Cohen Highley LLP
LAWYERS

RENT CONTROL BULLETIN

BIG ISSUES FOR "SMALL" LANDLORDS

"CONTRACTING OUT": SNOW REMOVAL AND LAWN MAINTENANCE

Landlords who rent units in smaller complexes, from single family homes to six-plexes, will often make the tenant responsible for looking after their own snow removal and lawn maintenance. "Small" landlords need to be aware that even where lease obligations are in writing, the tenant can refuse to honour the agreement and the landlord will have to provide the service at no extra cost to the tenant.

In 2009 the Ontario Court of Appeal held that landlords could not make tenants responsible for snow shovelling their own walks as part of the tenancy agreement. The Court held that such an arrangement in the lease amounted to an unlawful "contracting out" of the landlord's obligations under the *Residential Tenancies Act* (RTA). Under s. 20 of the RTA the landlord is "…responsible for …complying with …safety, housing and maintenance standards". Most by-laws relating to residential property require that pedestrian access be kept free from unsafe accumulations of ice and snow and lawns be mowed and kept free of noxious weeds.

The Court of Appeal did provide guidance about how landlords and tenants can still agree that the tenant will assume snow removal and lawn maintenance duties; however, it would be done as an independent contractual obligation. If a landlord separately contracts with individuals, regardless of whether those individuals are tenants, then the agreement for services is valid and enforceable. A landlord and tenant can make a separate agreement for a monthly amount to be paid by the landlord to the tenant for lawn maintenance and snow removal. Such payment could be made by way of a "set off" against the monthly rent, thereby "legally" transferring responsibility for lawn maintenance and snow removal to the tenants. If the monthly payment for the services was stated to be, for example, $80.00 and if the monthly rent the landlord wants for the rental unit is $900.00, then the lease would state the monthly rent is $980.00 and there would be a separate contract for snow removal and lawn maintenance where the landlord pays to the tenant $80.00 monthly by way of a set off against the $980.00 rent. In this situation, if the tenant fails to do the work and if the landlord has the right to terminate the contract, then the landlord is entitled to payment of the full amount of rent and can serve an eviction notice if the tenant fails to pay it. This is substantial leverage, depending on what the separate monthly set off is for the yard work and snow removal.

A word of caution: the agreement for services must clearly describe the specific services to be performed. The court noted in the case in question: "The provision vaguely places the task of snow removal "from their walkway and stairway" on tenants jointly. It does not set out specifically what part of the complex's common walkways this tenant agrees to keep clean and does not stipulate on what schedule she should perform the joint obligation. The provision fails to define this individual tenant's task clearly enough to create an enforceable contractual obligation".

Bottom line: ensure that any such agreements with tenants specify what services are to be performed; the circumstances in which the agreement can be terminated (particularly where the tenant fails to adequately provide the services); the amount of compensation to be paid to the

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tenant for providing the service; and the manner of payment for same by way of set-off against the monthly rent. It would also have to be clear in the agreement that the contract for services ends when the tenancy ends.

The full Reasons of the Court of Appeal are available in *Montgomery v. Van,* 2009 ONCA 808 (CanLII) or by clicking on the following link:

www.canlii.ca/en/on/onca/doc/2009/2009onca808/2009onca808.html.

If you require a proper services agreement for your property, contact us.

APPORTIONING ELECTRICITY CHARGES

In small residential complexes landlords often require tenants of separate units to pay a proportionate share of the total electricity charge for the property. With the January 1, 2011 proclamation into force of s. 138 of the RTA, landlords who engage in electricity apportionment in buildings of two to six units must now adhere to mandatory disclosure and "energy efficiency" obligations.

The RTA makes it clear that the electricity apportionment is not "rent" and therefore a failure to pay electricity cannot form the basis for an eviction application (the arrears would have to be pursued in small claims court). The landlord is obliged to disclose to "prospective" tenants information about the total costs of electricity for the residential complex, as well as apportionment costs and calculations, and must ensure this is done on the "prescribed form". The landlord must also ensure that the refrigerator in the rental unit was manufactured on or after January 1, 1994.

A failure by the landlord to meet any of these obligations makes the landlord liable to findings of a breach of the RTA on a tenant application and the tenant can get a rent abatement, rent reduction, a new fridge, or termination of the tenancy. The section gives tenants an effective new way to break their leases. By ensuring compliance with these new RTA obligations, landlords can avoid costly proceedings at the LTB and tenant turnover. The mandatory disclosure forms are available from the LTB at www.ltb.gov.on.ca

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