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# Reforming Residential Tenancy Law for Victims of Domestic Violence

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## Abstract

Financial liability for ending residential tenancies early can prevent victims of domestic violence from fleeing danger or affording adequate housing. Domestic violence is one of the leading causes of homelessness for women, the primary victims of domestic violence. A recent amendment to residential tenancy legislation in most Canadian provinces has made it easier for victims to leave their rental housing by allowing early termination of tenancies with minimal financial penalties. However, the early termination amendments vary greatly among jurisdictions, and some of the provisions are problematic. In addition, more reforms of residential tenancy law are needed before its commonly encountered structural barriers to leaving or staying safely are removed. The new federal homelessness strategy may provide motivation for reform.

## Introduction

It is widely acknowledged that domestic violence is a leading cause of housing insecurity, including homelessness, for women and children in Canada (Richter & Chaw-Kent, 2008; Tutty et al., 2008; Kolkman & Ahorro, 2012; Kirkby & Mettler, 2016).<sup>2</sup> Residential tenancy law, as well as the policies of landlords and public housing agencies, play a role in what has been characterized as “a downward

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<sup>2</sup> Women are the primary victims of domestic violence — 79 percent according to police-reported information in 2017 (Department of Justice Canada, 2017) — and so feminine pronouns will be used in references to victims and male pronouns in references to perpetrators of domestic violence. The terms “victim” and “domestic violence” are used because they are the most common in the residential tenancy legislation examined in this paper.

slide into homelessness for victims of domestic violence” (Gander & Johannson, 2014, p. 6). That slide may begin with a complaint by a neighbour to a landlord about noise, followed by the landlord’s eviction of both the victim and the perpetrator of domestic violence for breaching their duty not to interfere with the rights of other tenants. The possibility of eviction and the lack of housing alternatives is often a reason for staying in violent situations (Young, 2015; West Coast LEAF, 2014).

Most Canadian provinces and territories recently amended their residential tenancy laws to make it easier for tenants who are victims of domestic violence to leave their rented housing. Most victims are now able to end their tenancies early with minimal financial penalties in eight provinces and one territory: Quebec (2006), Manitoba (2011), Nova Scotia (2013), the Northwest Territories (2015), British Columbia (2016), Alberta (2016), Ontario (2016), Saskatchewan (2017) and Newfoundland and Labrador (as of January 1, 2019). These amendments have been welcomed by those who work with victims of domestic violence, but the reforms have also been acknowledged to be merely a first step (Nasser, 2016; Fraser, 2017; Maki, 2017).

The recent nature of these early termination amendments is the first reason I focus on the intersection of domestic violence and residential tenancy law in this paper. There has been little comparative analysis of these changes. A second reason is that the law that governs rented housing — law found in discrete provincial and territorial statutes — is separate from the laws that apply to owner-occupied housing. The structural barriers embedded in residential tenancy laws that adversely impact the ability of victims of domestic violence to safely leave or stay in rented housing are unique. However, the recently removed financial penalties for ending tenancies early are not the only legislative provisions that have limited victims’ options and imposed uncertainty or financial burdens. These structural barriers have not been addressed in the social science or legal literature, and that is a third reason for the narrow focus in this paper. Fourth, the

amendments are the first time that residential tenancy laws have required landlords to deal with relationships between occupants of the landlord's property. Residential tenancy laws had not even acknowledged that there might be more than one tenant for each rental unit; none made provision for co-tenants or joint tenants before these changes became the law. It will be interesting to see if these changes are the first of many recognizing the relational nature of residential tenancy law. In addition, a few recent public legal education projects have focused on domestic violence and renting, and in doing so have revealed a need for more information and more law reform (Women's Shelters Canada, 2018, pp. 11–13; Gander & Johannson, 2014; Gander, 2017; Gander & Siu, 2018). Finally, there is some evidence that victims of domestic violence who live in rented housing are more likely to experience domestic violence than those who own their homes (Brownridge, 2005; Shobi et al., 2011), indicating that residential tenancy law is an area deserving of, as well as in need of, attention.

After setting out my approach to the topic in Part II, I discuss the recent wave of early termination amendments that were implemented across most of Canada. The different jurisdictions take surprisingly different approaches to a relatively simple issue, and these differences, as well as the problems caused by some of approaches, are the focus of my discussion. No further changes to residential tenancy laws have been made since these reforms. Nevertheless, I argue that work remains to be done to make those laws less of an obstacle for victims of domestic violence. The most commonly encountered of these obstacles are discussed and illustrated with case law in Part IV. The conclusion summarizes the types of reforms to residential tenancy laws that should be considered in policy and law reforms.

## **Methodology**

The inspiration for this paper began with a request from Professor Lois Gander, who was conducting research on the residential tenancy

issues facing victims of domestic violence on behalf of the Centre for Public Legal Education Alberta (CPLEA). In her 2017 report, “Domestic Violence: Roles of Landlords and Property Managers,” Professor Gander noted that uncertainty over specific legal issues was preventing Alberta landlords from accommodating the needs of victims of domestic violence. Those issues concerned the constraints of privacy laws, the definition of a “tenant,” landlords’ power to terminate tenancies for domestic violence, landlords’ power to change locks, landlords’ ability to recover the cost of repairs for damages, and the implications of different forms of no-contact orders for residential tenancies (Gander, 2017, pp. 44–45). Professor Jennifer Koshan, graduate student Elysa Darling and I addressed the legal issues identified by Professor Gander, as well as Alberta’s early termination amendment to its residential tenancy legislation, in eight posts collected in “Landlords, Tenants and Domestic Violence” (ABlawg, 2017).

This paper expands the analysis of the issues specific to residential tenancy legislation that proved to be the most problematic for victims of domestic violence in Alberta to all of Canada’s thirteen provincial and territorial jurisdictions. I began with a review of the existing literature on domestic violence and rented housing, focusing on the Canadian context. I then examined the residential tenancy legislation in each of the jurisdictions for the presence and content of the recent amendments that made it easier for victims to terminate leases early. To facilitate comparisons, the residential tenancy legislation was also analyzed for the grounds on which a landlord could evict tenants, the definitions of “tenant,” and their dispute resolution processes. Government websites with information on the early termination amendments were examined for current practices. Legislation allowing courts or other judicial authorities to grant exclusive possession of housing, whether owned or rented, was also reviewed. However, because each province and territory has its own version of civil protection order laws allowing exclusive protection orders, as well as its own variety of residential tenancy law, examining the

contradictions and gaps between these two different areas of law in each jurisdiction was well beyond the scope of this paper.

Finally, I searched for cases that discussed domestic violence in residential tenancies. Finding such cases is difficult and there are few of them to be found. First, all of the residential tenancy laws provide for specialized administrative or arbitral tribunals or a dedicated branch of the government to decide claims between landlords and tenants, and to do so in an inexpensive and expeditious manner. These disputes rarely reach the courts for a variety of reasons. Second, not all of the specialized landlord and tenant dispute resolution bodies make their decisions public, and those that do make only a small portion of those decisions freely and publicly available. Alberta, Prince Edward Island, Newfoundland and Labrador, Nova Scotia, New Brunswick, Quebec, the Yukon and Nunavut provide primarily oral, but also written, decisions with reasons to the parties to the dispute and no one else. Manitoba makes their decisions available for limited use for an annual fee of \$250 (Government of Manitoba, 2018). In jurisdictions where some decisions are publicly available, it is difficult to get an idea of what percentage of orders are reported. For example, the stated goal of the Saskatchewan Office of Residential Tenancies is to post roughly 10 percent of their decisions (Government of Saskatchewan, 2016) and, although the Ontario Landlord and Tenant Board now resolves about 78,000 applications a year (Social Justice Tribunals Ontario, 2017–2018), the database reporting those decisions includes less than 17,000 decisions spread over the past 10 years.

Only British Columbia, Saskatchewan, Ontario, Quebec and the Northwest Territories make at least some of their landlord and tenant decisions publicly available at no cost. The British Columbia government provides its own searchable database. I did not search the Quebec case law because landlord and tenant law in Quebec is found in its *Civil Code* and contextualized by that province's unique civil legal tradition (Government of Quebec, 2018a; *Civil Code*, art. 1974.1). The databases of landlord and tenant decisions for the four

remaining jurisdictions were searched for cases discussing domestic violence, using the search term “ ‘domestic violence’ or ‘family violence’ or ‘interpersonal violence’ or ‘intimate partner violence’ or ‘domestic abuse.’” Another search for all uses of the words “violence” or “abuse” was performed in Saskatchewan’s database as a check on the more specific search terms; it did not reveal any additional cases involving domestic violence. The returns from these searches were very meagre: three cases involving domestic violence out of a total of over six thousand cases in the Northwest Territories database, three of more than nine hundred in Saskatchewan, twenty-six of more than sixteen thousand in Ontario, and six of an unknown total number in British Columbia. Many of those thirty-seven cases did not have enough details about the parties or their actions to be illustrative, often because the tenants did not attend the hearing. Only thirteen decisions were detailed enough to be useful.

As a result, the decisions discussed in this paper cannot be said to be representative; their approaches and results cannot be generalized. They are, at best, only examples of issues identified in previous research or my own assessment of the statutes. This lack of access to the practices of those who decide landlord and tenant disputes, and the consequent lack of knowledge about how the law is applied in individual cases, is an additional structural barrier to access to justice.

Housing on Canadian reserves is not discussed because reserve land is under federal jurisdiction (Darling, 2017), and neither is military housing, which is managed by the Canadian Forces Housing Agency. There is no federal equivalent to the provincial and territorial residential tenancy legislation examined in this paper, and the types of problems seen on reserves and in military housing are unique to each of these two locations. Subsidized public housing is included. The statutory provisions that are discussed in this paper do not distinguish between private and public housing. The practices of public housing agencies most likely differ from those of private landlords, but although the former are often publicly available, the

latter are not, and so comparisons cannot be made on that basis. Further research using different methods would be required.

### **Early Termination Reforms of Residential Tenancy Law**

As noted in the Introduction, 9 Canadian jurisdictions recently amended their residential tenancy laws to allow victims of domestic violence to end their tenancies early without the usual financial consequences of early termination. The reform was announced by one Minister of Housing as a way to “help reduce the financial cost that may result from ending a lease early and help ensure survivors can leave an unsafe living environment quickly” (Nasser, 2016).

Before the amendments, as well as in those two provinces and two territories where the law has not been changed, if a victim left rented housing before the end date of a fixed-term tenancy, she remained liable for the rent until that agreed-upon end date. If, for example, a victim signed a fixed term one-year lease and the victim left in the second month of her tenancy, the financial cost of terminating that tenancy early would be the total amount of the rent she agreed to pay for the last ten months of the tenancy — a prohibitive amount. The amount of notice usually required to end a year-to-year periodic tenancy if the early termination amendments do not apply is either three months (e.g., *Civil Code*, art.1884; New Brunswick’s *Residential Tenancies Act (NB RTA)*, s.24(1)(a); Nova Scotia’s *Residential Tenancies Act (NS RTA)*, s.10(1)(a); the Yukon’s *Residential Landlord and Tenant Act (YK RLTA)*, s.45(ii)) or at least sixty days before the end of a tenancy year in order to end on the last day of the tenancy year (e.g., Alberta’s *Residential Tenancies Act (AB RTA)*, s.9; Ontario’s *Residential Tenancy Act (ON RTA)*, s.44(3)). In either case, the financial cost of leaving early might be unaffordable. On the other hand, even before the early termination amendments, month-to-month periodic leases only require a tenant to give one month’s notice before the end of a month in order to end the tenancy on the last day of the next month (e.g., British Columbia’s *Residential Tenancy Act (BC RTA)*, s.45).

Victims of domestic violence do not have to stay in the rented housing during the notice period, whether an early termination notice period or not. They can leave at any time, but they remain responsible for the rent and any other charges, such as for property damage, until the tenancy comes to its early end.

Victims of domestic violence must be tenants before they can — or need to — take advantage of these amendments. Only tenants are financially liable for rent and most other charges. Unfortunately, it is not always clear who is a tenant (as I will discuss in Part IV).

Not all types of tenancies can be terminated early in all jurisdictions. Some of the amendments are restricted to fixed-term tenancies (e.g., Saskatchewan’s *Residential Tenancies Act (SK RTA)*, s.64.2(1)). Others include both fixed-term and year-to-year periodic tenancies (e.g., *NS RTA*, s.10F(1)). Still others include fixed-term, year-to-year and month-to-month tenancies (e.g., *ON RTA*, s.47.1), or simply apply to all types of tenancies (e.g., *AB RTA*, s.47.3(1)). Newfoundland and Labrador’s new legislation applies to fixed-term and month-to-month tenancies (*Residential Tenancies Act, 2018 (NL RTA 2018)*, s.25(1)(b)).

There is a threshold requirement that a tenant believes their safety or that of their dependent children (and sometimes other dependents) is at risk because of domestic violence if the tenancy continues. The definition of the type of violence that is within the scope of the amendments varies. In most provinces and territories, it is tied to definitions in the jurisdiction’s civil protection order legislation under which orders for exclusive possession of rented housing can be made. For example, in Nova Scotia, “domestic violence” and “victim” have the same meaning in the residential tenancy legislation (*NS RTA*, ss.2(abb), 2(ja), 5(1)) as they do in the province’s *Domestic Violence Intervention Act*. Cohabiting or co-parenting relationships are required between the victim and the perpetrator, but the definition of domestic violence is broad enough to include assaults (excluding self-defence), sexual assaults, acts or threats causing a reasonable fear of bodily harm or property damage, confinement, and any series of

acts such as following, contacting, communicating, observing or recording that cause the victim to fear for her safety. In Manitoba, “domestic violence” and “stalking” in the early termination amendments (Manitoba’s *The Residential Tenancies Act (MN RTA)*, s.92.2) are tied to the *Domestic Violence and Stalking Act* (s. 2(1)), an act with broader coverage as it includes intimate relationships of all types, family relationships with or without cohabitation, dating relationships, and co-parenting relationships, and it includes emotional or psychological abuse. In British Columbia residential tenancy law (*BC RTA*, s.45.1), “family member” and “family violence” have the same meaning as in the *Family Law Act* (s.1), which requires a marriage-like or parental relationship between victim and perpetrator but very broadly defines “family violence” to include psychological or emotional abuse, threats to others persons or pets, unreasonable restrictions on financial or personal autonomy, intentional damage to property, and the indirect or direct exposure of a child to family violence.

However, not all provinces have coordinated their legislation. Ontario relies on a stand-alone definition of “violence” to a tenant or a child residing with the tenant (*ON RTA*, s.47.3), perhaps because there is no definition of “violence” in its *Family Law Act*. Alberta’s residential tenancy statute has its own definition of “domestic violence” (s.47.2(1)), whereas the province’s *Protection Against Family Violence Act (PAFVA)* uses the terminology of “family violence” (s.1(1)(e)), and the content of the two definitions are different. The lack of coordination between the two statutes means that victims of domestic violence in dating relationships or those subject to emotional or psychological abuse are eligible to terminate their tenancy early but cannot obtain an emergency protection order under the *PAFVA* as a way to prove their eligibility.

If the threshold requirement is met, victims may terminate their tenancy by giving their landlord two documents: a notice in writing of their intent to terminate their tenancy within a relatively short period of time, together with a certificate that confirms the existence

of the threshold requirement. While the notice periods vary somewhat, the required supporting documents vary widely by jurisdiction.

Notice periods start to run after the landlord is served with the required documents. The most common notice period is twenty-eight days, found in the amendments in Ontario, Saskatchewan, Alberta, and the Northwest Territories (e.g., *SK RTA*, s.64.2(2)(a)). A calendar month is specified in Nova Scotia and British Columbia, as well as in Quebec, for leases shorter than one year (*Civil Code*, art.1974.1). For leases longer than one year, the Quebec notice period is two months (*Civil Code*, art. 1974.1). In Manitoba, the notice period is one rental payment period, however long that might be (*MN RTA*, s.92.3(2)(a)).

The victim of domestic violence must also serve the landlord with confirmation that grounds for ending the tenancy early do exist. The most common document is a certificate issued by a government agency or another government-designated authority after reviewing the victim's emergency protection order, restraining order, peace bond or other no-contact order. In Nova Scotia, certificates are issued by the government's Victim Services upon production of an emergency protection order or a complaint to the police that resulted in a no-contact order (*NS RTA*, s. 10H(2)). A certificate is issued under *The Victims of Interpersonal Violence Act (VIVA)* in Saskatchewan, and a statement by a designated professional such as a social worker, psychologist, doctor, nurse, shelter worker or police officer can be used in place of an emergency protection order, restraining order, peace bond or other no-contact court orders (*SK RTA*, s.64.2). In addition to providing a court order, in Manitoba the victim must have made a complaint to the police and cooperated in the investigation of that complaint and in court (*MN RTA*, s.92.3(2)). In Alberta, as an alternative to a court order, the victim may provide a certified statement from a professional such as a doctor, nurse, social worker, police officer, shelter employee or victim support worker (*AB RTA*, s.47.4(2)). The new provisions in Newfoundland and Labrador are the same as Alberta's, except that the certificate-issuing authority

is the Director of Residential Services (*NL RTA* 2018, s.25(2)), rather than someone specializing in victim support services.

When a government-designated authority issues a certificate, it appears that they review the victim's application and supporting documents on a substantive basis. In Alberta, Manitoba, and Newfoundland and Labrador, the certificate-issuing authority must assess the application and be satisfied that there is a risk to the safety of the tenant or her dependent children if the tenancy continues (*AB RTA*, s.47.4(2)(b); *MN RTA*, s.92.4(3)(c); *NL RTA* 2018, s.25(2)(b)). In Saskatchewan, the person authorized under the *VIVA* makes the same type of substantive assessment (s.12.4(2)). In Nova Scotia, the Director of Victim Services must not only have reason to believe that the tenant is a victim of domestic violence, but they may also request information from a police agency to use in their assessment (*NS RTA*, s.10H(2)(3)). The decisions of the government agency or other government-designated authority to issue the certificate or to refuse to do so is usually a final decision, not open to review or appeal (e.g., *AB RTA*, s.47.5(5); *NS RTA*, s.10H(5)).

An independent assessment of the existence of the grounds for early termination — in addition to a no-contact court order such as a peace bond granted in criminal proceedings — might be a check on problems such as the wrongful arrests of women acting in self-defence that can arise from mandatory charging policies or the manipulation of the legal system by male perpetrators to make it appear that their female partners were the dominant aggressor (Pollack, Green & Allspach, 2005; Mosher, 2015). However, the requirements for certificates confirming that domestic violence grounds do exist are requirements for corroboration. They suggest that victims of domestic violence are not to be believed.

There is even more variation in the remaining jurisdictions, none of which require court orders. In British Columbia, the tenant must serve a family violence confirmation statement that confirms their eligibility to end their tenancy early, as well as a notice to terminate

(*BC RTA*, s.451.). The confirmation statement may be made by a very wide variety of persons including victim services workers, child welfare personnel, victim court support caseworkers, lawyers, university counsellors and aboriginal court workers (*Residential Tenancy Regulation*, s.39). The professionals making family violence confirmation statements must keep records, but there is no indication they routinely supply copies to the government. The process is similar in Quebec, except for the important difference that confirmation is issued by the Office of the Public Prosecutor in the form of an attestation, which must be applied for under oath by the victim (*Government of Quebec*, 2018b). The victim's grounds must be supported by a prescribed statement made by someone from a list of designated authorities such as women's shelter workers, doctors, social workers and police officers.

In the Northwest Territories, an application accompanied by a no-contact court order is made to a Rental Officer — the same administrative decision-maker that handles all landlord and tenant disputes in the territory (*NWT RTA*, s.54.1(1)). The Rental Officer issues an order to terminate the tenancy. The process in the Northwest Territories is therefore a part of ordinary residential tenancy law.

The only jurisdiction that does not require any third-party assessment of the victim's grounds is Ontario. A restraining order or peace bond will do, but a signed statement by the tenant that includes her allegations of domestic violence and her belief that she or a child may be at risk of harm or injury if they stay in the rented housing will also suffice (*ON RTA*, s.47.3(5)). No confirming certificate from a government authority is needed; the tenant simply serves the landlord with one of the specified types of court order or her signed statement (s.47.1(4)). However, a Tenant's Statement About Sexual or Domestic Violence and Abuse (Form N15) has been challenged in at least one case. The Ontario Landlord and Tenant Board held that an attempt at early termination of a tenancy by a male tenant who gave his landlord a Form N15 Statement, based on alleged abusive conduct

by his female co-tenant and her boyfriend, was invalid because the male tenant did not have the type of relationship with the female tenant that was covered by the early termination provisions (TSL-90833-17 (Re), 2018). It therefore appears that a landlord can contest the validity of a Tenant's Form N15 Statement and that the Landlord and Tenant Board is prepared to review it to see whether it comes within the scope of the legislation.

The relative simplicity of the Ontario, British Columbia and Yukon processes raises the question of whether the procedures in the other provinces are too complex. Their methods all involve obtaining the necessary documentation from a designated authority to deliver to the landlord — documentation that is additional to a no-contact court order or a statement by a professional. Most of the multi-step processes do have the advantage of putting victims of domestic violence in contact with support services. However, as those who have pointed out the legal system's problem in this area have noted (e.g., Neilson, 2013; Mosher, 2015), victims of domestic violence usually have to appear before a variety of courts and tribunals administering a variety of laws to tell their stories in a variety of ways to accomplish different purposes at a time when their ability to cope is challenged and their focus is on finding a safe place to live (Gander & Johannson, 2014, p. 4).

Once the notice to terminate and certificate are served on the landlord, the tenancy is usually terminated for all of the tenants in the rented housing, and not just the victim who served the notice (e.g., *NWT RTA*, s.54.1(9); *NL RTA* 2018, s.26(4)). The only exception is Ontario, where a victim may either terminate her interest in the tenancy or, if joined by the other joint tenants, terminate the tenancy (*ON RTA*, s.47.1(2)).

Landlords are not allowed to dispute these notices of early termination if the documentation is complete and they were properly served (e.g., *SK RTA*, s.64.2(9); *AB RTA* s.47.3(7)), although not all jurisdictions have a provision stating so. Quebec's public legal

education provider gives the example of a landlord who tried to convince a commissioner that the tenant was not really a victim of domestic violence, but the commissioner stated that he had to assume the information in the tenant's attestation was true (educaloi.qc.ca, 2018).

Although limited in their scope, these diverse reforms do appear to be helpful to victims of domestic violence. Research has indicated that financial obligations are the biggest problems facing most victims of domestic violence when they try to obtain or maintain rented housing, especially because landlords often pursue them for rent in arrears (Gander & Johansson, 2014, pp. 5, 34, 38). I say the reforms "appear to be" helpful because there is very little publicly accessible information or data about the use or usefulness of these new provisions, a shortcoming noted in other attempts to provide cross-jurisdictional information and analysis on domestic violence issues (Women's Shelters Canada, 2018, p. 1). In provinces where the government itself issues a certificate, there should be some form of accounting. The only mention of the use of government-issued certificates that I was able to locate was one made by the Alberta government. It reported that, in 2016–2017, their amendments enabled over 150 people to terminate their tenancies early (Service Alberta, 2016–2017, p. 23).

### **Common Problems in Residential Tenancy Law**

This part focuses on four of the most common problems that the standard residential tenancy legislation causes for victims of domestic violence leaving or staying in rented housing — problems untouched by the early termination amendments. These problems concern the status of "tenant," the inability of both landlords and tenants to terminate the tenancy of only one or more tenants instead of the entire tenancy, landlords' termination of victims' tenancies for the conduct of the perpetrators of violence, and victims' liability for damages to the rental housing caused by the perpetrators.

*Who Is a Tenant?*

It may be difficult to determine who is a “tenant” under residential tenancy legislation, but knowing who qualifies as a tenant is important for determining who can change or add locks to the rented premises, who is entitled to access the rented housing, who must pay rent, and who is responsible for damage to the rented housing. As already noted, the only victims of domestic violence who need to take advantage of the recent amendments allowing early termination of leases are those who have the status of “tenants” under the relevant legislation.

Three different approaches to defining a tenant have been adopted in the thirteen Canadian jurisdictions. In New Brunswick, use of a standard form of written lease signed by both the tenant and the landlord is mandatory (*NB RTA*, s.9(1)), as it is in Nova Scotia for fixed-term or year-to-year leases (Government of Nova Scotia, 2015, p. 2). A person must sign a written lease in order to be a tenant in Quebec (Government of Quebec, 2018b; *Civil Code*, art. 1851), and in Saskatchewan a written lease is required for fixed-term leases of three months or longer (*SK RTA*, s.20). In those jurisdictions, tenants are identified and distinguished from mere occupants in the written lease. Many landlords and tenants in the other jurisdictions assume that a person must sign a written lease in order to be a tenant, but that is not the case.

In four of the twelve remaining jurisdictions — Ontario, Newfoundland and Labrador (under the current legislation), the Northwest Territories and Nunavut — a person who pays rent and occupies rental housing is defined or deemed to be the tenant (e.g., *ON RTA*, s.2(1); Nunavut’s *Residential Tenancies Act (NU RTA)*, s.1(1)). In those four jurisdictions, it would be relatively easy in most circumstances to identify who pays the rent. However, the person with the higher income and/or the person who does not stay home to raise children is the person more likely to pay the rent, and most parents who stay home to raise children are women (Truemner, 2009,

p. 37). In many instances, a higher-earning male partner is more likely to be a tenant under this type of definition. Not being a tenant and therefore not owing rent would make it easier for a woman who is a victim of domestic violence to leave. However, in cases where the male tenant has been excluded from the rented housing under a no-contact order, the victim's ability to stay and to pay the same rent is not assured. Being identified as a tenant can be advantageous or disadvantageous to a victim of domestic violence, depending on her circumstances.

In the remaining jurisdictions, a tenant is someone permitted by the landlord to occupy the rental housing under a tenancy agreement, which can be written or oral or implied (e.g., *BC RTA*, s.1; Prince Edward Island's *Rental of Residential Property Act (PEI RRPA)*, ss.1(g), 1(o)). Recognizing that a landlord's permission can be implied by conduct causes a great deal of uncertainty. Landlords' practices for deciding how the presence of adult occupants other than tenants are to be dealt with vary greatly (Gander, 2017, p. 44). If a landlord is aware that more adults live in a rental unit than have signed the written lease for that unit and the landlord does not ask those adults to sign the lease, do those adults have the landlord's permission to occupy the unit? Does it depend on how long the landlord appears to have acquiesced to the situation? The answers are difficult to predict as they are so fact-dependent.

The importance of the definition of tenant to victims of domestic violence is illustrated by the Women's Legal Education and Action Fund (LEAF) intervention in 2002 in the unreported Ontario case of *Torres v Minto Management* (Women's LEAF, 2002). Ms. Torres lived with her husband in a rent-controlled apartment owned by Minto Management. He physically abused her and their children and, when he moved out of the family home, he gave the landlord notice to terminate the tenancy. The landlord demanded a new tenancy agreement from Ms. Torres and increased the rent by 41 percent. Ms. Torres challenged the rent increase, but the landlord argued that since she had not previously been a tenant, the rent control law did not

apply. LEAF argued that the legislation's disregard of spouses as tenants was in violation of the equality guarantee in the *Canadian Charter of Rights and Freedoms* because women are more vulnerable than men to housing crises, less likely than men to have incomes and therefore less likely to pay rent directly to the landlord, and more likely to contribute to the household in the form of unpaid labour. The Ontario Rental Housing Tribunal agreed with the landlord and ruled Ms. Torres was not a tenant because she did not pay rent directly to the landlord. On a review by another tribunal member, it was held that, even if Ms. Torres was a tenant, her husband's notice of termination was binding on her.

As the *Torres* case illustrates, one of the most significant reasons a person needs to have the status of a tenant is to obtain and retain access to rental housing. For example, only a tenant cannot be locked out. All residential tenancy legislation requires landlords who change or add to locks on access doors to make a key or other means of access available to tenants (e.g., *ON RTA*, s.31). Regardless of whether the victim is also a tenant or not, the perpetrator who is a tenant is entitled to keys and to access, unless the victim has a no-contact order with a condition for exclusive possession of the residential premises. Even then, if an order is silent about means of access or does not expressly terminate a perpetrator's tenancy, a landlord may be uncertain about their obligation to deny a perpetrator access (Gander, 2017, p. 45).

### *Termination of Tenancies, Not Individual Tenants' Rights to Possession*

Although residential tenancy legislation provides for a number of different circumstances in which landlords may terminate tenancies, there is a lack of flexibility and a lack of alternatives to the termination of a tenancy in its entirety, except in Ontario (*ON RTA*, s. 47.1(2)). The primary problem in the other twelve jurisdictions is that there are no provisions allowing the termination of the tenancy of only one of two or more tenants, or the suspension of a tenancy.

Instead, everyone occupying the residential premises must vacate when the tenancy is terminated (Truemner, 2009). This is so even if the perpetrator terminates the tenancy as he leaves, as in the *Torres* case. Allowing landlords to terminate the tenancy of only one tenant instead of all, or allowing each tenant to terminate only their tenancy, would provide more options for victims of domestic violence.

*Termination and Liability for the Conduct of the Perpetrator of Domestic Violence*

In situations of domestic violence, the most common provisions in residential tenancy legislation that allow landlords to terminate tenancies are breaches of statutory covenants not to significantly interfere with the rights of the landlord or other tenants, not to perform illegal acts on the premises, not to endanger other people or property, and not to do or allow others to do significant damage to the premises (Gander & Johannson, 2014, p. 26). For example, the noise associated with abuse, the repeated presence of police officers, the verbal abuse of the landlord's staff, or threats made to neighbours may result in the termination of tenancies for breach of the promise to avoid significant interference with the rights of the landlord and other tenants (e.g., *Beaverbone v. Sacco*, 2009). In the cases reviewed for this paper, all of the landlords' applications relied on the statutory prohibitions against significant interference with or unreasonable disturbance of the landlord, other tenants or neighbours.

Incidents of domestic violence, such as assaults, do constitute illegal acts justifying the termination of tenancies, as do breaches of no-contact orders (Decision 2045, 2013; Decision 1886, 2010; Smith, 2017). In one British Columbia case, where the rented housing was a basement suite in a home in which the main floor was occupied by the landlord, the landlord had given notice to end the tenancy based on "illegal activity that ... adversely affected ... the quiet enjoyment, security, safety or physical well-being of another occupant" or the landlord (*BC RTA*, s.47(1)(e)(ii)). The landlord provided evidence of four police calls to the basement suite within a two-month period. The tenant testified the calls were related to domestic violence on the

part of her partner who was by then under a no-contact order and barred from the basement suite. However, the landlord testified that the tenant continued to associate with her partner, which caused the landlord to fear for the safety and well-being of his children. The Residential Tenancy Branch arbitrator found that the tenant was in breach of the act “in permitting the return of her male partner to the rental unit after repeated incidents of domestic violence” (Decision 1331, 2012). The arbitrator granted the landlord an order of possession to take effect eighteen days later.

All cases involving arrests for domestic violence or breaches of no-contact orders involved male perpetrators. No cases raised issues about dual charging or the counter-charging of women as a result of mandatory charging policies (Pollack et al., 2005).

Another example is *YKDPM v. JA*, a 2017 case from the Northwest Territories. The landlord had applied to terminate a tenancy on the basis the tenant had repeatedly and unreasonably caused disturbances in and around the rented housing. Over a period of three and a half months, the landlord had received seven written complaints from other tenants about noise, fighting, intoxication and RCMP attendance. The tenant did not dispute the disturbances, testifying she was the victim of domestic abuse by her ex-partner who still resided with her despite her efforts to remove him. Most of the disturbances were caused by fights with him. The Rental Officer found that the tenant had “repeatedly failed to comply with her obligation not to cause disturbances and not to permit her guests to cause disturbances,” and that the termination of the tenancy was justified by the repeated disturbances for which the tenant was responsible (*YKDPM v. JA*, 2017). However, because the landlord had not given the tenant effective and fair warning of the complaints against her and the consequences she might face, the termination was conditional and would not take effect if no further complaints of disturbances were received by the landlord in the ensuing three-and-a-half-month period. In a similar example from Ontario in 2018, a termination of public housing based on substantial interference with the reasonable

enjoyment of the landlord and other tenants by someone the tenant permitted on the premises was also made conditional because of the substantial impact eviction would have on the tenant's 10-year-old son (TSL-91174-17 (Re), 2018).

Terminating the tenancy of everyone occupying the rented housing, whether perpetrator or victim, does remove the problem from the landlord's premises and, in multi-unit buildings, helps ensure the safety of tenants in other units and the safety of the landlord's on-site staff. Those are incentives for landlords to terminate (Gander, 2017). However, there is little research on landlords' termination for disruptive behaviour in Canada (Smith, 2017).

### *Liability for Damages*

Co-tenants are jointly and severally liable for damages to the premises; each is liable to the landlord for the damages to the full amount (Decision 6687, 2017). If a victim of domestic violence takes advantage of the early termination amendments, her liability for property damage ends at the end of the notice period, as does her liability for rent. However, she is still liable for damages to the rented housing up to the end of the notice period. Victims often have little or no income or savings to pay for damages and may need any funds they do have for new security deposits and moving costs. In addition, liability for damages up to the date of termination will follow victims when they leave, and women in public housing who flee a perpetrator may have to pay rent arrears or damage deposits before they can qualify for public housing again (Hoffart, 2015).

In a 2018 case from the Northwest Territories, *NTHC v. LB*, involving units in subsidized public housing, there was a complaint of disturbances that involved domestic abuse allegations to which the RCMP responded and arrested the tenant's ex-boyfriend. There were no further complaints after his arrest. Damage was caused to the premises on the day the ex-boyfriend was arrested, including numerous holes in walls and doors. The tenant accepted that she was responsible for the damages caused by her ex-boyfriend because she

was responsible for any disturbances or damages caused by any person that she permitted into her premises. Although the Rental Officer held the tenant was responsible for the damages, he denied the landlord's request for an order to terminate the tenancy, holding that the disturbances and damages did not establish a repeated pattern of behaviour that would justify eviction (*NTHC v. LB*, 2018).

Holding a victim who is a co-tenant liable for damage to the premises by the perpetrators of domestic violence further victimizes them. Victims should not be responsible for behaviour they are unable to influence, let alone control. The victim's ability to sue the perpetrator for their portion of damages or arrears payable to the landlord is not an acceptable solution because it requires the victim to engage in further court proceedings with the perpetrator, and it may require the victim to fully pay the landlord before pursuing the perpetrator.

There are other ways in which liability for a perpetrator's damage to rental housing may follow a victim of domestic violence into the future. Victims may not get references from current landlords (Maki, 2017). Additionally, some landlords use consumer credit reports issued by credit bureaus to decide whether to rent to potential tenants. Being a tenant and being the victim of acts of violence that damage the rented premises may affect victims' consumer credit reports (Machalinski, 2017). A lack of landlord references and a bad credit history means victims of domestic violence will have difficulty finding new housing (Kolkman & Ahorro, 2012). Landlords are required to comply with the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, as well as similar provincial legislation; they should be getting tenants' consent before getting or giving references and background checks. Property damage and rent arrears used to make it more likely that a victim's name ended up in a "bad tenant" database. However, the Office of the Privacy Commissioner of Canada determined in 2016 that *PIPEDA* did not allow landlords to disclose information about a tenant's payment history to unregulated "bad tenants" lists (*PIPEDA Report of Findings #2016-002*).

## **Conclusion**

Reforms to facilitate the ability of victims of domestic violence to choose to either leave without onerous financial liabilities or to stay safely with better coordination with civil protection orders should be on the national agenda. This paper's review of the relevant legislation and case law suggests a number of reforms that should be contemplated.

More certainty around the definition of a "tenant" to clarify who has rights and liabilities should be one of the first agenda items in any reform efforts. The recognition of co-tenants and their treatment as individuals in relationships in order to enable or require them to leave without ending the tenancy for the other co-tenant(s) should be considered. These types of reform should facilitate the exclusion of perpetrators of domestic violence even if the perpetrator is the only person recognized as a tenant, and without necessarily terminating the lease. Legislation should provide for the removal of a perpetrator's name from a lease while at the same time allowing a victim who has been occupying the premises the option to be recognized as a tenant and continue the tenancy on the same terms and conditions. A victim should also have the option to make a new lease on the same terms and conditions and for the same length of time as the perpetrator's lease. Legislative amendments should explicitly allow victims of domestic violence who are granted exclusive possession of rental housing to change door and window locks or other means of access without the landlord's consent, so long as the landlord is given the new means of access. Such amendments should also direct landlords to refuse to give keys to new locks or the new means of access to perpetrators, even if their name is on the lease.

Civil protection legislation could be more directive about the issues to be considered and provided for when exclusive possession orders are made. Such orders should allocate liability for rent in arrears and for damage caused prior to a separation of the victim and the perpetrator. The continuing liability of a perpetrator for the rent and

similar charges until the original tenancy ends, whether or not the perpetrator is excluded from the rented housing, should also be considered in each case. So too should be the withholding of the return of a perpetrator's security deposit until the tenancy ends, or the division of the security deposit among tenants and occupants.

Express prohibition on landlords terminating a tenancy, failing to renew a tenancy, or refusing to rent to a victim based on their obtaining a no-contact order or based on the acts that led to or violated a no-contact order should also be considered. A ban on a landlord giving a victim of domestic violence a negative credit entry or a bad reference should also be on the reform agenda. Immunity from liability for landlords who act in good faith in accordance with the law by, for example, excluding a perpetrator named in a no-contact order should also be added to legislation.

Making all or more of the decisions of the tribunals and arbitrators who decide landlord and tenant disputes publicly and freely available would increase access to justice as well. When Saskatchewan began to add some of its residential tenancy decisions to an accessible database, the Justice Minister indicated the government was doing so to “improve access to justice by providing an easily-accessible tool for landlords and tenants to use to research ways to resolve their own rental disputes,” as well as to ensure transparency and accountability to the public (Saskatchewan Press Release, 2016). The lack of any reporting of residential tenancy decisions in most jurisdictions, and the lack of comprehensive reporting in the remaining jurisdictions, hinders research in this area of the law.

Now should be a good time to put further reforms of residential tenancy law on the public agenda. In November 2017 the federal government announced a National Housing Strategy that included the principle of giving priority to those most in need, including women and children fleeing domestic violence (Government of Canada, 2017, pp. 5, 24–25). This new policy may motivate at least some of the required changes to residential tenancy law in this country, just as

homelessness prevention law and policy has done in other common law jurisdictions, such as England and the Australian states of New South Wales and Victoria (Edwards, 2011; Spinney, 2012; Wilson & Barton, 2018). In Canada, we should at least be able to accomplish the reform of residential tenancy law so that it no longer contains barriers to safe rental housing for victims of domestic violence.

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