Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI, OLC, FF

Introduction

This hearing was scheduled to deal with an Application for Dispute Resolution whereby the applicant seeks to dispute a rent increase that exceeds the annual rent increase permitted under the *Residential Tenancy Act* ("the Act") and the Residential Tenancy Regulations. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally, and to respond to the submissions of the other party.

At the outset of the hearing, I confirmed service of hearing documents, evidence and written submissions upon each other and the Residential Tenancy Branch.

As a preliminary issue, I determined it necessary to consider whether the Act applies to this living accommodation and whether I have jurisdiction to resolve this dispute. In brief, the applicant was of the position that the Act applies to all tenancies and is intended to protect all tenants in the Province; whereas, the respondent was of the position that the Act does not apply and I do not have jurisdiction to resolve disputes involving military residential housing units. I proceeded to hear the arguments of both parties and after hearing from both parties I informed the parties that I would reserve my decision, adjourn the hearing and should I decide to take jurisdiction I would reconvene the hearing.

Issue(s) to be Decided

Does the Act apply to military housing units and do I have jurisdiction to resolve this dispute?

Background and Evidence

It is undisputed that the applicant is a member of the Canadian Forces and is provided "Department of National Defense housing" under a license to occupy with the Department of National Defense. In this case, the land on which the housing unit is located is leased from a private corporation by Department of National Defence, a department of the federal government, which has delegated the administration of the property to the Canadian Forces Housing Agency in order to provide housing to its military members.

The respondent submitted that section 18 of the *Federal Real Property and Federal Immovables Act* provides that any property leased by the federal government is considered federal real property to be administered as though it is federal crown property. As such, this property is administered no differently than housing units on land owned by the federal government.

The respondent submitted that the Nova Scotia Supreme Court considered the issue of jurisdiction of provincial residential tenancy legislation to military housing units in the case of *Canada (Attorney General) v. Burt, (2000) 97 ACWS (3d) 915*. In that case, the court concluded that the provision of military housing is essential to the military and section 91 of the *Constitution Act*, 1867 gives the federal government exclusive jurisdiction over military and defence operations. Further, the application of the provincial residential tenancy legislation would infringe upon the exclusive jurisdiction of the federal government in relation to national defence.

The respondent submitted that the federal government's directive *Isolated Posts and Government Housing Directive* provides that "no formal landlord-tenant relationship exists between the government and employee-occupants of government-provided accommodation" and the appendix to the Queens Regulations and Orders entitled "*Charges for Family Housing Regulations*" refers to "charges" to the military member in receipt of the housing but not "rent". The respondent pointed out that in paragraph 5 of the Licence to Occupy agreement between the parties it provides that "various provincial Landlord and Tenant acts do not apply to the Department of National Defense Housing" and in paragraph 6 reference is made to payment of a "licence fee" for the housing but not "rent".

The respondent explained that military members in military housing units have recourse for their dispute by other means, including: a complaint process within the Canadian Forces Housing Agency, filing a grievance, or seeking recourse through the federal

courts, or through the federal Ombudsperson. The applicant acknowledged that he was aware of other dispute resolution avenues available to him and explained that he and other military members affected by the rent increase are exploring the various dispute resolution processes, including this application.

After hearing the respondent's position, the applicant acknowledged that he understands the respondent's position but pointed out that it conflicts with the information provided on the website for the Department of National Defence housing. In the frequently asked questions the website provides the following information, in part: "Provincial rent control is applicable in accordance with regulations. Occupants in rent control provinces in 2017 may see their rent increase up to the provincial limits (British Columbia 3.7 %...) if they were not paying the full Base Shelter Value in the previous year…"

The respondent acknowledged the applicant's position as understandable but explained the Queens Regulations and Orders, section 4, provides that where the housing is located in a province with rent increase controls, the rent controls will be incorporated in determining the charge for the military housing unit; however, that in itself does not convey jurisdiction over military housing disputes to the Province.

In summary, the applicant was of the positon that the Act is intended to provide protection to all tenants in the Province and should be available to him. The respondent was of the position that the military housing is excluded from application of the Act constitutionally and statutorily.

Analysis

It is before me to determine whether the Act applies to the military housing unit provided to the applicant, a member of the Canadian military, by the Department of National Defence, a department of the federal government. Below, I have considered the respective arguments of both parties.

Section 2(1) of the *Residential Tenancy Act* describes the applicability of the Act to tenancy agreements, rental units and residential property as follows:

> **What this Act applies to**
>
> **2** (1) Despite any other enactment but subject to section 4 *[what this Act does not apply to]*, this Act applies to tenancy agreements, rental units and other residential property

Section 1 of the Act defines “tenancy agreement” and “rental unit” as follows:

> **"tenancy agreement"** means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.
>
> [My emphasis underlined]
>
> **"rental unit"** means living accommodation rented or intended to be rented to a tenant;

The respondent referred to the contract between the applicant and the Department of National Defense as a license to occupy rather than a tenancy agreement. However, licenses to occupy meet the definition of tenancy agreement and I find that argument is not determinative. I also find paragraph 5 of the Licence to Occupy, where the parties agree that the provincial tenancy legislation does not apply and reference to the payment of a license fee rather rent in paragraph 6 are not determinative either since section 5 of the Act provides that the Act cannot be avoided, as seen below:

> **This Act cannot be avoided**
>
> **5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
>
> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Despite section 2 of the Act, section 4 of the Act does exempt certain living accommodation from application of the Act. Several types of living accommodation are exempt from application of the Act. Although military housing is not listed in section 4, it shows that the Act does not apply to all tenants or every type of living accommodation located in the Province, as argued by the applicant.

The respondent also argued that the Act does not apply to military housing by virtue of the *Constitution Act*, 1867. The Residential Tenancy Policy Guideline 27: *Jurisdiction* provides policy statements and information with respect to application of the Act to various living accommodation in the Province and speaks to constitutional jurisdiction in a limited way. Below, I have reproduced certain relevant portions of policy guideline 27:

The issue of the jurisdiction of the Director appointed under the BC *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation) can arise in two ways:

A. Constitutional Jurisdiction: Does the provincial legislature under the *Constitution Act* have the constitutional authority to enact a statute which can affect the relationship between the parties who are before the Residential Tenancy Branch (RTB)?

B. Statutory Jurisdiction: Does the statute confer upon the RTB the statutory authority to hear the dispute between the parties or to make the requested order?

A. CONSTITUTIONAL JURISDICTION

The first issue is complex and, for the most part, beyond the scope of this guideline. The only issue which will be addressed in this guideline, as a matter of constitutional authority, is Indian Lands. A brief discussion of the basis of the jurisdiction follows: In 1982 the *Constitution Act* continued the rights and powers originally enacted under the British North America Act of 1867, except that the *Constitution Act* added the Charter of Rights and Freedoms. Those statutes provide that Canada is a federal state with multiple levels of government. Each level of government has its own powers and responsibilities as set out in sections 91 and 92 of the *Constitution Act*. With some exceptions, one level of government cannot legislate within the sphere of the other level, except to "incidentally affect" that other level of government's power. If a level of government purports to legislate within the other's sphere, the courts will hold the legislation either invalid or inapplicable to the facts in dispute.

1. Indian Lands

Section 91 of the *Constitution Act* confers the jurisdiction over federal lands to the federal government. The Legislation takes the form of acts of the provincial legislature. The case law makes it clear that provincial legislation cannot affect the "use and occupation" of Indian Lands because that power belongs to the federal government under section 91.

Historically, the RTB accepted jurisdiction of disputes over monetary claims, but not disputes affecting the use and occupation of Indian Lands. However, a decision issued June 5, 2013 by the British Columbia Court of Appeal found that the entire MHPTA is constitutionally inapplicable to Sechelt lands. This decision, *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer),* 2013 BCCA 262, has broad implications – it is not limited to the Sechelt Indian Band. The decision means that both the MHPTA and the RTA are wholly inapplicable to tenancy agreements on reserve lands and property on reserve lands, where the landlord is an Indian or an Indian Band. Thus, the RTB has no jurisdiction to hear disputes of any nature arising from these tenancy agreements. However, when the manufactured home site or the rental unit is on reserve land, but the landlord is not an Indian or an Indian band, the MHPTA or the RTA may apply. In this situation – where the tenancy agreement pertains to a rental unit or site on reserve land, but the landlord is non-Indian – sections of the Legislation which do not affect the use and occupation of the land may apply. For example, a monetary claim

> for damages or rent arrears under the Legislation may not affect the right to the use and occupation of Indian Lands (particularly if the tenancy agreement has ended) and the RTB may find jurisdiction.
>
> [Reproduced as written]

As seen above, the policy guideline does not speak to military housing specifically; however, I find the respondent's argument that the Act does not apply to military housing by virtue of section 91 of the *Constitution Ac*t is consistent with the Residential Tenancy Branch's position with respect to constitutional jurisdiction over federal lands such as Indian Lands.

Also of consideration and as pointed out by the respondent, the Supreme Court of Nova Scotia found that the section 91(7) of the *Constitution Act*, 1867 gives the federal government exclusive jurisdiction with respect to military and defence. Under section 91(7) of the *Constitution Act,* 1867, the power to make laws regarding national defense is squarely under federal jurisdiction, while section 117 gives the federal government the power to assume public lands for national defense. The *National Defence Act* gives the Minister of National Defence very broad powers in section 4. Namely, the Minister is responsible for the construction and maintenance of all defence establishments and works for the defence of Canada. The *National Defence Act* defines "defence establishment" as any area or structure under the control of the Minister. I am of the view that military housing falls under this definition.

Provincial laws can and do operate in areas of federal jurisdiction; however, I find the doctrine of interjurisdictional immunity is applicable to military housing as application of the Act would intrude on the federal government's powers over national defense, and may hinder the federal government's ability to administer military housing as determined necessary and appropriate by the Department of National Defence.

Finally, I understand that the Canadian Forces Housing Agency and Department of National Defence have its own regulations, policies, and directives governing rent increases, allotment of housing, evictions, and an internal complaint resolution process for members to seek. This would bring the *Residential Tenancy Act* dispute resolution process into direct conflict with existing federal laws, regulations and policies flowing from federal jurisdiction. In such instances, the federal law would prevail over the provincial law under the doctrine of paramountcy.

For the reasons provided above, I find the military housing unit and the agreement between the parties is constitutionally exempt from application of the *Residential Tenancy Act* and I decline to take jurisdiction to resolve this dispute.

Conclusion

I have declined to accept jurisdiction to resolve this dispute.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: May 03, 2017

Residential Tenancy Branch