Access Pro Bono Submission to the Residential Housing Task Force

June 22, 2018

INTRODUCTION

Access Pro Bono (APB) is a non-profit organization dedicated to promoting access to justice in BC by providing and fostering quality pro bono legal services for people and non-profit organizations of limited means. We have various programs that provide frontline services throughout the province.

Over the last couple of years, APB has had a significant increase in clients seeking assistance with residential tenancy issues. Our Civil Chambers Program (based out of 800 Smithe Street in Vancouver) and our province-wide Roster Program have both been inundated with requests for assistance with stay applications and judicial reviews relating to Residential Tenancy Brach ("RTB") decisions. In an attempt to address the need for representation at the RTB dispute resolution stage, APB set up a Residential Tenancy Program in August 2016. The Residential Tenancy Program receives hundreds of calls a year, and provides summary advice and representation at RTB hearings for low-income tenants and landlords. While it has been a success, the demand still far outweighs the help available.

Based on the high (and increasing) volume of residential tenancy cases we see at various stages of the legal process, APB is uniquely positioned to identify recurring systemic issues affecting vulnerable tenants. We identify three priorities below, and offer specific recommendations for change.

1. INCREASE ACCOUNTABILITY FOR ARBITRATORS

(a) Record Dispute Resolution Hearing Proceedings

A significant concern with RTB hearings and decisions is a lack of consistency. We frequently hear from both our clients and our volunteers about serious procedural fairness issues, including (but not limited to) inadequate time, lack of opportunity to present their case or respond to the other party's evidence, apprehension of bias, and pressure from the arbitrator to settle the case.

We recommend that the RTB record all dispute resolution hearings, both to enhance the accountability of individual arbitrators, and to provide a proper record for parties attempting to challenge an unfair RTB decision. Currently, parties may make a written request in advance (at least 7 days before hearing) to have a Court Reporter create an official transcript of the RTB hearing.[1] If the arbitrator agrees, the requesting party must cover the cost of hiring a court reporter, and provide copies to RTB and the other party.[2] The cost, logistics, and arbitrator discretion involved in such a request mean that, in practical terms, hearings are almost never recorded.

[1] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/during-the-hearing

[2] *Ibid.*

We believe that recording all hearings will create internal pressure for (a) consistency on certain issues, and (b) conduct of the arbitrators. While we appreciate the significant time constraints under which arbitrators work and the difficulties inherent in adjudicating disputes between self-represented parties, it is critical to ensure that the RTB is meeting its obligations concerning procedural fairness – especially when people's homes are at risk.

We note that several other Canadian jurisdictions including Alberta, Ontario, and Quebec either record all hearings or record hearings on request.[3] Anecdotally, we note that representatives from tenancy boards in several other jurisdictions were shocked to learn that the RTB does not record hearings, and asked how procedural fairness issues are identified and dealt with.

(b) Procedural Fairness should be in scope for Review Consideration

Another concern is the lack of capacity of arbitrators to consider procedural fairness matters at the "Review Consideration" stage (i.e. the RTB's internal review process). Review Consideration has a very limited scope; landlords and tenants can only ask for review on the following grounds[4]:

i. New Evidence (i.e. there is new and relevant evidence that was not available at the time of the original hearing);
ii. Unable to attend (i.e. one of the parties can prove they were unable to attend the original hearing due to unexpected circumstances beyond their control); and
iii. Fraud (i.e. there is evidence that the original decision was obtained by fraud).

Importantly, basic procedural fairness issues such as "apprehension of bias" and "failure to consider evidence that was before the Arbitrator" are considered out of scope for Review Consideration. Instead, the first opportunity to raise these concerns is filing a petition for judicial review in the BC Supreme Court. Many of the most vulnerable self-represented tenants have disabilities, language barriers, and/or limited education, all of which make BC Supreme Court process significantly daunting and difficult to navigate – many tenants are not able to bring their case forward in that forum. We are unsure what the success rate is on Review Consideration, but we suspect it is very low because scope is so narrow – specifically, we expect that many requests for review denied because procedural fairness issues are raised but are out of scope.

It is critical that procedural fairness issues be included in the grounds for Review Consideration, as it provides marginalized tenants a realistic opportunity to bring these

[3] (Alberta) Residential Tenancy Dispute Resolution Service Rules of Practice and Procedure, https://www.servicealberta.ca/pdf/rtdrs/RPP_December_2017.pdf at p. 15; (Ontario) Landlord and Tenant Board Rules of Practice, http://www.sjto.gov.on.ca/documents/ltb/Rules/LTB%20Rules%20of%20Practice.html at s. 15; (Quebec) *Regie du logement,* https://www.rdl.gouv.qc.ca/en/hearing/how-the-hearing-is-conducted. We also confirmed via phone call to the Landlord and Tenant Service in Newfoundland that they audio record all hearings.

[4] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/after-the-hearing/review-clarify-or-correct-a-decision

concerns forward. Compare, for example, decisions made by the Employment Standards Branch (ESB) – another branch tasked with deciding disputes between private parties. If a party wishes to challenge an ESB determination on the grounds of procedural fairness, they have the opportunity to do so at the Employment Standards Tribunal[5] before having to proceed to a far more complicated judicial review.

Procedural fairness (also called "natural justice") issues are considered during internal review processes by tenancy boards in other Canadian jurisdictions. For example, Alberta allows for internal review by Residential Tenancy Dispute Resolution Service of quality of service, conduct of a Tenancy Dispute Officer and concerns about RTDRS policies and procedures.[6] Ontario allows for internal review of Landlord and Tenant Board decisions on procedural ("natural justice") and substantive grounds (legal errors).[7] In our view, the Ontario form would provide a great template for RTB Review Consideration to ensure it is a meaningful review process.

(c) Increase Timeline for Review Consideration

Currently, landlords and tenants requesting Review Consideration of an RTB order must meet very short timelines. Specifically, parties must apply for Review Consideration within the following timelines:

- Two days after receiving a decision or order related to an order of possession, sublet or assignment of a tenancy, or a Notice to End Tenancy for unpaid rent;
- Five days after receiving a decision or order (other than an order of possession related to repairs or maintenance, terminating services or facilities, or a Notice to End Tenancy (except for unpaid rent); and
- Fifteen days after receiving a decision or order related to any other matter.[8]

In our view, these timelines are unreasonably short. As applications for Review Consideration must be done in person at either a Residential Tenancy Branch office or a Service BC office, the very short timelines mean that many vulnerable tenants miss their window to have a decision reviewed. We ask that they be increased substantially across the board – particularly the two-day time limit relating to a decision or order related to an order of possession.

By way of comparison, in Ontario, parties have 30 days to file "Request to Review an Order" of the Landlord and Tenant Board.[9] In Alberta, parties have 30 days to file an appeal of a Residential Tenancy Dispute Resolution Service decision with the Court of Queen's Bench, and should file for review before doing that (although there does not appear to be a bright line time limit for filing for review).

---

[5] http://www.bcest.bc.ca/forms/Appeal%20Form%20-%20Form%201%20-%20November%2028,%202017.pdf

[6] https://www.servicealberta.ca/Complaint_Process_June_2016.pdf

[7] http://www.sjto.gov.on.ca/documents/ltb/Other%20Forms/Request%20to%20Review%20an%20Order.pdf (see p. 2 of 4)

[8] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/after-the-hearing/review-clarify-or-correct-a-decision

[9] http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/08%20-%20Review%20of%20an%20Order.html

2. STRENGTHEN TENANT PROTECTIONS

(a) Tie rent increases to the unit rather than the tenant

Currently, the limits on annual rent increases allow a landlord to raise a tenant's rent by no more than the annual allowable rate (established each year based on a formula of inflation plus two percent).[10] When a new tenancy begins, the landlord can set the rent at any rate agreed upon by the parties. This creates a financial incentive for a landlord to find a reason to end a tenancy where the landlord believes the rent is lower than the market can support, even where the current tenants have fulfilled all of their responsibilities.

The BC Poverty Reduction Coalition and many of its constituent groups have long been advocating that rent control should be tied to the unit rather than the tenant. We strongly support this change. While obviously tightening limits on rent increases, this change would also almost certainly have collateral benefit of reducing illegal evictions where a landlord is evicting a tenant in bad faith in order to significantly increase the rent at the start of a new tenancy. While there is already a prohibition against bad faith evictions for this purpose, it is notoriously difficult to prove.

(b) Increase the timeline for effective date of Order of Possession

When a landlord successfully obtains an Order of Possession for a rental unit, the Arbitrator sets a timeline for the effective date of the order – usually, a specified number of days following service of the order upon the tenant.

Recently, it has become standard practice for an arbitrator to issue an order of possession that is effective two days from the date of service of the order upon the tenant. In our view, this timeline is usually unreasonably short. This timeline may not have been difficult to comply with when the *Residential Tenancy Act* was enacted in 2002, but is nearly impossible to comply with in today's scarce housing market. Many tenants faced with such an order file for judicial review simply to obtain more time to secure alternate housing.

We recommend that the default for the effective date for an order of possession for a landlord be prescribed and lengthened (e.g. the greater of two weeks from the date of service of the order upon the tenant or the end of the month), unless the landlord can establish that there is serious risk to the unit, the landlord, or other tenants if the tenant remains.

In Ontario, timelines for the effective date of an order of possession tend to be much longer – the standard appears to be 11 days from the date of the order, and effective dates are often postponed pursuant to s. 83 of the *Residential Tenancies Act* (ON).[11] Importantly, we note that s. 83 of Ontario's *Residential Tenancies Act* allows tenants to ask for equitable relief / postponement of eviction to allow, for example, for time to find a new home (this is often referred to in Landlord and Tenant Board decisions as "section

[10] *Residential Tenancy Act,* [SBC 2002] c. 78, ss. 40-43.
[11] *Residential Tenancies Act,* 2006, SO 2006, c. 17, s. 83.

83 relief"). Considerations in granting equitable relief / postponement of eviction have included the difficulty of finding new housing, length of the tenancy, and the tenant's age and/or disabilities.[12]

(c) Stricter Penalties for Contraventions of the RTA

The RTA currently allows for the Branch to issue administrative penalties (fines) against landlords or tenants that violate the RTA. Unfortunately, the Branch rarely uses these powers, issuing fines in only two cases (in one of which the fines were later waived). While these fines were introduced to encourage compliance with the RTA,[13] the threat of a fine for contravening the RTA becomes meaningless if these sections are effectively unused.

Further, while there is a section setting out a fine for a person who "coerces, threatens, intimidates or harasses a tenant or landlord" in order to deter or retaliate against that person from seeking or obtaining a remedy under the RTA, there is no clear process for making a complaint about such behaviour. We have spoken to many tenants who are reluctant to (a) make applications to the RTA seeking monetary orders or other relief, or (b) file complaints about harassment and verbal abuse by landlords because they are afraid of landlord retaliation and do not have faith that such retaliation will be investigated and prosecuted.

We understand that the RTB is creating a new investigations and enforcement branch. We recommend that it provide a clear process for making complaints about contraventions of the RTA (and retaliation specifically), and that where a complaint is made, an investigation be made mandatory. We also support the three recommendations concerning enforcement that the Community Legal Assistance Society (CLAS) proposed in its report entitled "On Shaky Ground: Fairness at the Residential Tenancy Branch"[14]; namely:

- Advertise the possibility of administrative penalties more widely, investigate breaches of the RTA, and impose penalties more often;
- Hear from affected tenants when deciding an administrative penalty case;
- When an administrative penalty goes unpaid, commence enforcement proceedings and/or impose a second penalty.

3. FUND LEGAL AID FOR EVICTIONS

An important aspect of addressing housing precariousness is ensuring that people are able to meaningfully assert their rights. We wish to highlight in particular the need for poverty law legal aid funding for tenancy issues – at the very least, where a tenant is facing eviction. Legal aid funding for RTB hearings (and ideally judicial reviews) where a

[12] Examples of Landlord and Tenant Board (Ontario) decisions considering "section 83 relief": TEL-87547-18 (Re), 2018 CanLII 42912 (ON LTB), <http://canlii.ca/t/hs1cx>; SWL-11852-17 (Re), 2018 CanLII 42926 (ON LTB), <http://canlii.ca/t/hs07f>.
[13] British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard) Vol. 12, No. 6 (May 18, 2006) at 5022-5027 (Hon. R. Coleman).
[14] CLAS, "On Shaky Ground: Fairness at the Residential Tenancy Branch" (October 2013): https://d3n8a8pro7vhmx.cloudfront.net/clastest/pages/51/attachments/original/1400860798/On_Shaky_Ground_October2013.pdf?1400860798 at pp. 50-56.

tenant is facing eviction would help ensure a fair hearing, and reduce the imbalance in power and resources between tenants and landlords. Legal Aid Ontario assists tenants with housing issues at most of their community legal clinics.[15] Legal Aid Manitoba does the same through their Public Interest Law Centres.[16]

While recognizing the efforts of those currently trying to meet the need through legal advocacy and pro bono services, we note that the available free legal services do not come close to meeting the need, nor do they provide a clear path for tenants to follow when seeking assistance. As set out in a recent letter to the Honorable David Eby, QC by BC Public Interest Advocacy Centre (BCPIAC), "[t]here are virtually no government-funded poverty law services today…The Law Foundation of BC has provided direct funding for anti-poverty and social justice lawyers and advocates over the past years; however, despite their best efforts, a large gap in service remains."[17]

Priyan Samarakoone
Program Manager & Lawyer, Civil Chambers Program

Erin Pritchard
Interim Program Manager & Lawyer, Residential Tenancy Program

[15] https://www.legalaid.on.ca/en/getting/type_housing.asp
[16] https://www.legalaid.mb.ca/services/services-we-provide/housing/
[17] http://bcpiac.com/poverty-law-legal-aid-funding/