

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

April, 2015

THE BASICS – THE LEGAL SIDE OF LANDLORDING

As real estate investors, our perfect world would be something like this:

- ☺ find a completely renovated property that exactly fits our system and make an offer,
- ☺ satisfy due diligence and remove conditions,
- ☺ close on time,
- ☺ place our perfect tenant,
- ☺ and enjoy solid, positive cash flow.

That would be a perfect world, but real estate investing—and life—aren't perfect... anything but...

Over the last 40-plus years of being a lawyer, and after having handled approximately 25,000 transactions, I have discovered that every mortgage application, every tenancy, and every deal has its own wrinkles, crinkles, ups, and downs. However, there are many situations that keep coming up, time and time again, which raise basic questions that real estate investors need the answers to.

Having answers to those repetitive, recurring situations will help you move forward with your business of real estate. These answers will be valuable tools in your real estate toolbox, enabling you to quickly deal with those ever-present puzzles and questions that come up constantly in the world of real estate investing.

So, where are your answers coming from? The answer is, from a great understanding of [*The Basics*](#).

The Basics recognizes three realities.

Reality # 1: New real estate investors need to know the answers to classic, re-occurring questions.

Reality # 2: Most investors, new and veteran, employ basic buying and renting strategies for 80% of all purchases.

Reality # 3: Regular, ongoing discussion of basic examples is the best way to learn.

We are going to look at those situations that keep coming up and get into the details. This *Tale from the Trenches* is all about the legal side of landlording.

There is a lot more to successful landlording than just the legalities, but understanding your legal obligations is very important. Why? Because, as a landlord, you are governed by the laws of the legislative district where you own property. I will focus here on the Canadian province of Alberta.

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There are a number of laws that affect being a landlord.

The most important pieces of legislation that you should be very familiar with are the [Residential Tenancies Act](#) (RTA) and the [Residential Tenancies Ministerial Regulation](#) (Regulation). See other important regulations below. You can find these and other applicable laws on the Internet. You can view online, print, or order your own specific copies, but read and be ultra-familiar with these important laws.

Next, [Service Alberta](#), an arm of the [Alberta Government](#) provides a wealth of information online. One very helpful resource is the [RTA Handbook](#). Here's what they say on the [Service Alberta website](#) (accessed April 12, 2016):

This Handbook is designed to explain the rights and responsibilities of all tenants, landlords, and agents involved in renting residential premises in Alberta under the *Residential Tenancies Act* (RTA) and regulations:

- Residential Tenancies Exemption Regulation
- Residential Tenancies Ministerial Regulation
- Residential Tenancy Dispute Resolution Service Regulation
- Security Deposit Interest Rate Regulation
- Subsidized Public Housing Regulation

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[A Checklist for Tenants](#) (pdf)

[A Sample Cleaning List](#) (pdf)

[Inspection Reports](#) (pdf)

[RTA Offences](#) (pdf)

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What a great way to get up to speed quickly!! My strong, strong suggestion is that you read the *RTA Handbook* from beginning to end. Then read the frequently asked questions (FAQ) on the Service Alberta website. Between the *RTA*, *Regulation*, *RTA Handbook*, and the FAQ, you will soon have a very good understanding of how landlording works from the legal side.

Complying with the law will make your life easier if you ever have problems as a landlord.

You just have to understand that if there is ever a problem and you are in Provincial Court or in front of the [Residential Tenancies Dispute Resolution Service](#) (RTDRS), the Judge or Hearing Officer will listen to the facts, look at your paperwork, and apply the law. It's all there in the *RTA* and the *Regulation*, which is all explained in plain English in the *RTA Handbook* and the FAQ. The more exactly you comply with the law, the better your chance of having problems resolved in your favour will be.

RTA Offences

Don't obey the rules?? You could be warned, fined, or taken to Court. There are lots of offenses. My perception and anecdotal understanding is that charges are rarely laid except in very serious cases and even fines are relatively rare.

Even though fines are rare, it doesn't mean they don't happen.

Here are just three examples. Beside each offence is the maximum fine on conviction of the offence as well as the specified penalty for a violation ticket.

- Failing to provide a "notice of landlord": \$5,000 & \$150
- Failing to retain inspection records for at least three years after the termination of the tenancy or make them available to the Director for purposes of an inspection or investigation: \$5,000 & \$150
- Failing to provide a tenant or landlord with a key when the locks have been changed: \$5,000 & \$400

As I said, charges and fines are rare, but don't be the exception that proves the rule! Now, let's have some more information with thanks and a tip of the hat to the [RTA Quick Reference Guide](#).

The RTA does not apply to:

- Mobile home sites covered in the Mobile Home Sites Tenancies Act.
- Business premises with living premises attached and rented under a single agreement
- Rooms in the living quarters of a landlord, if the landlord actually resides there
- And seven other situations

Fixed-term Tenancy Agreement Definition and Comments:

- is for a specific period of time, typically one year. It begins and ends on specific dates

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- does not require either party to give notice to end the tenancy.
- At the end of the fixed term the landlord and tenant may negotiate a new residential tenancy agreement. The new agreement could include a change in the rent amount and the conditions of the tenancy. The new agreement can be a new fixed term or can be changed to a periodic tenancy.

Periodic Tenancy Definition and Comments:

- has a start date but not an end date
- A periodic tenancy renews or continues weekly, monthly or yearly without notice.
- either the landlord or tenant will end the agreement by giving notice
- is usually month-to-month

Implied Periodic Tenancy:

- a combination of a fixed term tenancy and a periodic tenancy

Inspection Reports

The Residential Tenancies Act (RTA), section 19, and the *Residential Tenancies Ministerial Regulation* section 4, speak to the topic of inspection reports. It is mandatory for landlords and tenants to complete both a move-in and move-out inspection report.

The following requirements apply to Inspection Reports:

- Landlords and tenants must inspect the residential premises within one week before or after a tenant moves in and within one week before or after a tenant moves out.
- The premises should be vacant when the move-in and move-out inspections take place, unless the landlord and tenant agree otherwise.
- The landlord and tenant must inspect the residential premises together. They must identify all damage such as scratches or burns and write it down on the inspection report.
- And six other comments

Security Deposits (a.k.a. Damage deposits)

The *Residential Tenancies Act (RTA)*, allows a landlord to ask a tenant to pay a security deposit (sometimes called a damage deposit). The deposit is held in a trust as a security for damage and cleaning costs, unpaid rent, and any other obligation of the tenant to the landlord.

Purpose of a Security Deposit:

- To cover the landlord's costs of repairing or replacing physical damage to premises.
- To cover the costs of cleaning because of extraordinary or abnormal use. This does not include cleaning associated with normal wear and tear.
- To cover any arrears of rental payments.

Amount of Security Deposit:

- The maximum amount a landlord can ask for as a security deposit is the equivalent of one month's rent at the time the tenancy starts.

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- The security deposit cannot be increased as rent increases.
- Refundable fees/charges are considered to be part of the security deposit. Therefore the total amount of the security deposit plus refundable fees cannot exceed one month's rent.
- And eight other comments

Non-refundable Fees

The Residential Tenancies Act (RTA) does not prohibit a landlord and a tenant from agreeing to non-refundable fees and charges that are in addition to the security deposit and rent. The following points apply to additional fees and charges:

- Once a tenant agrees to an additional fee or charge, the tenant is obligated to pay the fees or charges when the circumstances giving rise to them occur.
- A refundable fee or charge is considered to be part of the security deposit.
- A non-refundable fee or charge is not subject to the security deposit restrictions.
- And five other comments

As you are getting started, it might seem like there is way too much information to figure out and really understand. But, it's all pretty straightforward and, just like any other job or skill, the more effort you put into understanding how landlording works, the better you will get at it.

Now, let's get out of the theoretical and into the practical. Following is the case of *Krause v. Bonin* decided in the Provincial Court of Alberta. I have edited the case for easier reading, but if you want to read the full version, you can [view it in the CanLII database](#). For research on other landlord and tenant issues in the CanLII database, just enter "Residential Tenancies Act." There is lots of interesting reading,

This real case illustrates what happens when landlords or their property managers don't know the rules.

In the Provincial Court of Alberta

Between:

Plaintiff Shelby Krause

- and -

Defendants Robert Bonin and Kazacka Ltd.

Summary of the facts: March 1, 2010 the tenant, Ms. Krause ('the tenant') and her friend, Ms. Arnold, entered into a "month to month" residential tenancy agreement with the landlord, through Mr. Bonin, (the property manager) for a unit in an apartment in Red Deer, Alberta. The rent was paid in a timely manner until July 1, 2010 when it was paid late. The rent due August 1, has not been paid.

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Beginning on August 1 at noon, Mr. Bonin's office repeatedly left messages on the tenant's cell phone and contacted her known friends and family instructing them to have her call. There was no response.

On August 6, Mr. Bonin attached a "two week" notice to the apartment door purporting to terminate the tenancy as of August 20 for non-payment of rent. While not relevant for the purposes of this analysis, the notice was ineffective as it purported to require payment of administrative fees or penalties in addition to rent in order to nullify the notice (contrary to s. 29(2) of the Act), and did not properly calculate the required notice period, which is exclusive of the date of service and the date of expiry.

On August 9, another tenant complained of an odour coming from the suite. When Mr. Bonin attended, it appeared to him that no one had been in the apartment since August 6, as the previously posted notice remained in the doorjamb. He decided to enter to "take a look." He says he that what he observed led him to conclude that the tenant had abandoned the suite. This included various scattered items of furniture, insects, and some spoiled food on the counter and in the fridge. Mr. Bonin belatedly posted a 24-hour notice of his intention to enter the premises on the apartment door, and returned on August 10. On that day he had the locks changed and sent a letter to the tenant decreeing that as she had abandoned the suite, her personal property was being stored or disposed of, she was responsible for the associated cost, and threatening that criminal charges may result if she returned to the building or her apartment. The letter was sent to her mailbox at the apartment.

As it happens, Ms. Krause was pregnant with her first child. Around the first of August, she began having difficulties with the pregnancy and was staying at her mother's house. In June her roommate had moved out, leaving the responsibility for the rent in her hands. In early August her assistance cheque was not available on time to pay the rent. She went into early labour on August 6 and had her baby on August 9.

About this time she learned of the notice by the landlord purporting to terminate the lease on August 20. She could not afford the rent and the various administrative penalties that were being demanded. She returned to her suite on August 10, to pick up some of her property including her baby things. She found the locks had been changed and she had no access to the apartment or her personal property.

On August 12th, Mr. Bonin had the tenant's property removed and the apartment cleaned. He disposed of any items he deemed a health hazard, and put the remainder into storage.

On August 25th, he met with the tenant and advised that in order to recover any of the remaining property she would have to pay the moving and storage costs, which he estimated at over \$1,000. She did not agree with this demand, confirming in her letter of August 27 that she had not abandoned the suite.

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On September 28, as the impasse had not been resolved, Mr. Bonin determined that the value of the items stored was under \$2,000.00 and he disposed of them believing he had the authority to do so under s. 31 of the *Act*. Some items were taken to the landfill and some sold at what he decided was fair value to persons who assisted him with the cleaning of the apartment and removal of the property.

It should be noted that considerable effort was devoted by Mr. Bonin and his witnesses at trial to describe the dirty and unsanitary condition of the apartment. However the photographs taken by him did not show anything close to the conditions described. This seemed odd, as a landlord normally makes an effort to take photos that clearly depict the unsatisfactory condition or disorder of the premises. While I am satisfied that the apartment was not in a very sanitary or clean condition, when considered in light of the other findings in this case, one is left with the conclusion that this evidence was exaggerated.

Issue #1. Upon electing to treat the tenancy at an end, did the landlord have the right to change the locks and retake possession of the apartment on August 10, 2010?

Mr. Bonin took the legal position on behalf of himself and the landlord that the tenant had abandoned the apartment, or at the very least that he had reasonable grounds to believe that to be the case, and that this allowed him to break into the apartment and dispose of her property.

The *Residential Tenancies Act* SA 2004 (“the Act”) is a comprehensive statute outlining the rights as between landlords and tenants. A tenancy can only be terminated in accordance with the act. Any waiver or release by the tenant of the rights, benefits or protections of the Act is void (s. 3(1)).

Section 27 of the Act codifies the landlords rights when the landlord believes that the tenant has abandoned the premises or otherwise repudiated the lease.

27(1) If a tenant by abandonment of the residential premises or otherwise gives the landlord reasonable grounds to believe that the tenant has repudiated the residential tenancy agreement, the landlord may either

- (a) accept the repudiation as a termination of the tenancy, or
 - (b) refuse to accept the repudiation and continue the tenancy.
- (2) In the case of a periodic tenancy, for the purposes of subsections (3) and (7), the tenant's acts of repudiation constitute a proper notice effective to terminate the tenancy on the earliest date that the tenant could have terminated the tenancy under this Act.
- (i) in the case of fixed term tenancy, until it would have expired had the landlord not accepted the repudiation, or
 - (ii) in the case of a periodic tenancy, until the termination date.

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Mr. Bonin changed the locks and removed Ms. Krause's property - acts which were consistent only with electing to terminate the lease. Upon an election to terminate the lease, s. 27(2) applies. Any acts of repudiation "...constitute notice effective to terminate the tenancy on the earliest date the tenant could have terminated the tenancy under this Act". The earliest the tenant could have terminated would have been with a 30 day notice under s. 8(1)(a). Section 8(1) (a) provides that a periodic monthly tenancy has to be terminated by the tenant on or before the first day of a tenancy month to be effective on the last day of the tenancy month. As Mr. Bonin claims to have become aware of acts of abandonment or repudiation after August 1, 2010, notice to terminate the tenancy would have been effective on October 1. In other words, when there are facts sufficient to constitute acts of repudiation (including abandonment), the Landlord is in the same position as if he were provided with a 30 day notice by the tenant under s. 8(1).

Other than proceeding with the consent of the tenant, the Act provides for no right outside of a court order to terminate the lease or retake possession until the notice period in s. 27(2) expires. Mr. Bonin's actions were not consistent with the statute. His retaking of possession on behalf of the landlord was unlawful, in breach of the covenant for quiet enjoyment under s.16 and the prohibition concerning the changing of the locks in s.24.

In the vast majority of situations where the rent will be in arrears concurrent with the tenant vacating or abandoning the premises and the landlord can terminate and if necessary get an order for possession on an expedited basis using the 14 day notice provisions. The situation is very different if the landlord wishes to terminate solely on the belief the tenant has abandoned or repudiated the lease.

Mr. Bonin's entry for the limited purpose of dealing with the odour, any insect infestation, and to determine if there had been abandonment was justified under s. 23(2).

Issue #2: Did the landlord have the right to remove the tenant's personal property, detain it and then dispose of it in accordance with s.31 of the Residential Tenancies Act?

No. Section 31 of the Act applies to abandoned goods. The tenancy here had not expired or been properly terminated. Further, Ms. Krause testified she had not abandoned the premises. Accordingly s. 31 does not provide any authorization for seizing her property.

Damages: The main purpose of damages in cases of trespass to chattels is to put the person who suffered the loss into the same position, as much as possible, as she was in before the loss occurred. The onus is on the person suffering the loss to prove the value of the loss on a balance of probability.

All of the circumstances should be taken into account. The loss is usually determined by assessing "actual value". This is not the same as replacement value or market value, but the pecuniary loss suffered by the claimant. In coming to a conclusion about actual value, evidence respecting replacement value less depreciation and market value is admissible, but is not conclusive. It is simply considered along with any other evidence.

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A second list of items prepared by Ms. Krause contained more items than the first list, more detailed descriptions and dollar values totalling \$10,570.00. The evidence of Ms. Krause and Ms. Arnold was that when the court required a better accounting of the loss for trial purposes, they sat together and on a room by room basis, tried to recall what items were in the apartment. They looked up the cost of similar goods on a Wal-Mart website.

I am satisfied that an honest effort was made to list the property lost. I am not satisfied that the second list contains an accurate representation of the quality of the items. This was not due to any intent to deceive, in my view, but is attributable to the witnesses not being familiar with the technical difficulties encountered when calculating actual value for the purpose of damages.

It was, however, apparent from the exhibit photos that the furniture in the apartment was of low end quality, some in need of repair, and was generally consistent with furniture and belongings which were second hand and of a type collected by a young person just starting out on their own.

Further with respect to the issue raised as to whether some items, such as clothing, were present on the property, I would accept the evidence of Ms. Krause and Ms. Arnold over that of Mr. Bonin and his witnesses. The removal of the tenant's property was conducted over a period of time when a number of people had access to the apartment. There was no impression gained from the evidence that the inventory by Mr. Bonin was carefully supervised.

Looking at all of the evidence, I determine the loss in favour of Ms. Krause to be \$4,000.00.

In addition I find that an award for non-pecuniary general damages is appropriate considering the emotional effects and inconvenience suffered by Ms. Krause. There were serious and ongoing breaches of the Act, and disposal of virtually all of her worldly goods, including those she was relying on to take care of her newborn. Replacement of the various individual items has or will involve considerable time, effort and inconvenience. The award in this regard is \$2,000.00.

Counterclaim by the Landlord: Mr. Bonin submitted an invoice whereby the costs of the seizure and cleaning of the premises were calculated. It was apparent on cross examination that the invoice was not based on independent billing by third parties or records of actual time spent, but on Mr. Bonin's ruling of what was appropriate. One invoice appeared to be from an independent company, but was calculated and issued by Mr. Bonin. Many of the persons involved in the seizure or cleaning were paid in cash or in kind, with no accounting record. Administrative fees and fines were assessed, apparently with no reasoning behind their quantum other than Mr. Bonin's judgment of what he felt was fair. All in all, the amounts claimed were generally unverified, related to illegal or unauthorized activities, or constituted penalties for which relief from forfeiture would and does apply.

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With respect to cleaning costs, while the apartment wasn't in pristine condition after the Landlord's agent retook possession, Ms. Krause was deprived the opportunity of cleaning the property by the Landlord's breach of the lease. Therefore the cleanup costs, other than the sum of \$50.00 for the work required to deal with the rotting potatoes, are not established.

The total owing for damage deposit offset against the rent, and the allowed cleaning costs is \$495.68 (\$775-50-229.32), in favour of Ms. Krause against the landlord.

The final total of the judgment in this matter is in favour of Ms. Krause as follows:

- as against Kazacka and Bonin, jointly and severally, the sum of \$6,000.00;
- as against Kazacka only, \$495.68.

In the event that any party wishes to speak to the issue of costs, they can bring the matter forward within 30 days for that purpose. Otherwise, Ms. Krause is entitled to a cost as against the Landlord and Mr. Bonin, jointly and severally, in the sum of \$800.00, inclusive of all disbursements. While this exceeds the usual tariff, the trial was lengthy and involved.

Dated at the City of Red Deer, Alberta this 24th day of
May, 2011.

J.D. Holmes
A Judge of the Provincial Court of Alberta

LESSONS LEARNED:

1. Know the rules
2. Follow the rules
3. Document everything

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