Housing Law Update, 2020

Recent Developments in Residential Tenancy Law

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Changes to the *Residential Tenancy Act* and *Regulation*

Ministerial Orders 89 and 195

- Order 89 came into effect on March 30th. It featured:
  - A ban on all evictions; suspending a landlord's right to entry; prohibiting landlords from seeking writs of possession at Supreme Court; preventing tenants from seeking compensation for services restricted due to COVID-19.

- Order 195 altered Order 89 on June 24th:
  - It resumed landlords' right to entry, allowed all evictions except non-payment evictions, and permitted landlords to seek writs of possession starting on July 1st.

COVID-19 Related Measures Act (CRMA)

- The *CRMA* codifies some of the ministerial orders made during the state of emergency, and enacts them as law

- Ministerial Order 89 (presumably including the changes made by MO195) will remain in force until 45 days after the end of the State of Emergency

COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act) Regulation

- Repayment plan framework
  - Landlord must offer a tenant a repayment plan to pay back “affected rent” that complies with the requirements of the regulation before the landlord is permitted to evict for non-payment
  - The earliest that the payments could have begun is Oct 1; plans must be offered at least 1 full month before the first payment is due, and payments must be due on the day rent is normally due, unless the parties agree otherwise
- Landlords cannot use a 1 Month Notice to End Tenancy to evict for a reason related to non-payment of “affected rent”
- Tenants’ barred from bringing claims for loss of access to common areas
  - Provided that landlords are limiting access in response to COVID-19 health concerns
- Any rent increase effective after March 30, 2020 comes into effect on November 30, 2020
- Landlords are not permitted to charge late fees for late payment of affected rent

S.38.1: Tenants’ Direct Request for Deposit Return

Order for return of security and pet damage deposit

38.1 (1) A tenant, by making an application under Part 5 [Resolving Disputes] for dispute resolution, may request an order for the return of an amount that is double the portion of the security deposit or pet damage deposit or both to which all of the following apply:

(a) the landlord has not applied to the director within the time set out in section 38 (1) claiming against that portion;

(b) there is no order referred to in section 38 (3) or (4) (b) applicable to that portion;

(c) there is no agreement under section 38 (4) (a) applicable to that portion.

(2) In the circumstances described in subsection (1), the director, without any further dispute resolution process, may grant an order for the return of the amount referred to in subsection (1) and interest on that amount in accordance with section 38 (1) (c).

S.45.1 & 45.2: “Household Violence” Notice to End

- Tenants’ Notice to End for Family Violence has been expanded to also include “Household Violence”
  - Household violence is defined as “violence that has adversely affected a tenant's or occupant's quiet enjoyment, security, safety or physical well-being or is likely to adversely affect those if the tenant or occupant remains in a rental unit”.
- Notices must still be approved by a person authorized to do so in the Regulation (e.g. social workers, doctors)

Changes to the *MHPTA* and *Regulation*

COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act) Regulation

- Identical provisions apply to *MPHTA* tenancies that apply to *RTA* tenancies

Changes to RTB Policy Guidelines

Policy Guideline 5 - Duty to Minimize Loss (complete rewrite)

- Partial Mitigation
- Betterment
  - Purpose of compensation claims is to restore the claiming party to the position they would be in had the loss or damage not occurred
- Loss of rental income (regarding tenants who break a fixed term tenancy agreement):
  - Old PG: “Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date.”
  - New PG:
    “When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:
    1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
    2. re-rent the unit as soon as possible.

    For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November.”

Policy Guideline 5 - Duty to Minimize Loss (complete rewrite) ctd.

- When a notice to end tenancy is given
  - Sets out landlord duty to minimize loss of rental income where the landlord gives a notice to end tenancy
- Proof of effort to minimize damage or loss
  - The party claiming compensation has the burden to show they mitigated

Policy Guideline 9 - Tenancy Agreements and Licenses to Occupy (complete rewrite)

- RTA: “tenancy agreement” includes a license to occupy, but not under the *MHPTA*
- Old PG: “If there is exclusive possession for a term and rent is paid, there is a presumption that a tenancy has been created, unless there are circumstances that suggest otherwise.”
- New PG: “It is up to the party making an application under the *MHPTA* to show that a tenancy agreement exists.”
- Factors that may be considered to distinguish a tenancy agreement from a license to occupy
  - Similar to previous PG, re-organized, re-worded and expanded a bit
- Property zoning
  - Whether zoning allows MHPTA tenancies on the property may inform the question of whether the agreement is a tenancy agreement or license to occupy, it is the actual use and nature of the agreement that is determinative

Policy Guideline 11 - Amendment and Withdrawal of Notices (complete rewrite)

- Mostly rewritten for clarity and to remove legalese
- But also removed the following section:
  - “Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.”
- So if you want to argue estoppel or implied waiver, you may need to put your own legal authorities into evidence

Policy Guideline 13 - Rights and Responsibilities of Co-tenants (complete rewrite)

- Clarifies that one tenant/co-tenant can sign a mutual agreement to end tenancy, and it will be effective to end the tenancy for all, even if it is a fixed term.
- Provides more specific scenario-based examples of co-tenancy issues
- Includes more information about occupants, such as the useful:
  - Where the tenancy agreement lacks a clause indicating that no additional occupants are allowed, it is implied that the tenant may have additional occupants move into the rental unit.

Policy Guideline 49 - Tenant's Direct Request (new policy guideline)

- Tenant's direct request for return of a security deposit and/or pet damage deposit - **section 38.1 of the *RTA***
- For a s. 38.1 direct request, the tenant **must** provide:

1. A copy of the signed tenancy agreement showing the initial amount of rent, the amount of security deposit required, and if applicable, the amount of pet damage deposit required;
2. If a pet damage deposit was accepted after the tenancy began, a receipt for the deposit;
3. A copy of the forwarding address given to the landlord (Form RTB-47 is recommended, but not required) or a copy of the condition inspection report with the forwarding address provided;
4. A completed Proof of Service of Forwarding Address (Form RTB-41);
5. A Tenant's Direct Request Worksheet (Form RTB-40); and
6. The date the tenancy ended.

Policy Guideline 49 - Tenant's Direct Request (new policy guideline)

- Proving Service of Forwarding Address
  - Forwarding address can be in a letter or on the condition inspection report
  - Proof of Service of Forwarding Address (Form RTB-41) is a required form
  - Tenants can use any method of service permissible under section 88, but the PG lists 'preferred methods of service', along with examples of evidence the tenant can provide to substantiate service using those methods
- Notice of Dispute Resolution
  - Must be served within 3 days of receiving it from the RTB, by either registered mail or in person
  - Tenant must complete and submit the proof of service form, Form RTB-50

Policy Guideline 49 - Tenant's Direct Request (new policy guideline)

- Possible outcomes
  - Monetary order for the Tenant
    - Director has to be satisfied that:
      - at least 15 days have elapsed since the landlord received the tenant's forwarding address in writing and since the tenancy ended
      - No outstanding monetary order against the tenant
      - No written agreement that the landlord can keep the deposit
      - The tenant did not forfeit their right to the return of their deposit
  - Adjournment to a participatory hearing
    - May happen if there are questions about the documents submitted by the tenant, if credibility findings are needed, or if the landlord has submitted an application to claim against the deposit
  - Dismissal, with or without leave to re-apply
    - May happen if the tenant
      - Does not provide all required documents or proof of service
      - Made a monetary claim other than the return of a deposit
      - Would not be successful in a participatory hearing, based on the evidence

Policy Guideline 52 - COVID-19 Repayment Plans and Related Measures (new policy guideline)

- Provides greater level of detailed explanation of the COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act) Regulation, e.g.:
  - Prior agreements can be cancelled unilaterally by either party if they offer a repayment plan that complies with the requirements in the Regulation
  - Giving examples of different possible terms in a repayment plan, including what terms a landlord and tenant can amend by agreement
  - The impact of the Regulation on Monetary Orders for affected rent
    - Applications for MOs made prior to July 31: complex application
    - Applications for MOs made on or after July 31: RTB will treat these as attempts to circumvent the Regulation, and potentially as abuses of the Dispute Resolution process
    - Existing MOs for affected rent: not a basis for 1MoNTEs, enforcement steps taken by a landlord may be relevant in their application for an Order of Possession
  - Failure to comply with the Regulation may lead to Compliance and Enforcement Unit involvement, up to and including administrative penalties

Policy Guideline 53 - Publishing Administrative Penalties (new policy guideline)

- RTB has started to publish Administrative Penalty decisions on their website
- Purpose of publishing: deterrent against non-compliance, accountability for penalized parties, transparency of the Compliance and Enforcement Unit
- Decisions will include:
  - the name of the party being penalized
  - the nature of the contravention
  - the amount of the penalty
- Decisions will not include the name of third parties (e.g. if a landlord is fined, no tenant's name will appear)
- Decisions will be published 15 days after being made (to account for Review Consideration deadline)
- Posted decisions will be reviewed every 5 years. If the penalized party has both paid the fine **and** not committed any new contraventions, a decision will be taken down.

Other Changes to Policy Guidelines

- Policy Guideline 30 - Fixed Term Tenancies
  - Sections C&F
- Policy Guideline 42 - Digital Evidence
  - Section B - added acceptable file formats
- Policy Guideline 44 - Format of Hearings
  - Preamble, Sections D, E
- Policy Guideline 46 - Emergency Shelter, Transitional Housing, Supportive Housing
  - Section B (changed to reflect definition of emergency shelter in *Regulation*)

Caselaw Update

Wiebe v Olsen, 2019 BCSC 1740

Facts:

Ms. Wiebe had moved her motorhome onto Ms. Olsen's property and had been paying her rent. Over time, she had removed the wheels, sealed the door shut, and added an overhang roof and patio. Ms. Olsen served a Notice to End Tenancy, and Ms. Wiebe filed to dispute it. Both parties submitted evidence and written argument before the hearing - neither raised the issue of whether the *RTA* or *MHPTA* did not apply.

At the hearing, the Arbitrator, on their own initiative or on Ms. Olsen's, found that they did not have jurisdiction over the hearing. The Arbitrator referred to cherry-picked sections of Policy Guideline 9 in making this finding, and did not address relevant evidence about the motorhome.

Wiebe v Olsen, 2019 BCSC 1740

The judge overturned the decision for two reasons:

1. The Arbitrator only considered factors in PG 9 that supported a finding of no jurisdiction, and ignored the factors and evidence that supported the *MHPTA* applying.
2. It was procedurally unfair for the Arbitrator to "spring" the issue of jurisdiction on the parties where both sides agreed in written submissions that the *RTA*/*MHPTA* applied

Ratios:

- An Arbitrator cannot cherry-pick parts of a Guideline; if they rely on parts of it and not other parts that are relevant, they must explain why they are doing so
- Where one party quite clearly concedes a point, and the Arbitrator intends to rely on a new position that undercuts the effect of that concession on their own initiative, they should give the parties an opportunity to reasonably address the tribunal's concerns
    - In some cases, parties may want to argue that an adjournment is necessary to address the issue

Khan v Savino, 2020 BCSC 555

Facts:

Mr. Khan, a landlord, filed a $17,000 claim against Mr. Savino. A hearing was set for May 7. On April 23, Mr. Khan amended his claim to increase it to $30,000 and submitted a large volume of additional documentary evidence.

The Arbitrator found that he had submitted this extra evidence one day late, and, in any case, was attempting to "ambush" Mr. Savino at the hearing. The Arbitrator made several other findings regarding Mr. Khan's delay in providing documents.

However, the Arbitrator did not ask Mr. Savino whether he was prejudiced by the late service of evidence, and simply assumed that he had been.

The Arbitrator also dismissed the entirety of Mr. Khan's claim without leave to reapply, without hearing the original, unamended claim on its merits.

Khan v Savino, 2020 BCSC 555

The judge found that the Arbitrator failed to follow Rule of Procedure 3.17, which requires arbitrators to give **both** parties an opportunity to be heard on the question of accepting late evidence.

The judge also found that it was wrong for the Arbitrator to dismiss the entirety of Mr. Khan's case, and that many of their findings of willful delay were not based on any evidence.

Ratios:

1. Prejudice cannot be assumed: Arbitrator's must canvass both parties on the issue.
2. Findings of "willful delay" in service of documents/evidence must be based on evidence beyond simply complying with the last possible deadline allowed in the Rules
    a. Rule 2.5 is still relevant: in some cases, parties may need to show that they did not have or could not have submitted, at the time of filing, evidence that they then submit later in the process

Guevara v. Louie, 2020 BCSC 380

Facts:

- Ms. Guevara was a tenant of Ms. Louie, and consistently paid her rent late for the duration of her tenancy. The two had a friendly relationship.
- Ms. Louie served Ms. Guevara with a 1 Month NTE for Cause for repeated late payment. Ms. Guevara disputed it.
- At the hearing, the arbitrator found the following:

I find, based on the testimony and evidence of the parties, and on a balance of probabilities that the Tenant has been repeatedly late paying rent as alleged in the Notice. The evidence before me confirms that the Tenant was late 12 times in total during the tenancy, and six times in the most recent year...

The Landlord issued the Notice in June 21, 2019. As such, I find that she acted in a timely manner after the most recent late payment.

[...]

During the hearing the Tenant stated that she has had difficulty paying rent on the 1st due to issues with her online banking app on her phone. [...] [I]t is the Tenant's responsibility to pay rent on time, and it was incumbent on her to ensure the payment was received. In this respect I prefer the testimony of the Landlord that the Tenant's failure to pay rent was not due to circumstances beyond the Tenant's control.

Guevara v. Louie, 2020 BCSC 380

The judge found that, per *Vavilov*, "tribunals must demonstrate an understanding of the proper approach to statutory interpretation" - namely, reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context. The judge found that the Arbitrator failed to do this because:

- S.47 (cause evictions) requires serious misconduct before an eviction is permitted
- The Arbitrator failed to take into account the full circumstances and context of the tenancy

The judge also found that the Arbitrator failed to consider or apply the principle of estoppel - the decision contains a summary of how estoppel can be argued to defend against a late payment of rent eviction where the landlord has accepted rent late in the past

Ratios:

Arbitrators have to demonstrate an understanding of the proper approach to statutory interpretation: they must engage with the text, context, and purpose of the statute and cannot choose interpretations simply because they are convenient. They must also properly engage with the relevant circumstances of the case before them.

Section 47 Evictions for Cause require "**serious misconduct** that seriously affected the landlord or the other tenants of the building in which the premises are located, failed to comply with a condition precedent to the rental agreement coming into effect (s. 47(1)(a)) or have taken an unreasonable amount of time to comply with a material term of the tenancy agreement".