

April 30, 2025

Need for Law Reform: Residential Tenancies and Late Fees

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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 Fall 2024 and Winter 2025 semesters, the Clinic conducted legal research on fees payable for late payment of rent. The [Alberta Law Reform Institute](#) is undertaking a review of the *Residential Tenancies Act*, [SA 2004, c R-17.1](#). The Clinic's research confirms legislative amendments would help to clarify the enforceability of fees charged by a landlord for the late payment of rent.

Introduction

The lack of clarity regarding the topic of fees payable for late payment of rent (hereinafter “late payment fees”) is one issue in Alberta’s *Residential Tenancies Act*, that has a disproportionate adverse effect on renters over landlords. However, it is also an issue that, if solved, can have a significant beneficial impact on both renters and landlords. Amending the *Residential Tenancies Act* or its regulations to introduce a clear standard on the enforcement of late payment fees is necessary to ensure both landlords and tenants have access to information regarding their rights and obligations on this topic.

Currently, the *Act* is silent on whether late payment fees are enforceable, and so the common law governs. Late payment fees are not enforceable by landlords under the common law in Alberta when they are imposed as a penalty. Late payment fees construed as a ‘penalty’ do not have to be paid by tenants. However, this point of law is not widely known or understood. Even for tenants who think to go to the *Residential Tenancies Act* to confirm the law, the only mention of late fees is in section 70(1) which gives the Minister power to make regulations on late fees and the regulation enacted thereunder only applied during the initial months of the COVID-19 pandemic. It seems likely that a tenancy agreement that calls for late payment fees on rent would be understood by a tenant as enforceable against them, even if the law holds otherwise.

This lack of clarity is problematic considering that over a quarter (28.5 per cent) of Alberta households rent their home (see [here](#)). Moreover, Alberta has experienced rapid population growth over the past few years, with the past year representing the highest year-over-year growth since 1981 and contributing to a low vacancy rate for rentals (see [here](#)). The low vacancy rate in Alberta has made it more difficult for renters to find housing, so they are likely more willing to do anything to stay in their landlords’ good graces out of fear of losing their home.

This post is comprised of an overview of Alberta’s legislative framework, a review of applicable judicial and Residential Tenancy Dispute Resolution Services (RTDRS) decisions, and a comparative survey of the enforceability of a late payment fee in other provinces and territories. From these findings we conclude that it is time for Alberta to clarify the enforceability of late payment fees in residential tenancies legislation. We leave to others the policy choice on whether those fees should be payable, however we do provide an overview of what is established in other Canadian jurisdictions and a suggestion on how to generate clarity and simplicity in the legislative framework.

Alberta’s Legislative Framework

The *Residential Tenancies Act* included ministerial power to make regulations on late payment fees when it was enacted in 2004. The initial version of the *Act* included section 70(1)(j): “The Minister may make regulations respecting the circumstances under which landlords may charge a fee or penalty for late payments of rent by tenants, and prescribing the maximum amounts of such fees or penalties or the manner in which they are calculated.” This power remains in the *Act* today, and when Alberta enacted “emergency provisions” amendments to the *Act* in response to the COVID-19 global pandemic, two additional related clauses (j.1) and (j.2) were added to section 70(1) (see the *Tenancies Statutes (Emergency Provisions) Amendment Act, 2020*, [SA 2020, c 6](#)). These powers were relied on by the Minister to make the *Late Payment Fees and Penalties Regulation*, [Alta Reg 55/2020](#) (*Regulation*), which prohibited landlords from charging a fee or penalty for late payments of rent or non-payment of rent by tenants between April 1, 2020 and June 30, 2020 (s 2). Section 3 of this *Regulation* specified that any provision in a residential tenancy agreement related to the imposition or charging and the enforcement or collection of late fees or penalties was void during this three-month period. While this *Regulation* is no longer applicable because of its specified timeframe, it remains published on the [CanLII](#) database. This is problematic because a reader of this legislation on a publicly accessible site, without legal training, might reasonably assume from this that the imposition or charging and the enforcement or collection of late payment fees or similar penalties is otherwise valid in an Alberta residential tenancy. While perhaps reasonable to make, this assumption is incorrect at law.

Enforcement of Late Payment Fees at Common Law

Alberta relies on the common law to resolve disputes concerning late payment fees in residential tenancies. Decisions regarding late payment fees by Alberta’s [RTDRS](#) demonstrate how such disputes are dealt with at common law. As evidenced by the various decisions referenced below, the RTDRS has a well-established approach with respect to late payment fees.

The Law in Alberta

The common law on this issue was set out in two Alberta Provincial Court (as it then was) decisions; the principle derived from *Cracknell* and *Fothergill* continues to be the authority on late payment fees in Alberta (for a discussion of these decisions in relation to the enforceability of late payment fees see [When are Late Payment of Rent Charges in Residential Tenancies Unenforceable?](#)). A late payment fee which is seen as a ‘penalty’ is not enforceable against a tenant.

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

In *Cracknell*, Judge LeGrandeur summarized the applicable law from *Dunlop Pneumatic Tyre Co Ltd. v New Garage & Motor Co. Ltd.*, [1915] AC 79, [1914] UKHL 1, as follows:

- (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.
- (*Cracknell* at para 14)

The relevant rule, as is the case in most decisions discussing late payment fees charged by a landlord, is the first one. Thus, in determining whether late payment fees are an unenforceable penalty or an enforceable pre-estimate of liquidated damages, the question is whether the late payment fee specified in the rental agreement is “extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach.” This is a question of law for the court or administrative tribunal to decide upon consideration of the whole agreement with the determination being whether the amount is reasonable in the circumstances (*Cracknell* at para 15).

In *Cracknell*, the court held that the service charge of \$5.00 per day was a penalty as the amount was exorbitant relative to the monthly rental payment of \$325.00 (at para 16).

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

Fothergill, another decision from Judge LeGrandeur, involved a landlord seeking arrears of rent for a sum of primarily late payment fees that accrued over the course of one year. The tenant claimed that they never agreed to or were informed of any late fees or similar penalties, and the landlord could not be sure that they provided the tenant with a copy of the rules governing the parties’ oral tenancy agreement.

Judge LeGrandeur held that the late payment fees were not enforceable on the basis that the landlord could not establish that they provided valid notice (*Fothergill* at para 12). Notwithstanding the notice issue, Judge LeGrandeur’s went on to apply the first rule set out in *Cracknell* and concluded that the fee would not be enforceable as it was not a reasonable pre-estimate of the landlord’s damages (at para 13). The fee in question was a pair of \$40.00 charges; the initial \$40.00 fee became payable whether the rent payment was one to fifteen days late, and the additional \$40.00 whether the rent was sixteen days late to thirty days late (at para 15). In Judge LeGrandeur’s view, the fact that each charge became payable in full on the second and sixteenth

day of the month, paired with the landlord's inability to produce evidence to demonstrate how the charges were determined, indicated that they were intended as a threat and a punitive response to late payment regardless of how long the lateness was (at para 15).

Application of the Law in Alberta

Decisions from the RTDRS have consistently followed the principle, set out in *Cracknell* and *Fothergill*, that provisions in a rental agreement on late payment fees will not be enforced if they are determined to be punitive in nature rather than genuine estimates of liquidated damages. Relevant RTDRS decisions dealing with the imposition of late payment fees include:

- ***19007636 (Re)*, [2020 ABRTDRS 1 \(CanLII\)](#)**
The tribunal held that the incurrence of a \$25.00 fee every day that rent is late had no obvious relationship to any actual loss suffered by the landlord. Therefore, the \$25.00 daily fee was ruled an unenforceable penalty (at 7).
- ***19001233 (Re)*, [2019 ABRTDRS 34 \(CanLII\)](#)**
The rental agreement provided for a \$50.00 late/NSF fee as well as a \$25.00 daily late fee for each calendar day rent is in arrears. When asked if he had actually suffered a financial loss due to the rent not being paid on time, the landlord claimed he lost the “benefit of capital.” Applying the reasoning from *Cracknell* the tribunal held that the late fee is a penalty and not enforceable (at 6 – 8).
- ***19003148 (Re)*, [2019 ABRTDRS 41 \(CanLII\)](#)**
The rental agreement provided for a \$50.00 late fee for any rent payment not made on the first day of the month. Without any explanation as to how the landlords lost \$50.00 because rent was paid one day late, the tribunal held that the \$50.00 fee is a penalty and therefore unenforceable (at 3 – 4).
- ***19003015 (Re)*, [2019 ABRTDRS 8 \(CanLII\)](#)**
The landlord claimed \$6,200.00 in late fees, which was equivalent to \$100.00 for each month of the entire tenancy. The incurrence of a \$100.00 fee every month has no obvious relationship to any actual loss suffered by the landlord. Without any explanation as to how the landlord lost \$100.00 each month, the tribunal held that the \$100.00 fee is a penalty and therefore unenforceable (at 5).
- ***23014290 (Re)*, [2024 ABRTDRS 5 \(CanLII\)](#)**
The landlord claimed \$3,140.00 in late fees, equivalent to \$5.00 per day for each day the tenant was in arrears (628 days). The landlord suggested that she (inaccurately) understood that late fees are unenforceable in residential matters, however, the same prohibition does not apply to mobile home sites tenancies. The officer cited *Cracknell* and *Fothergill*, the latter being a mobile home site tenancy, for the tribunal's well established approach to dealing with the imposition of late fees. By adding an additional \$150.00 per month in late fees on top of the \$500.00 rent, the landlord was effectively adding a surcharge of 30% per month. The tribunal held that the late fees were unenforceable as such an amount was

extravagant and unconscionable, and a penalty bearing no relation to a proven pre-estimate of damage (at 4 – 5).

- **21002018 (Re), 2021 ABRTDRS 22 (CanLII)**
The tribunal declined to award a judgment against the tenant for late payment penalties equivalent to 1.5% of the tenant’s arrears (in the total amount of \$1,020.00), as claimed by the landlord. The tribunal cited *Cracknell*, asserting that the case “stands for the proposition of mechanically-applied late fees being treated as unenforceable penalties.” (at 2)
- **1863512 (Re), 2019 ABRTDRS 6 (CanLII)**
Large corporate landlord attempted to circumvent the prohibition against punitive late fees by offering “rental incentives.” The 12 month fixed term rental agreement provided that the first month would be free on the condition that rent was paid on time on all subsequent months. The officer cited *Dorland Property Management v Hood*, [2000 ABPC 165 \(CanLII\)](#) for the principle that contractual clauses revoking monthly rent incentives are punitive, do not reflect genuine estimates of liquidated damages, and therefore are not enforceable. The RTDRS views rental incentives that can be revoked if rent is paid late as a form of late fees (at 3 – 4).

These decisions show that fixed late payment fees in tenancy agreements are often viewed as a ‘penalty’ because of the absence of evidence that correlates the late fee with actual damages suffered by a landlord.

Late Payment Fees in Other Provinces and Territories

Alberta is not the only Canadian jurisdiction whose residential tenancies legislation is silent on late payment fees. Other jurisdictions include Saskatchewan, Yukon, and Prince Edward Island. In contrast, some jurisdictions have clear guidelines on late payment fees. Quebec and Ontario prohibit late payment fees.

Province/Territory	Legislation	Notes
British Columbia	<i>Residential Tenancy Act</i> , SBC 2002, c 78 , section 97 <i>Residential Tenancy Regulation</i> , BC Reg 477/2003 , section 7(1)(d)	The Act provides for the making of regulations on fees charged by a landlord. The Regulations provide that where a tenancy agreement provides a late payment fee, a landlord is entitled to charge an administration fee of not more than \$25.00.
Ontario	<i>Residential Tenancies Act, 2006</i> , SO 2006, c 17 , sections 134(1)(a), 111	Section 134(1)(a) expressly prohibits landlords from collecting, requiring, or attempting to collect or require any fee or penalty beyond the lawful rent.

		Note: section 111(2) allows landlords to provide a discount of up to 2 per cent of the rent that could be otherwise lawfully charged for a rental period if the same is provided for payment of rent on or before the date it is due.
Quebec	<i>Civil Code of Québec</i> , CQLR c CCQ-1991 , section 1904	Section 1904 of the Civil Code prohibits a landlord from charging any fee other than rent.
Saskatchewan	<i>Residential Tenancies Act, 2006</i> , SS 2006, c R-22.0001	Saskatchewan's residential tenancies legislation is silent on late payment fees for rent.
Manitoba	<i>The Residential Tenancies Act</i> , CCSM c R119 , section 69(4) <i>Residential Tenancies Regulation</i> , Man Reg 71/2010 , sections 20, 21	The Act provides that when a tenant fails to pay the rent or a tenant services charge on a date specified in the tenancy agreement, a landlord may charge a late payment fee in accordance with the regulations. The Regulations provide for a fee of up to \$10 for the day the rent or services charge is due plus up to \$2 for each day after the due date, to a maximum of \$100. Note: a landlord who intends to require a tenant to pay a late payment fee must advise the tenant in writing of his or her intention before charging the fee.
Nova Scotia	<i>Residential Tenancies Act</i> , RSNS 1989, c 401 , section 9(1) statutory condition 9	Where a tenancy agreement contains a provision for a monetary penalty for the late payment of rent, the monetary penalty shall not exceed one per cent per month of the monthly rent.
PEI	<i>Residential Tenancy Act</i> , RSPEI 1988, c R-13-11	The legislation is silent on late fees for rent payable.
New Brunswick	<i>Residential Tenancies Act</i> , SNB 1975, c R-10.2 , section 19.1	Section 19.1 of the Act provides that where a tenant fails to pay

	<i>General Regulation</i> , NB Reg 82-218 , section 14.1	<p>the rent when due and the tenancy agreement provides that the landlord may require a late payment fee in that circumstance, the landlord may require the tenant to pay a late payment fee in accordance with the regulations.</p> <p>The Regulations provide that a late payment fee is payable is limited to the circumstances in which the rent was given in the form of a cheque (or other negotiable instrument) that was subsequently dishonoured.</p>
Newfoundland & Labrador	<i>Residential Tenancies Act, 2018</i> , SNL 2018, c R-14.2 , section 15 A Policy and Procedure guide issued August 2021 states the Minister set the fee, and this is also referenced in tribunal decisions – but we did not locate the Order itself.	Where a tenant does not pay rent for a rental period within the time stated in the rental agreement, the landlord may charge the tenant a late payment fee in an amount set by the minister (currently \$5 for the first day the rent is late and \$2 for each additional day, to a maximum of \$75).
Yukon	<i>Residential Landlord and Tenant Act</i> , SY 2012, c 20 <i>Residential Tenancies Regulation</i> , YOIC 2015/193 , section 6	<p>The legislation is silent on late fees for rent payable.</p> <p>Late fees are not a permitted fee under section 6 of the Regulation (note: they are also not a prohibited fee under section 7).</p>
Nunavut	<i>Residential Tenancies Act</i> , RSNWT (Nu) 1988, c R-5 , section 41	The legislation imposes statutory liability for a late payment fee. Upon application by a landlord a rental officer may make an order requiring a tenant to pay a penalty for the late payment. The legislation sets out a formula to calculate the penalty.
Northwest Territories	<i>Residential Tenancies Act</i> , RSNWT, 1988, c R-5 , section 41(2) <i>Residential Tenancies Regulations</i> , NWT Reg 052-2010 , section 3	The legislation imposes statutory liability for a late payment fee. Upon application by a landlord a rental officer

		may make an order requiring a tenant to pay a penalty for the late payment. The amount of the late payment fee is established in the Regulations. The Regulations provide that a late payment penalty respecting the rent due under a tenancy agreement must not exceed \$5 plus \$1 for each day after the due date that the rent is late, to a maximum of \$65.
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This comparison reveals a few observations on the legislative structure and substance of late payment fees across the provinces and territories. First, the most common structure is for the statute to provide regulation-making power to address late payment fees. Second, the Northwest Territories and Nunavut are distinct in that liability for late payment fees is imposed by the legislation itself, rather than authorizing a landlord to charge a late payment fee. Third, some jurisdictions require a landlord to give notice of a late payment fee, such as requiring the obligation to be set out in a tenancy agreement to be enforceable, others do not require prior notice. Fourth, the fee itself varies between a percentage-based calculation, a per day rate, and a maximum cap on fees payable, or a combination of these. Lastly, two provinces prohibit late payment fees – Ontario and Quebec.

Conclusion

If the policy direction is to provide for late payment fees in residential tenancies and ensure clarity and simplicity in the law, the most suitable way forward might be to enact a new regulation, relying on the Minister's existing regulation-making power regarding late payment fees under section 70(1)(j) of the *Residential Tenancies Act*. A regulation that imposes liability for a per-day fee up to a prescribed maximum, such as what is legislated in the Northwest Territories, would likely simplify the dispute-resolution process in these scenarios. Alternatively, if the policy direction is to prohibit late payment fees, the Minister has the authority under section 70(1)(j.1) to prohibit those fees. Either way, a new regulation would benefit landlords and tenants in the province by providing certainty on what the rules are in relation to late payment fees.

This post may be cited as: Shaun Fluker and JD Students with the Public Interest Law Clinic, "Need For Law Reform: Residential Tenancies and Late Fees" (30 April 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/04/Blog_SF_LateFees.pdf

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