requirement met with documents exchanged electronically?

As is noted below, the RTDRS has addressed questions like this in the context of an exchange of materials within an adjudication. Uncertainties and inconsistencies remain, however, in relation to notices exchanged that are not part of an RTDRS adjudication.

Notice of Application to the Court or RTDRS

If a landlord or tenant applies to a court or the RTDRS to obtain a remedy in prescribed situations, that party must serve Notice of Application and (if applying to the RTDRS) Notice of Hearing on

the other party within a prescribed time. Similarly, a party who withdraws an application for a hearing at the RTDRS must serve notice of the withdraw on the other party. These requirements are set out in section 41of the Act, and sections 6 and 31 of the Residential Tenancy Dispute Resolution Service Regulation, Alta Reg 98/2006.

These service requirements have received inconsistent interpretation by courts and the RTDRS.

In *Hansen v Hicks*, 2007 ABQB 746 (CanLII), these provisions were considered and interpreted where a tenant had vacated the rental unit and sub-let it to another person, and they gave evidence of not actually receiving a Notice of Application to RTDRS that the landlord had posted to the door:

> A purposive interpretation of the legislation must recognize the Legislator's policy decision that residential landlords were likely to have particular difficulties in serving absconding tenants personally with process relating to a tenancy and that an alternative, and lesser, type of service could fairly replace personal service. The Legislator must have foreseen that the posting of a notice in a conspicuous place on the leased premises would not always result in actual notice to a tenant. (at para 9)

The Court observed that a tenant is not necessarily entitled to actual service under a literal reading of section 57, and also gave a purposive reading that suggests alternative methods of service are intended to give landlords flexibility to deal with evasive tenants.

Conversely, in *Boardwalk Reit Limited Partnership v Busler*, 2006 ABQB 695 (CanLII), the Court gave significant emphasis to the need for personal delivery of a notice of application (in particular notice of applications to the court for judicial relief with significant consequences for the served party), and endorsed the following comment in favour of personal service:

> Personal service is preferable for a number of reasons. First it provides absolute certainty that the documents have been received by the respondent(s). Secondly it serves to emphasize the importance of the documents. In the usual course a defendant receives a posted "14 day notice" which specifies the period which the rental arrears must be paid or the tenancy is terminated. The period expires and nothing happens except the posting of a further notice saying the tenancy will be terminated and a Writ of Possession will issue. Two different but similar documents giving notice of dire consequences. I believe that personal service has the effect of bringing home the importance of the latter documents. (at para 11)

Similarly, in *Abougouche v Miller*, 2015 ABQB 724 (CanLII), the Court suggested that effective service is fact-dependent and that the service rules in the legislation were just the minimum requirement:

> The materials for the RTDRS proceedings were served by posting at the rental premises on October 5, 2015. The Regulation permits service in that manner. While that may be true, I would note that there is sometimes a difference between what is permissible, and what is appropriate in a given situation. Court and tribunal decisions

> are not made in a vacuum. The facts always drive the result. What is permissible is a minimum standard. A decision making body can require more in appropriate circumstances. (at para 10)

Given that the landlord and tenant had used text or email to communicate with each other, and that the landlord knew the tenant was not living in the premise, the Court in *Abougouche v Miller* noted that simply posting RTDRS hearing materials on the door of the rental premise might not be sufficient service without a courtesy text or an email message indicating that there would be a proceeding, or indicating where materials could be obtained.

While courts have emphasized personal service for notice of applications, either in the spirit of the Rules of Court or precisely because of those Rules (see *Owczarczyk v Livingston*, 2003 ABQB 158 (CanLII) at para 16), email has been accepted by the RTDRS in instances where a tenant had vacated a premise and refused to provide any forwarding contact information:

> Service is a quintessentially practical consideration. The only point of service is that the defendant must get notice of the claim against it. Service is not some sort of magical or formalistic ritual that has to be followed. While civil procedure recognizes certain forms of service, unconventional forms of service that actually bring the legal process to the attention of the person being served are still effective. For example, assume that personal service is required, but when the process server arrives the defendant is not there. His wife agrees, however, to provide the documents to her husband when he returns. The next day the husband sends an e-mail, the contents of which make it clear that his wife did follow through, and that he is aware that he has been sued and served. This is effective service, even though it is unconventional.
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> (22006708 (Re), 2022 ABRTDRS 41 (CanLII), citing *Sandhu v MEG Place LP Investment Corporation*, 2012 ABCA 266 (CanLII) at para 19)

The RTDRS has also accepted email as the method of service for a notice of hearing where the tenant denied knowledge of the hearing but the landlord provided further evidence with an email delivery confirmation and subsequent email communications that suggested the tenant had actual notice (see 22006615 (Re), 2022 ABRTDRS 39 (CanLII)). The RTDRS has observed that emailing a notice of application can be a measure of prudence for a landlord when they are unsure whether the tenant still resides in the premise, and also to help ensure the other party actually receives notice (see 21004801 (Re), 2021 ABRTDRS 21 (CanLII), where the RTDRS adjudicator also dismissed claims made by the tenant that the emailed notice was difficult to read, ruling that the tenant could have responded with an email asking for clarification).

Other Notices and Communication under the Act

Apart from notices in relation to an application for adjudicative relief from a court or the RTDRS, the Act contemplates notices and communication between landlords and tenants in a range of scenarios. For example, service of notices for matters such as a rent increase, termination of tenancy, or seeking entry to the premise. Disputes over method or receipt of service in these scenarios has been addressed by RTDRS adjudicators. Despite the absence of a reference to email

or text messaging as a method of service under section 57 of the Act, email or text communications have generally been accepted as valid by adjudicators in written decisions, (only a small number of RTDRS decisions are written and published – see "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)") and sometimes encouraged as means of acting reasonably and avoiding conflicts or misunderstandings that arise between the parties because of poor communication (see 19008905 (Re), 2021 ABRTDRS 7 (CanLII)). One obvious issue that arises with electronic communication is the signature requirement attached to the notice or document. It is not clear how or whether this requirement is complied with in all instances where electronic communication is used and accepted, however, as noted, below a text message has been accepted by an RTDRS adjudicator as communication for the purpose of obtaining consent to enter the premise, even though the text message did not include a signature.

Tenancies are categorized as either 'fixed' or 'periodic'. A 'periodic tenancy' is a tenancy that is renewed or continues without notice; this includes a tenancy that continues beyond a fixed term tenancy. Termination of a 'periodic tenancy' requires notice served by the party who seeks to end the tenancy. Notice of termination must be served according to prescribed time and form requirements. The form requirements for a Notice of Termination are the inclusion of date of termination and standard terms (written, signed, reasons). These requirements are set out in sections 5 to 12 of the Act. Email and text messaging has been accepted by the RTDRS as a proper method for a tenant to serve a landlord with a Notice of Termination and otherwise communicate with a landlord about ending a tenancy (see 19008174 (Re), 2020 ABRTDRS 2 (CanLII); 20003525 (Re), 2020 ABRTDRS 21 (CanLII); 20003763 (Re), 2020 ABRTDRS 28 (CanLII); 22003039 (Re), 2022 ABRTDRS 19 (CanLII); 22004610 (Re), 2022 ABRTDRS 34 (CanLII))

Termination of a tenancy because of a 'substantial breach' (breach of a specified covenant in the Act) or significant damage or assault (or threat of), requires notice served by the party who seeks to end the tenancy with prescribed form requirements (written, signed, reasons for the termination, date of termination). The other party can object to the termination by serving notice with form requirements (written, reasons for objection). In the case of damage or assault where the tenant doesn't vacate, the landlord can apply to court for relief, and the notice served is included as affidavit evidence. These requirements are set out in sections 28 to 30 of the Act. In a dispute where a tenancy was terminated by the landlord because of unpaid rent and the Notice of Termination was served by posting the Notice on the door of the premise (in accordance with the conditions of section 57 of the Act), the RTDRS has cited *Hansen v Hicks* to support an interpretation that a tenant is not necessarily entitled to actual service and there is no legal obligation on the landlord to contact the tenant by phone (or presumably otherwise) (see 21001411 (Re), 2021 ABRTDRS 12 (CanLII)). This is a noteworthy contrast to the comments made by the Court in *Abougouche v Miller* that the legislated service rules are just the 'minimum' requirement in relation to service of a Notice of Application, and similar comments made by the RTDRS itself in relation to serving a Notice of Application (21004801 (Re), 2021 ABRTDRS 21 (CanLII)).

Not all communications between a landlord and tenant during a tenancy must be formally 'served'. A tenant must obtain written consent from the landlord before assigning or subleasing a tenancy agreement. If the landlord does not respond within 14 days, consent is assumed. Refusal is only acceptable for reasonable grounds, which must be provided in writing. A landlord may enter the

premises without consent, so long as the landlord has provided written notice within prescribed time and form requirements (writing, signed, reason, date and time of entry). If either the landlord or tenant changes or adds locks on doors providing access to the residential premises, they must give notice to the other party. These requirements are set out in sections 22 to 24 of the Act. Communication requirements for the purpose of obtaining consent to enter the premise has been satisfied by text messages where the parties have regularly communicated in this method, even though the text message did not include a signature (see 21000871 (Re), 2021 ABRTDRS 5 (CanLII)).

Notices and Exchange of Documents at RTDRS

Almost all adjudicated disputes between a landlord and a tenant are heard and decided by the RTDRS – the number of disputes filed has risen sharply in the past couple years from approximately 10,000 between 2016 and 2021 to just over 14,000 in 2023 (see the 2022/2023 RTDRS Annual Report at 5). The RTDRS explicitly allows for service of documents within an adjudication by email. Section 31(1)(b) of the *Residential Tenancy Dispute Resolution Service Regulation* provides the RTDRS with authority to deviate from section 57 of the Act:

> 31(1) Any notice or other document required to be served under this Regulation must be served
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> (a) for matters under the Residential Tenancies Act, in accordance with section 57, except subsection (5), of that Act,
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> (a.1) for matters under the Mobile Home Sites Tenancies Act, in accordance with section 60 of that Act, or
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> (b) in any other manner as directed by the Administrator or a tenancy dispute officer.
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> (2) The service of a notice or other document must be proved to the satisfaction of the tenancy dispute officer hearing the matter.

Section 3 of the RTDRS Rules of Practice and Procedure sets out rules on the service of documents in an adjudication (including evidence) between the parties to the dispute. These rules provide for several deviations on the physical service requirements in section 57 of the Act, including a statement on service by way of email:

> As per the Administrator's directive pursuant to section 31(b) of the RTDRS Regulation, parties to any RTDRS application are permitted to effect service by way of email, as long as the parties have previously communicated by email, or the parties previously agreed to communicate by email, and the party serving notice is able to demonstrate to the Tenancy Dispute Officer that the email was delivered, such as with a reply, a read receipt or verifying software. (at section 3.2)

Service of Notice in Other Provinces and Territories

Unlike Alberta, most other provinces in Canada have amended their residential tenancies legislation to address electronic communication. We examined residential tenancies legislation in all provinces and territories other than Quebec to identify whether the legislation makes reference to service of notice by electronic means, and if so, whether there are specific requirements associated with it. We found that 8 jurisdictions explicitly reference serving notice by electronic means, some refer specifically to email while others reference electronic methods more generally. Some jurisdictions include these references in the Act itself, while others prescribe electronic service in the regulations. The requirements specific to electronic service vary across jurisdictions, and include some or all of the following:

- the electronic document must be in the same or substantially same form as printed;
- the recipient has provided an electronic address for receipt of the document and the document is sent to that address;
- rules on when service by electronic means is deemed to have been made;
- the document sent by electronic means must be accessible by the recipient;
- the document received must be capable of being retained by the recipient so as to be usable for subsequent reference;
- the sender must provide a name and contact information if there is a problem with the transmission;

Province/ Territory	**Legislation**	**Notes**
British Columbia	*Residential Tenancy Act*, SBC 2002, c 78, SBC 2002, c 78, s 88 *Residential Tenancy Regulation*, BC Reg 477/2003, s 43	Allows for additional methods of service under the regulations. The regulations allow for opting-in to service by email and include specific rules on service by email.
Yukon	*Residential Landlord and Tenant Act*, SY 2012, c 20, s 99	Allows for additional methods of service under the regulations, however, the regulations do not address service.
Nunavut	*Residential Tenancies Act*, RSNWT (Nu) 1988, c R-5, s 71	Does not make reference to electronic service.
Northwest Territories	*Residential Tenancies Act*, RSNWT 1988, c R-5, s 71 *Residential Tenancies Regulations*, NWT Reg 052-2010, s 4	Allows for additional methods of service under the regulations. The regulations allow for opting-in to service by email and include specific rules on service by email.
Saskatchewan	*Residential Tenancies Act*, 2006, SS 2006, c R-22.0001, s 82	Allows for service by electronic form, includes

		specific rules on service by electronic form, and has a provision in the Act allowing service by any other prescribed means.
Manitoba	*The Residential Tenancies Act*, CCSM c R119, s 184	Does not make reference to electronic service, but has a provision in the Act allowing service that provides for 'actual notice'.
Ontario	*Residential Tenancies Act, 2006*, SO 2006, c 17, s 191 Landlord and Tenant Board, "Rules of Procedure", ss 3.1, 3.5 – 3.7	Allows for additional methods of service under the Rules. The Rules enacted by the Landlord and Tenant Board allow service by email.
Nova Scotia	*Residential Tenancies Act*, RSNS 1989, c 401, s 15	Allows for service electronically to an 'electronic address' and includes specific rules on service by electronic means.
PEI	*Residential Tenancy Act*, RSPEI 1988, c R-13-11, s 100	Allows for service electronically to an 'electronic address' and includes specific rules on service by electronic means.
New Brunswick	*Residential Tenancies Act*, SNB 1975, c R-10.2, s 25	Allows for service electronically to an 'electronic address' and includes specific rules on service by electronic means.
NFLD & Labrador	*Residential Tenancies Act, 2018*, SNL 2018, c R-14.2, ss 34, 35	Allows for service electronically to an 'electronic address' and includes specific rules on service by electronic means.

Conclusion

Alberta's *Residential Tenancies Act* is clearly out-of-date by failing to address electronic communication. The disparity between practice and legislation leads to inconsistency and ambiguity in applying and interpreting notice requirements under the Act.

In considering how to amend the legislation to reflect current practice in communication and the exchange of documents, Alberta needs to ensure that safeguards are in place to prevent the exploitation of vulnerable individuals in scenarios where power imbalances exist. Safeguards can include, for example, a requirement that the parties previously communicated by email, that the parties previously agreed or consented to communicate by email, and that the party providing notice can show the email was delivered or read. Another significant consideration here is whether parties have adequate access to electronic communication and any software necessary to receive and read documents transmitted by electronic methods.

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