

## CONFIDENTIAL ATTACHMENT 1

### CONFIDENTIAL INFORMATION OR ADVICE

---

This confidential attachment examines the likelihood of successfully challenging the proposed amendments (the "Amendments") to the Residential Tenancies Act, 2006 (RTA) that may undermine the rights of tenants to a fair hearing.

#### **Summary Conclusion**

Rules of natural justice and procedural fairness dictate that an individual whose rights may be affected by a decision of an adjudicative body have a right to be heard and the right to an impartial hearing. While the Amendments introduce new procedures, ultimately they do not undermine a tenant's right to be heard or to have an impartial hearing.

In addition, the City would have difficulty obtaining standing to bring the case to court for a decision. While the City owns Toronto Community Housing Corporation (TCHC) which is a residential landlord, it is questionable that its position creates any private interest standing to challenge the Amendments' impact on a tenant's right to a fair hearing. Further, it is possible that the City will not be granted public interest standing.

#### **Analysis**

The public portion of this report describes the Amendments that may affect a tenant's right to a hearing. Briefly, these amendments are as follows:

Amendment 1 introduces additional procedural requirements for tenants wishing to oppose eviction orders for non-payment of rent;

Amendment 2 introduces the option for the Board to mandate mediation, with or without the consent of the parties; and

Amendment 3 allows the Board to order eviction on an ex parte application where a tenant fails to abide by the terms of Board approved settlement agreements.

This confidential attachment considers two legal issues; (1) whether the City would obtain standing for the purpose of bringing an application to challenge the Amendments and (2) whether the Amendments undermine the rights of tenants to a fair hearing.

#### ***Standing***

The law of standing answers the question of who is entitled to bring a case to court for a decision. There are limitations on standing to ensure that the courts do not become overburdened by marginal or redundant cases and that they benefit from contending

points of view of the most directly affected. In the present circumstance, there is doubt that the City could withstand a challenge to its standing to bring a court application seeking a declaration that the Amendments illegally undermine the rights of tenants to a fair hearing.

In Ontario, prospective parties seeking to commence litigation must have standing, either private interest standing or public interest standing.

To have private interest standing, the prospective claimant must generally have some adversely affected legal interest. While the TCHC is a residential landlord, the subject of the potential challenge is a tenant's right to a fair hearing. As such, it is difficult to see the City effectively arguing that it has private interest standing to commence a challenge in the courts on this specific issue.

Canadian courts have granted public interest standing to ensure that impugned laws are not immunized from review. The Supreme Court of Canada has identified the following interrelated factors that must be weighed in exercising judicial discretion to grant or deny public interest standing:

- i. Whether the case raises a serious justiciable issue;
- ii. Whether the party bringing the action has a real stake or genuine interest in its outcome; and
- iii. Whether the proposed suit is a reasonable and effective means of bringing the issue before the Court.

These factors are not to be treated as hard and fast requirements or independent tests. They are to be assessed flexibly in a broad and liberal manner to serve the underlying purposes of limiting standing.

The primary impediment to the City establishing that it should be granted public interest standing relates to whether the case raises a serious justiciable issue. To be a serious justiciable issue, the claim must be far from frivolous. Courts will not examine the merits beyond a preliminary review. As the Amendments do not undermine a tenant's right to a fair hearing (this issue is thoroughly addressed below) a court may conclude the claim does not raise a serious justiciable issue. As such, it is unlikely that the court would be convinced that scarce judicial resources should be spent granting the City public interest standing.

Additionally, it is not the role of a municipality to bring these types of public interest claims. The only occasion in which the City has commenced an action to challenge legislation at either the provincial or federal level at least in recent memory was the City's challenge to Bill 5 which reduced the size of its municipal council. This legislative amendment clearly affected the City's interests directly. This is entirely different than commencing litigation on behalf of a subset of the City's population. There are other groups that are better situated to commence the type of court challenge that is being considered such as legal aid clinics (who represent tenants whose direct interests could be materially affected by these amendments) or poverty law advocacy groups. These

groups will also be in a better position to present a factual matrix as to the impact of the legislation on tenants so the court has a sufficient basis to consider any challenge.

### ***Do the Amendments undermine the rights of tenants to a fair hearing?***

The Amendments introduce a number of new procedural requirements that arguably create a more onerous process for tenants that may lead to undesirable consequences for tenants for non-compliance with new procedures. It cannot be said, however, that these Amendments are being introduced in bad faith or without reasonable justification.

Unfortunately, the principles of procedural fairness do not dictate that the adjudicative process be user-friendly, but rather that there be a mechanism whereby an individual may be heard. Despite the more onerous procedural requirements introduced through the Amendments, the tenant's right to be heard remains intact although the path to a hearing may be less straightforward.

#### *Amendment 1 introduces additional procedural requirements for tenants wishing to oppose eviction orders for non-payment of rent*

A tenant is entitled to a hearing before an impartial decision maker where a landlord seeks to evict them for the non-payment of rent. That entitlement is unchanged by the Amendments.

The RTA had permitted tenants to raise other issues that could be the subject of an application before the Board when their landlord seeks to evict them for non-payment of rent. That remains unchanged by the Amendments. However, the Amendments add a requirement for the tenant to provide notice to the landlord, in advance of the hearing, of the issues that they intend to raise at the hearing. The notice is to be in a form and within a time frame to be set out in the Board's Rules. Presumably, this Amendment was introduced so that the landlord could be on notice of and be ready to respond to issues that otherwise would not necessarily be anticipated. This is not an unreasonable amendment, but it does introduce the potential for a tenant to be barred from raising new issues if they fail to provide this notice.

However, when the Amendment is read in context, it is evident that if the tenant fails to provide proper notice, the tenant may still, on a motion to the Board, provide an explanation as to why they failed to provide such notice, and if the explanation is accepted, the tenant may still raise those issues in the course of the hearing. In any event, the Amendments do not restrict a tenant's ability to directly respond to the subject matter of the hearing, the tenant's alleged non-payment of rent.

In our view, Amendment 1 does not undermine a tenant's right to a fair hearing.

#### *Amendment 2 introduces the option for the Board to mandate alternative dispute resolution (ADR)*

Mandatory ADR is generally viewed as a more user-friendly approach to resolution of litigation. ADR removes a lot of the procedural requirements associated with the

hearing process that can pose barriers to unrepresented litigants. Furthermore, as the Amendments currently read, the process would not be binding. This means that if a tenant (or landlord) was not satisfied with a proposed settlement, that individual would have the right to refuse settlement and proceed to a hearing.

Mandatory ADR does not remove or undermine a tenant's right to a fair hearing. In Ontario, in some other subject areas, there are also requirements for mandatory ADR.

*Amendment 3 allows the Board to order eviction on an ex parte application where tenant fails to abide by the terms of Board approved settlement agreements*

As described in the public portion of this report, the Board may approve settlement agreements by way of an order. Amendment 3 provides that such an order may include a provision that where a term of settlement is breached by the tenant, the landlord obtains the right to apply for the tenant's eviction without having the tenant as a party to the application. In such an application, the Board could order eviction of the tenant without a hearing.

Amendment 3 also provides tenants with a right to subsequently obtain a hearing when an eviction order described above is made. The tenant has 10 days from the order being issued to bring a motion. When the motion is made, the eviction order is stayed (effect is suspended) and there will be a hearing on the matter.

While Amendment 3 could result in the eviction of a tenant without a hearing, it does not do so without affording the tenant the right to have a hearing on the matter. Accordingly, in our view Amendment 3 does not undermine a tenant's right to a fair hearing.

### *Human Rights Law Considerations*

When the Amendments take effect, they may result in systemic discrimination - ie. they are neutral rules that when applied create a disproportionate negative impact on vulnerable groups. We expect it could be established that there is a positive correlation between the population of tenants and disadvantaged populations.

Disadvantaged populations might:

- i) be unable to effectively give notice of other issues that they want to raise in an application for their eviction for non-payment of rent. Similarly, they may not be well positioned to explain their reasons for not giving notice. (Amendment 1);
- ii) not have the facility, language, and resources to participate in ADR in a way that levels the playing field. The Amendments do not offer provisions for support in the process. (Amendment 2); and,
- iii) be unable to effectively bring a motion to obtain a hearing where there has been an ex parte eviction. (Amendment 3)

The most vulnerable groups in society may be disproportionately negatively impacted by the Amendments in ways that impact a tenant's right to a fair hearing. However, at this time, given that they have not come into effect and there is no evidence of adverse impacts, it would be difficult to challenge the Amendments on that basis.

## **Conclusion**

With the exception of mandatory ADR, which may be viewed as a welcome amendment for tenants, the Amendments introduce new (and arguably more onerous) procedural requirements for tenants. In our view these new procedural requirements do not in and of themselves undermine a tenant's right to a fair hearing.

The types of procedural requirements that are being introduced are not unusual. Filings and notice requirements exist in many other adjudicative settings. Whether the increased procedural requirements lead to more mistakes being made by tenants and as a result a narrowing of the issues that may be raised at a hearing (Amendment 1) or fewer hearings (Amendment 3) remains unknown. Much may depend on considerations around clarity and content of the Board's notices and forms and revised rules, and the availability of duty counsel, assistance from legal aid and interpreters.

There is little prospect of the City successfully challenging the Amendments on the basis that they undermine tenants' rights to a fair hearing given that none of the Amendments deny the right to a fair hearing.