Ontario Landlord & Tenant Law Meets the Bed Bug Crisis

Presented by:
Harry Fine, Landlord Solutions
Today’s presenter

Harry Fine is a licensed paralegal and President of Landlord Solutions.

As a former adjudicator, Harry has expert knowledge of Landlord and Tenant law and administrative law, as well as expertise in how the Human Rights Code, and common law doctrine come into play when arguing at the Landlord and Tenant Board.

Harry is an approved education provider for 7 different Real Estate Boards and teaches at Humber College, the Ontario Non-Profit Housing Association and the Institute of Housing Management.
Since January 31st, 2007 the law resolving disputes between residential landlords and tenants is the Residential Tenancies Act, 2006.

The Residential Tenancies Act does not deal with bedbugs directly, but has the tools required to deal with the issues provided the Landlord and Tenant Board, which oversees the application of the law, takes a balanced approach.

Making the topic a bit more complicated is that the presence of bed bugs gives rise not only to applications by landlords, but applications by tenants, far more tenant applications than landlord applications.

Making the topic more complex still is the connection between hoarding and mental health problems, making treatment of certain units more difficult.
BB Related Issues Raised by Tenants

- A tenant can raise an issue at the very commencement of the tenancy that the rental complex or rental unit are not free from bed bugs.

- A tenant can raise an issue during the tenancy that there are bed bugs in their unit and the landlord, by not resolving the issue, has breached its obligation to repair, maintain and keep fit for habitation.

- A tenant can raise an issue during the tenancy that there are bed bugs in their unit and the landlord, by not resolving the issue, is substantially interfering with their reasonable enjoyment of the complex.

- A tenant can seek a number of remedies, but the most common would be compensation, that the problem be resolved, and/or that the tenancy be terminated.
BB Related Issues Raised By Landlords

- A landlord can raise an issue by way of application during the tenancy that there are bed bugs in the unit caused by the tenant’s conduct by not keeping the unit in a state of ordinary cleanliness.

- A landlord can raise an issue by way of application during the tenancy that there are bed bugs in the unit caused by or exacerbated by the tenant not advising them upon noticing the problem.

- A landlord can raise an issue by way of application during the tenancy that there are bed bugs in the unit, howsoever caused, and that the tenant has obstructed or interfered with the landlord’s lawful right by not allowing remediation work to be done.

- A landlord can raise an issue by way of application during the tenancy that the tenant has, wilfully or negligently, caused undue damage to the unit or complex through his or her conduct as it relates to bed bugs.
Commencement of tenancy

13. (1) The term or period of a tenancy begins on the day the tenant is entitled to occupy the rental unit under the tenancy agreement. 2006, c. 17, s. 13 (1).

Covenants interdependent

17. Except as otherwise provided in this Act, the common law rules respecting the effect of a serious, substantial or fundamental breach of a material covenant by one party to a contract on the obligation to perform of the other party apply with respect to tenancy agreements. 2006, c. 17, s. 17.
Statutory Obligations re: Tenants

Tenant’s responsibility for cleanliness

☐ 33. The tenant is responsible for ordinary cleanliness of the rental unit, except to the extent that the tenancy agreement requires the landlord to clean it.

Tenant’s responsibility for repair of damage

☐ 34. The tenant is responsible for the repair of undue damage to the rental unit or residential complex caused by the wilful or negligent conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant.

Tenant not to harass, etc.

☐ 36. A tenant shall not harass, obstruct, coerce, threaten or interfere with a landlord.
Statutory Obligations re: Tenants

- As a result of the interplay between Sections 13, 17, 33, 34, and 36 of the RTA, tenants:
  - cannot wilfully or negligently introduce bed bugs into the residential complex;
  - are required to promptly report bed bug problems to the landlord;
  - must prepare the rental unit for bed bug treatment as per the landlord’s reasonable instructions and/or otherwise cooperate with the landlord’s agents to rid the residential complex of bed bugs, and
  - must cooperate in minimizing damage and make attempts to clean or otherwise repair his or her possessions.
Landlord’s responsibility to repair

20. (1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

(2) Subsection (1) applies even if the tenant was aware of a state of non-repair or a contravention of a standard before entering into the tenancy agreement.
There are limitations on the liability of the landlord to maintain the residential complex in a good state of repair. These limitations include:

- a landlord will usually not be penalized for failing to fix a problem that was never brought to its attention;
- a tenant must file the application within 1 year of the problem occurring;
- the landlord's obligation to maintain the unit in a good state of repair does not mean that the landlord must cater to a hypersensitive tenant, subject to the obligation under the human rights code to accommodate people with disabilities to the point of undue hardship; and
- tenants must take reasonable steps to minimize their losses.
Landlord not to interfere with reasonable enjoyment

22. A landlord shall not at any time during a tenant’s occupancy of a rental unit and before the day on which an order evicting the tenant is executed substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household.

Privacy

25. A landlord may enter a rental unit only in accordance with section 26 or 27.

26. (1) A landlord may enter a rental unit at any time without written notice,

(a) in cases of emergency; or

(b) if the tenant consents to the entry at the time of entry. 2006
Tenant applications

29. (1) A tenant or former tenant of a rental unit may apply to the Board for any of the following orders:

1. An order determining that the landlord has breached an obligation under subsection 20 (1) or section 161.

3. An order determining that the landlord, superintendent or agent of the landlord has substantially interfered with the reasonable enjoyment of the rental unit or residential complex for all usual purposes by the tenant or a member of his or her household.
Serve N5 Notice - Termination for cause, damage

62. (1) A landlord may give a tenant notice of termination of the tenancy if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex.

Notice void if tenant complies

(3) The notice of termination under this section is void if the tenant, within seven days after receiving the notice, complies with the requirement referred to in clause (2) (c) or makes arrangements satisfactory to the landlord to comply with that requirement.
Serve N5 Notice - Termination for cause, reasonable enjoyment

- **64. (1)** A landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant is such that it substantially interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or another tenant or substantially interferes with another lawful right, privilege or interest of the landlord or another tenant.

Notice void if tenant complies

- **(3)** The notice of termination under subsection (1) is void if the tenant, within seven days after receiving the notice, stops the conduct or activity or corrects the omission.
N5 Notice for Damage or Enjoyment

Notice to Terminate a Tenancy Early
Form N5

Read the instructions carefully before completing this form.

To: (Tenant's name and address)
FRED TENANT / MARY TENANT
123 MAIN STREET, UNIT #111
TORONTO ON, M1M 1B2

From: (Landlord's name and address)
SAMPLE LANDLORD
123 MAIN STREET, UNIT #222
TORONTO ON, M1M 1B2

Address of the Rental Unit:
123 MAIN STREET, UNIT #111 TORONTO ON, M1M 1B2

Termination Date
You must move out of the rental unit identified above on or before 05/04/2011 (day/month/year)

Part A
Reasons for this Notice
I am giving you this notice because:

☒ 1. You, your guest or another occupant of the rental unit has wilfully or negligently damaged the rental unit or the residential complex.

☒ 2. You, your guest or another occupant of the rental unit has substantially interfered with:
   - the reasonable enjoyment of the residential complex by the landlord or another tenant,
   - another lawful right, privilege or interest of the landlord or another tenant.

☐ 3. The number of people living in the rental unit is more than permitted by health, safety or housing standards.
The landlord must provide details about the events that led to giving you this notice, including information about the dates and times these events occurred.

On February 9th, 2011, the landlord met with the tenant in the rental unit to discuss the problem with bed bugs and unit condition. They reviewed procedures to prepare for treatment that would take place on February 13th, 2011, and the tenant agreed to follow the instructions provided.

On February 13th, 2011, at 1:45 pm, the landlord inspected the unit with a pest control technician who attended to treat for bed bugs. They found that it was in an unsanitary state with bed bugs throughout. Furthermore, the tenant has failed to prepare the unit or improve the condition from the February 9th inspection. The state of the unit made it impossible to treat for bed bugs.

The landlord is informed by its pest control agent that this infestation is spreading from this unit to other units. Despite the offer of assistance from the landlord, and the offer of assistance from community resources such as Homemakers, the tenant will not accept such assistance nor will he rectify the unsanitary condition of the unit and prepare it for treatment.

There is debris, garbage, clothing, papers, items that appear to have been brought in from the street scattered throughout the unit covering 80% of the floor area. This notice may be voided if the tenant corrects the behavior set out in this notice by correcting the above which includes, but is not limited to sorting and removing debris from the unit, bagging clothing as per the provided instruction sheet, removing all food-stuffs from the floor, throwing out old newspapers, reducing the quantity of items so that there is space to spray in all rooms in the unit including surrounding all furniture and baseboards, and correcting the condition so that the pest control company is able, in its expert opinion, to treat the unit for bed bugs. The pest control company charged the landlord $100 as a flat-rate cancellation charge for the wasted visit and another visit will be required.

As part of the voiding of this notice, the landlord is also seeking reimbursement of the $100 cost they incurred that was wasted due to the tenant’s failure to prepare for unit treatment.
Landlord’s Remedies Under Act

Application by landlord

- **69. (1)** A landlord may apply to the Board for an order terminating a tenancy and evicting the tenant if the landlord has given notice to terminate the tenancy under this Act or the *Tenant Protection Act, 1997*.

Compensation for damage

- **89. (1)** A landlord may apply to the Board for an order requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex willfully or negligently causes undue damage to the rental unit or the residential complex and the tenant is in possession of the rental unit.
Interpretation

1. (1) In this Act, "health hazard" means,
   (a) a condition of a premises,
   (b) a substance, thing, plant or animal other than man, or
   (c) a solid, liquid, gas or combination of any of them,
   that has or that is likely to have an adverse effect on the health of any person;

Purpose

2. The purpose of this Act is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.
Duty to inspect

10. (1) Every medical officer of health shall inspect or cause the inspection of the health unit served by him or her for the purpose of preventing, eliminating and decreasing the effects of health hazards in the health unit.

(2) The duty of every medical officer of health under subsection (1) includes, but is not limited to, the duty to inspect or cause the inspection of the following:

1. Food premises and any food and equipment thereon or therein.
2. Premises used or intended for use as a boarding house or lodging house.
Complaint health hazard related to occupational or environmental health

11. (1) Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit served by the board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist.
Order by M.O.H. or public health inspector re health hazard

13. (1) A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard.

Condition precedent to order

(2) A medical officer of health or a public health inspector may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,
- (a) that a health hazard exists in the health unit served by him or her; and
- (b) that the requirements specified in the order are necessary in order to decrease the effect of or to eliminate the health hazard.

This chapter applies to all property in the City of Toronto.

§ 629-5. Owner’s duties.

The owner of property shall:

A. Repair, maintain and keep clean the property in accordance with the standards and take immediate action to eliminate any unsafe condition.
§ 629-6. Occupant’s duties.

Every person who occupies property shall:
A. Maintain the property in a clean and sanitary condition;
E. Co-operate with the landlord in complying with the requirements of this chapter;


All properties shall at all times be kept free of rodents, vermin, insects and other pests and from conditions which may encourage infestation by pests.
Resources

- Health Units and government ministries are great starting points. Some excellent online resources are at:

- http://bedbugsinfo.ca/

- http://www.toronto.ca/health/bedbugs/tipsforlandlords.htm
Human Rights Code Implications

- The Policy Guideline for Rental Housing was introduced on October 5th, 2009 by Chief Commissioner Barbara Hall.

- The Policy Guideline is a roadmap, and it applies to all landlords, both for profit and non-profit.
Discrimination in Accommodation

- Under the Code, everyone has the right to be free from discrimination in housing in 14 key areas called “protected grounds”:

2. (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.
Adverse Effect Discrimination

- Constructive discrimination, sometimes called adverse effect discrimination is not well understood, and happens when:

  a requirement or rule exists which results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination, that person’s rights are infringed unless the requirement…is reasonable and bona fide in the circumstances, or unless the Code specifically provides otherwise (Section 11(1)).
Prohibited Grounds of Discrimination

- When enforcing rules about conduct such as unit condition or hoarding, it is discriminatory for a landlord to engage in constructive discrimination in any of these 14 areas:
  - Race
  - Ancestry
  - Place of Origin
  - Colour
  - Ethnic Origin
  - Citizenship
  - Creed
  - Sex (i.e. Gender)
  - Sexual Orientation
  - Age
  - Marital Status
  - Family Status
  - Disability
  - Receipt of Public Assistance
Landlord Must Attempt to Accommodate

- Many bedbug cases also involve compulsive hoarding. In such cases there is often an element of mental illness. It is then that the Human Rights Code comes into play at the Landlord and Tenant Board.

- Principles of accommodation dictate that before looking to terminate a tenancy of a tenant who is not cooperating in preparation or prevention efforts, a landlord must first determine if there are any Code related issues.
It is not the inability of the individual to perform a requirement that infringes on the right of the individual:

A right of a person is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending to the exercise of the right by reason of disability. (Section 17(1)).
Landlord Must Attempt to Accommodate

- Before an individual is found incapable, the landlord must first attempt accommodation:

  *this person shall not be found incapable of such performance unless the needs of this person cannot be accommodated without undue hardship... considering the cost, outside sources of funding, if any, and health and safety requirements (Section 17(2)).*
Approach To Bed Bug Cases at the Landlord and Tenant Board
Currently the approach taken by the Board is all over the map. Tenants sometimes look for the strict liability approach that sees monetary compensation flow from any breach.

but...

There are conflicting approaches to the application of the law of compensation in a residential tenancy context. In one approach, the landlord is expected to address issues such as bed bugs quickly and efficiently and resolve the problem, which would likely result in no compensation being awarded. Then there is a more “contractualization” approach that bases compensation on a value-for-rent analysis and compensates regardless of the landlord’s efforts.
Landlords are often looking for a strict liability approach that blames tenants for the mere presence of bedbugs, seeking eviction and compensation for damage. On occasion the LTB has blamed the tenant for the mere presence of bed bugs and any monetary damages arising from the clean-up.

but...

This approach is not helpful in that it prevents tenants from advising the landlord of the presence of bed bugs. Unless the landlord is able to prove that the tenant’s conduct was willful or negligent in bringing in bed bugs, there should be no eviction or order for damages based on causation.
A recent decision at the Divisional Court on appeal of an LTB decision affirmed the right of a landlord to be compensated for damages related to clean-up costs, not just physical damages. *(Morguard Residential v. Lilly Peters, [2010] Divisional Ct.)*

There is an entire line of decisions setting out that Human Rights Code related issues, usually a disability, does not obviate a person’s responsibility to compensate for damage caused to a landlord’s property. *(Eskritt v. MacKay [2008] OCA)* *(Morguard Residential v. Lilly Peters, [2010] Divisional Ct.)*
The Landlord and Tenant Board must always consider whether or not the alleged behaviour by a tenant was caused by one of 14 Code related grounds, most often a disability.

However, a recent decision at the Divisional Court on appeal of an LTB decision affirmed the right of the Board to make a finding that the tenant has no intention of or is simply incapable of bringing the unit into an acceptable condition in accordance with s.33 of the RTA. (*Morguard Residential v. Lilly Peters, [2010] Divisional Ct.*)
Landlords are frustrated that they are being held responsible for the cost of clean-up and remediation even though it was not their failure that caused the problem.

but...

Neither did the tenant necessarily cause the problem, and it is clearly the landlord’s responsibility under the Residential Tenancies Act to repair, maintain and keep fit for habitation. So….it becomes a cost of doing business. And that…is the elephant in the room!
Tenants will occasionally move in and change their minds while during the move-in due to bed bugs. Those tenants often wish to rescind their agreement and not move in, almost always to the objection of the landlord.

but...

The Residential Tenancies Act does require that the Landlord and Tenant Board consider the concepts of fundamental breach and interdependence of covenants that allows the distressed party to terminate performance of a contract as well as to seek damages.
Decisions on BB’s at Move-In

- **TST-02298 / TST-02092** – Tenant filed application, claiming unit was infested with bed bugs. She had occupied less than 2 weeks. LTB decided that unit was NOT unfit for habitation, and the Board refused to allow termination of the tenancy. Board was satisfied that the landlord took immediate steps once notified of the problem.

- **Metcap Living v. Nasser Esmaeil Kousej, 2004 Divisional Ct.** – At trial the tenant was awarded money for roaches that were present at move-in. The landlord filed an appeal. The appeal Court upheld the original decision, saying that there was an agreement that unit was to be roach free. Tenant had right to rescind contract and for damages.
Decisions on TT’s Applications

- **SWT-16514-10—** The tenant filed an application about maintenance. The Member quite correctly put the burden on the tenant to show that it was more likely than not that the landlord’s failure to maintain that caused bed bugs.

- There was no evidence that the landlord had any specific reason to inspect the unit for bed bugs, or that they ought to have known about them.

- The landlord’s claim was that the tenants had brought in the bed bugs. The Member also found that there was no evidence of this. The tenant’s application was dismissed.
Decisions on TT’s Applications

- TET-02033-09 – The tenant filed an application about maintenance. Evidence showed that the landlord took reasonable measures. The tenant relied on studies that showed the chemicals used to treat bed bugs were dangerous to his health. He cancelled the second treatment.

- The landlord argued that the City of Toronto guideline for treatment was being followed. The Member found that the recurrence of bed bugs after the first treatment was at least partly the fault of the tenant who refused a second treatment. The tenant’s application was dismissed.
Decisions on TT’s Applications

- TNT-12293-10 – The tenant filed an application about maintenance and enjoyment. Evidence showed that the landlord took some measures to spray, but that the tenants across the hall from the applicant would not allow the pest control persons into their units.

- The Board Member found that the Landlord failed to meet the Landlord's obligations under subsection 20(1) of the Act to maintain the rental unit, and failed to deal aggressively enough concerning the cockroach infestation. Although the Landlord engaged a pest control company to do regular treatments, he should have done a spraying of all the units when it should have been obvious that the regular treatments of common areas and some units were not adequate to control the problem. As compensation for the cockroach problem, an abatement of 10% was awarded to the tenant for 8 months.
Decisions on LL’s Applications

- **SWL-27484** – The landlord filed an application for payment of damages, specifically twice treating the unit for bed bug infestation. There was no dispute that the landlord incurred costs, but the issue was whether or not the tenant caused undue damage, willfully or negligently.

- The Board Member properly looked at the issue of negligence to determine whether the tenant had a duty of care and failed in that regard, and whether the tenant took an action or failed to take an action that resulted in the damage.

- Based on the analysis, the Board found that the tenant took no action that resulted in the infestation, or exacerbated it. Therefore the landlord’s claim was dismissed.
Decisions on LL’s Applications

- TSL-29998 – The landlord filed an application for eviction and payment of damages incurred, specifically for the tenant’s failure to cooperate in the process of eradication of the bed bugs.

- The Board Member properly looked at the issue of how the tenant responded to the landlord’s requests, and did not try to determine fault. He determined that the tenant had failed to shoulder his share of the load, and that the landlord subsequently incurred cleaning costs and that 7 other tenants moved out.

- The Board terminated the tenancy and ordered the tenant pay $2,850 to the landlord as compensation. Issues including the voiding of the notice, the definition of damage and negligence were dealt with.
Practical Issues and Considerations

- Section 10 of the RTA provides that in selecting prospective tenants, landlords may use, in the manner prescribed in the regulations made under the Code, income information, credit checks, credit references, rental history, guarantees, or other similar business practices as prescribed in those regulations.

- Draft leases with provisions about cleanliness, advising landlords of issues as they occur, allowing landlord to inspect tenant’s possessions for infestation prior to moving in and cooperating with the landlord in resolving issues of an infestation howsoever caused.
The case law indicates that the requirement that the landlord maintain the residential complex in a good state of repair will require a landlord to:

- have a regular maintenance regime in place;
- perform repairs when necessary, and do proper turn-over inspections;
- educate staff on how to dispose of mattresses and other items;
- respond promptly to requests from tenants regarding routine maintenance concerns;
- respond even faster in emergency situations;
- pay the costs of treatment as a normal requirement of maintaining the rental unit, and
- Consider putting integrated pest management practices in place.
The case law indicates that tenants need to cooperate in the remediation of the problem both as complainants and as respondents to eviction or monetary claims by:

- when moving into a unit, make sure that furnishings are inspected and cleaned or discarded as need be;
- advising the landlord as soon as the problem is noticed;
- cooperating in the preparation of the unit for treatment;
- taking measures to minimize the damage;
- advising the landlord if there is a condition that prevents them from preparing the unit for treatment.
Questions