File #16524

IN THE MATTER between **MSC**, Applicant, and **YHA and NTHC**, Respondents.

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act");

AND IN THE MATTER of a hearing before **Hal Logsdon**, Rental Officer,

BETWEEN:

MSC

Applicant/Tenant

-and-

YHA

and

NTHC

Respondents/Landlords

REASONS FOR DECISION

Date of the Hearing:	**June 26, 2019, continued on September 18, 2019**
Place of the Hearing:	**Yellowknife, Northwest Territories**
Appearances at Hearing:	**MSC, Applicant** **JS, representing the Respondents** **KW, representing the Respondents (September 18 only)**
Date of Decision:	**October 3, 2019**

REASONS FOR DECISION

The parties entered into a written monthly tenancy agreement commencing on September 5, 2013. The Respondent had been transferred several times and took occupancy of the current premises on March 13, 2017. The premises are subsidized public housing. The application was filed on April 30, 2018, pursuant to section 30 of the *Residential Tenancies Act*. The matter was scheduled for hearing on June 26, 2019.

On June 19, 2019, I attended the rental premises with two representatives of the landlord and was shown areas of concern by the Applicant.

The Applicant alleged that the Respondent has breached section 30 of the *Residential Tenancies Act* by failing to maintain the rental premises. Specifically, she alleges that the premises contains mould and asbestos which are affecting her family's health. As well, she alleges that there are numerous minor repairs that are necessary due to normal wear and tear or improper construction. In addition, the Applicant states that the premises are too small to accommodate her family size and do not met their special accessibility and health needs.

The Applicant seeks remedy in the form of a transfer to other rental premises and repairs to the current premises.

The Applicant set out the details of her application at the June 26, 2019, hearing, including the submission and review of numerous pages of evidence which had not been filed with the application. Those documents were subsequently filed with the Rental Officer and served on the Respondent. Consequently, the hearing was adjourned *sine die* to permit the Respondent time to respond to the new evidence. The hearing was continued on September 18, 2019.

Authority of the Rental Officer

*"*Rental premises" in the context of the *Residential Tenancies Act* refers to a specific dwelling.

> *"rental premises" means a living accommodation or land for a mobile home used or intended for use as rental premises and includes a room in a boarding house or lodging house.*

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The obligations of the landlord to maintain rental premises is set out in subsection 30(1) of the *Residential Tenancies Act*:

> *30. (1) A landlord shall*
>
> *(a) provide and maintain the rental premises, the residential complex and all services and facilities provided by the landlord, whether or not included in a written tenancy agreement, in a good state of repair and fit for habitation during the tenancy; and*
>
> *(b) ensure that the rental premises, the residential complex and all services and facilities provided by the landlord comply with all health, safety and maintenance and occupancy standards required by law.*

Subsection 30(4) sets out the remedies a rental officer may consider when a breach of an obligation under section 30 is determined at a hearing:

> *30. (4) Where, on the application of a tenant, a rental officer determines that the landlord has breached an obligation imposed by this section, the rental officer may make an order*
>
> *(a) requiring the landlord to comply with the landlord's obligation;*
>
> *(b) requiring the landlord to not breach the landlord's obligation again;*
>
> *(c) authorizing any repair or other action to be taken by the tenant to remedy the effects of the landlord's breach and requiring the landlord to pay any reasonable expenses associated with the repair or action;*
>
> *(d) requiring the landlord to compensate the tenant for loss that has been or will be suffered as a direct result of the breach; or*
>
> *(e) terminating the tenancy on a date specified in the order and ordering the tenant to vacate the rental premises on that date.*

An order issued pursuant to paragraph 30(4)(a) would clearly be limited to ordering repairs, construction, or modifications to the rental premises named in the tenancy agreement in order to make the premises compliant with a good state of repair, statutory requirements, and fitness for habitation.

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Paragraph 30(4)(e) does allow the termination of the tenancy agreement, but there is no provision in section 30, or any other section of the Act, to order a landlord to transfer the tenant to other premises or to enter into another agreement regarding different rental premises. Such an order, in my opinion, would clearly be *ultra vires*. Consequently, the Applicant's request for an order requiring the landlord to transfer her to other rental premises is denied and I shall only consider remedies which are available pursuant to subsection 30(4).

The Respondent testified that they operate 29 four-bedroom units located in several locations. All the locations except those in Lanky Court are considered unacceptable by the Applicant and her physician. There are seven units located in Lanky Court. The Respondent testified that the Applicant was placed on the four-bedroom waiting list on November 10, 2014, and is currently first on the list. Barring unforseen circumstances, the Applicant will be offered the first available unit in Lanky Court. It is clear that the Landlord acknowledges the Applicant's requirement for other rental premises, although perhaps not for all of the same reasons. Notwithstanding a rental officer's inability to order a transfer to other premises, if there are no other premises available, the authority question is moot. I mention this only because it appears the Applicant feels the Landlord has intentionally deprived her of suitable housing. I can not agree.

The asbestos issue

The residential complex in which the rental premises are located was renovated in early 2017, just prior to the Applicant taking possession. The work included the removal of drywall which is known to pose a potential asbestos hazard. The premises were posted with signage during the renovations which drew the attention of the Applicant who was waiting to move into the unit. She was assured by the Respondent that steps were being taken to ensure that there would be no asbestos risk when she took possession.

There was also a house fire in the neighbourhood in March 2017. The Applicant stated that asbestos fibres can be released during a fire. A study of an asbestos incident published in a public health medical journal was provided in evidence as well as guidelines concerning asbestos published by the NWT Workers' Safety and Compensation Commission (WSCC).

The Applicant provided letters from two physicians concerning her daughter's respiratory problems. Both letters were written in early 2019. Both physicians recommend a transfer to other accommodation. One bases their recommendation on "reported exposed asbestos" and another on "notices indicating presence of asbestos in the building."

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The Respondent testified that the renovations had been undertaken in compliance with WSCC guidelines. The Respondent testified that the premises had been tested for asbestos after drywall had been removed and the premises had been determined to be safe. A copy of the air sample laboratory results were provided in evidence.

In my opinion, the WSCC evidence provided by the Applicant does not support her allegations. It appears that she is applying the words of the document out of context. For example, the document states that the use of air monitoring of occupied areas in not an acceptable method to determine if asbestos-containing materials must be removed. The Applicant interpreted this to mean that air monitoring was not an acceptable method to measure the air quality after the completion of asbestos-containing material. In fact, air monitoring is a recommended procedure after removal, as outlined in the current WSCC Code of Practice.[1]

I find the medical evidence of little help. Clearly the reported exposed asbestos is not based on the physician's direct knowledge but rather on the Applicant's information. I question the validity of an opinion based on a notice that was posted on the premises two years ago.

The argument that a fire in the vicinity two years ago may still pose a significant risk to residents in the area is exaggerated at best. The research paper provided in evidence by the Applicant concludes:

> "Many symptoms of diseases in 344 people were attributed to the fire but there is no hard evidence to suggest that these were directly due to the fire, although some may have been indirectly attributable to the fire. It was concluded.....that the excess of symptoms was not a direct effect of toxicity, although it may have been caused indirectly through anxiety and heightened awareness."

I find no evidence of significant risk of asbestos exposure in the rental premises due to the renovation work undertaken by the Respondent in 2017. It would appear from the evidence that the removal of drywall during the renovation of the premises was undertaken in accordance with good practice and that at the conclusion of the removal stage, the air quality tests were acceptable.

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[1] *Asbestos Abatement, NWT and Nunavut Codes of Practice*, WSCC Workers Safety and Compensation Board, September, 2018.

However, there does appear to be a risk associated with several areas of damaged drywall in the premises. Some of the damaged areas are not on seams or corners of drywall and would not pose any risk of asbestos fibre released as the possibility of asbestos is only present in the drywall mud, not the panels. There are two locations where the wall corners have been damaged; one in a bedroom and another in the laundry room area. These are areas that contain drywall mud. Using the WSCC *Asbestos Risk Decision Model*, these areas should be repaired.

The question becomes: who is responsible for the repair? Normally, damage to wall corners is considered tenant damage and the tenant is responsible to repair. This type of damage is clearly the result of mechanical action, not deterioration or normal wear and tear. For the laundry room corner, however, it is clear from a check-in inspection report completed by the Applicant and Respondent that the laundry room corner was damaged before the Applicant took possession. Therefore the Respondent is responsible for the repair.

Unfortunately, I am unable to determine if the damaged corner in the bedroom was pre-existing as the Applicant provided only a single page of the check-in inspection report. The condition of the bedroom at the commencement of the tenancy agreement is not known to me. I will not order the repair but suggest that it be done and the cost borne with reference to the check-in report.

An order shall issue requiring the Respondent to repair the damaged wall corner in the laundry room area.

The mould issue

The applicant alleged that there was mould in the laundry area behind the dryer and in a damaged wall corner in the bedroom. During the June 19, 2019, inspection the dryer was pulled out from the wall and the area in question was inspected. There is a small area of damaged drywall above the baseboard which is dark in colour. The dark material could be transferred to a paper towel wiped across the area. There has been no inspection by an environmental health officer or other expert familiar with mould. The dryer is properly vented but the fan in the adjoining bathroom has been inoperative for some time. The affected area was not damp.

It is unfortunate that the Applicant did not seek the opinion of an environmental health officer with regard to the mould. In my opinion, the discolouration on the damaged drywall near the dryer could be mould or it could not be mould. In any case, the area requires repair and it is not the result of tenant damage. The check-in inspection report notes that the damage existed at the

commencement of the tenancy. The area should be ideally inspected by an environmental health officer and if it is mould, remediated as per their recommendations. Otherwise it should be sealed, re-mudded and the baseboard re-installed. An order shall issue to that effect. This will isolate the mould and eliminate any risk to the occupants. I find no evidence of mould in the wall corner damage in the bedroom or any other area in the premises.

Accessibility

The Applicant testified that she and her children had disabilities which made it difficult to occupy the present premises. I hesitate to go into detail on the specific disabilities presented, but it appears that none could be reasonably eliminated or mitigated through any repair or modification to the premises that might be ordered. This issue may have some merit in considering a transfer to other premises, but as I have outlined previously, this is not a remedy I am able to consider. I believe, however, that this issue has been considered by the Respondent in assigning the Applicant's priority on the waiting list.

Other minor repairs

At the continuation of the hearing, the Applicant stated that some of the minor repairs initially outlined had been completed by the landlord, leaving only the following outstanding:

- Several minor drywall repairs, including damage due to improper installation of door stops;
- Incomplete caulking at base of bathtub;
- Toilet paper holder no longer affixed to wall;
- Periodic paint "bubbles" that vanish, sometimes leaving chips on the wall finish; and
- Missing electrical outlet covers in living room and bedroom.

There are several minor damaged areas of wall surface. Several are clearly the result of improper doorstop installation, allowing the knob to strike the wall and dent the wall surface. The repair of the areas is clearly the responsibility of the landlord. An order shall issue requiring the Respondent to install adequate door stops and repair all wall damage related to the improper or missing doorstops.

When the premises were inspected on June 19, 2019, the base of the bathtub had not been caulked. The Applicant testified at hearing that a piece of trim had been installed at the base of the tub but had not been caulked on both sides. This area should be inspected and caulked as necessary to prevent water infiltration into the floor structure.

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The Respondent testified that they considered the missing outlet covers and toilet paper holder to be the result of tenant damage. Normally, I would agree. I do not accept that either item was improperly installed but I cannot determine the condition of either item at the commencement of the tenancy agreement because there was not a complete inspection report available at the hearing.

The Respondent did not dispute the problem with the periodic bubbling of the wall finish but stated that they had never seen it and would have to view it in order to determine the cause, solution, and responsibility for the repair. There was no evidence of what caused the condition. It does not appear to be the responsibility of the Applicant. I am unable to determine this matter nor do I know what repairs would be appropriate.

Hal Logsdon
Rental Officer