Tribunals Ontario
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Submissions on Proposed Changes to the Landlord Tenant Board

Rules of Procedure, Interpretation Guideline 1, Practice Direction on CMH and Payment Agreement Form

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DCLC
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Contents

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Background

1. The Durham Community Legal Clinic (DCLC) was founded in 1985, after operating for a couple years as a telephone service for tenants providing summary advice. For much of its history, DCLC focused income security matters with its Legal Aid Ontario (LAO) funding, such as Ontario Works (OW), Ontario Disability Support Program (ODSP), and Canada Pension Plan Disability (CPP-D) denials. A significant surge in housing needs over the past 5 years resulted in the clinic expanding its tenant law services from summary advice to representation. This mirrored much of the economic downturn observed in Durham Region, in part connected to closures in manufacturing and industry. Housing law is now the largest area of services DCLC provides in Durham Region.

2. DCLC experiences some significant challenges with housing services, in particular because of the set-up of the Landlord Tenant Board (LTB) in Durham Region. There is only a single LTB location in Durham Region, situated in Whitby, for a population over 645,862 and across 2,523 km². This location can see up to 250 people in a crowded space of approximately 2000 sq. ft., in an area shared with a Service Ontario office. DCLC provided services for 2,690 housing cases between 2019-2020, up by 460 cases from the previous fiscal year, which includes summary tenant duty services on-site at the LTB, also provided free of cost to all tenants. The clinic is the primary provider of legal services for

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tenants in Durham Region, and typically the exclusive provider of legal assistance for low-income residents.

3. DCLC provides these submissions to the LTB, with the intent of highlighting and addressing some of the important gaps and considerations created by Bill 184.[1]

Orders by Hearing Officers

4. The proposed changes to the Landlord Tenant Board (LTB) Rules of Procedure[2] include expanding the powers of a LTB Hearing Officer as follows:

> 1.7 In addition to the powers provided for in the RTA, a LTB Hearing Officer may hold a hearing and make an order for:
>
> a. any landlord application about arrears of rent,
> b. any application where the applicant does not appear at the time scheduled for the hearing; or
> c. any application where the parties have consented to the terms of the order.

5. The concerns here are that a Hearing Officer may be allowed to make an *ex parte* order under s. 78 of the *Residential Tenancies Act*.[3] In addition to the concern about fast-track

[1] *Protecting Tenants and Strengthening Community Housing Act, 2020.*
[2] Landlord and Tenant Board, "Rules of Procedure" [as proposed], Tribunals Ontario, July 7, 2020, available at: <http://www.tribunalsontario.ca/documents/ltb/consultations/LTB%20_%20Rules_of_Procedure_Consultation_EN.pdf> [the "LTB Rules"] .
[3] 2006, SO 2006, c 17 [the "*RTA*"], as amended by Bill 184. DCLC flagged this issue generally to the Standing Committee on Social Policy on June 24, 2020; see: <https://www.durhamcommunitylegalclinic.ca/wp-content/uploads/2020/06/Ha-Redeye-DCLC-Submissions-on-Bill-184-June-24-2020-final-copy.pdf>.

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evictions, there are concerns about inadequate screening for duress, coercion or undue influence, for any agreements that the parties may have appeared to agreed upon. The LTB has a duty and an obligation under common law and the *Statutory Powers Procedure Act*[4] to ensure procedural fairness.

6. Where a tenant has been denied the opportunity to speak, and the representative of the LTB has failed to make proper inquiries, the courts have found that the principles of natural justice and procedural fairness have been violated.[5]

7. Courts have also held that where the LTB has made a determination when a tenant did not attend a hearing and even indicated in advance that hearings may be missed due to substance abuse that procedural fairness was violated.[6] Many low-income populations struggle with substance abuse and mental health issues, and would face these challenges under the new procedures. Furthermore, the courts have found procedural fairness has been violated even were compelling facts of this nature were not present.[7]

[4] RSO 1990, c S.22 [the "*SPPA*"].
[5] *Two-Two-Ought-Four Dufferin Limited v. Mitchell*, 2019 ONSC 276 (CanLII)
[6] *Duncan v. Toronto Community Housing Corp.*, 2015 ONSC 4728 (Div. Ct.)
[7] *Brewer v. The Landlord Tenant Board Southern RO*, 2018 ONSC 1006 (CanLII)

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8. It's unclear whether a Hearing Officer would be prepared to ensure these obligations, or have the proper training and resources to do so. The importance of "reasonably intelligible" reasons have been emphasized by the Supreme Court of Canada in *R. v. Sheppard*,[8] as they are "central to the legitimacy of judicial institutions in the eyes of the public".[9] The justification, transparency, and intelligibility of a decision can largely determine the reasonableness of a decision.[10]

9. The likelihood of a Hearing Officer dealing with a high volume of cases consistently providing adequate and implicit reasons for an order, especially where this occurs on an *ex parte* basis, is also highly unlikely.

10. This new process creates a higher risk of inadequate decisions that will seek judicial review before the Divisional Court, pursuant to s. 25(1) of the *SPPA*. This will inevitably increase the burden on the reviewing courts, as well as increase the number of cases sent back to the LTB for a new hearing. More importantly, there are many low-income tenants who will never even know that their procedural fairness rights are violated, and may not benefit from this type of review at all.

[8] 2002 SCC 26 (CanLII), [2002] 1 SCR 869 at para 55.
[9] *Ibid* at para 5.
[10] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190 at 47; However, the standard of review has been subsequently revised in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII).

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Service by E-mail

11. The LTB Rules proposes to allow e-mail as a valid form of service, as follows:

> 3.3 A party may ask the LTB to permit an alternative method of service including service by email or service on the party's representative. The request may be made in writing prior to the hearing or at the hearing.
> Service by Email
> 3.4 Parties may consent in writing at any time to service by email.
> 3.5 Consent to service by email may be revoked at any time by giving notice in writing to the person or party.
> 3.6 Where a party does not consent to service of a document by e-mail, the LTB may permit the document be served by e-mail on such terms as are just.
> [emphasis added]

12. Unlikely other circumstances in civil proceedings, matters before the LTB can be differentiated in that the last known address is almost always known by the landlord, as the tenant will typically still be residing in the landlord's unit. The necessity for virtual or e-mail service is therefore significantly diminished in this context.

13. There are some circumstances where service by e-mail may be just and appropriate, for example, where the tenants have moved out of the jurisdiction entirely and are no longer easily located.[11] These circumstances are rare generally, and almost never occur with low-income tenants, who lack the ability to easily find residence in other jurisdictions.

[11] *Consultpro Inc. v. Currill*, 2011 ONSC 3478 (CanLII)

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14. Service by e-mail may also be appropriate where a tenant's whereabouts are no longer known, and they have vacated a unit. The new provisions under s. 49.1 of the *RTA* allow for landlord applications for up to twelve months *after* the tenant has vacated the unit. In these circumstances, service by e-mail may be practicable or warranted for many former tenants, but would be entirely inappropriate for the unsheltered, especially if they are homeless as a result of an eviction during the COVID-19 pandemic and its aftermath.

15. Low-income tenants do not always have regular access to the Internet, and may not use e-mail in the same way as the rest of the population. Where a tenancy application requires or requests an e-mail address, many tenants will still provide one. This does not mean that they check this e-mail with adequate frequency, and service of documents by e-mail without this knowledge and consent may result in further matters being heard in an *ex parte* manner, or with the assumption that a tenant has simply not participated or appeared for scheduled hearings.

16. Tenants who are unsheltered or transient are even less likely to check e-mail in this manner. If a matter involves a claim for damages after a tenant has already moved out, they may be

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depending on funds from this application to be properly homed or to meet their regular living needs.

17. The LTB should be particularly cautious in enforcing the use of e-mail address for low-income populations, and should be aware of the concerns here that may otherwise be overlooked. The use of e-mail generally by the rest of the population may not give rise to the same concerns, especially if it is a work or business address that is routinely used.

Service of Evidence

18. The LTB Rules also propose to allow e-mail as a valid form of service, as follows:

> 5.1 The LTB will serve the Notice of Hearing together with an application, motion, or request and any relevant information sheets, on all parties unless the Rules or RTA require otherwise, or the LTB exercises its discretion to order a party to serve. The LTB will not serve evidence that the parties intend to rely upon at the hearing. The LTB may serve an application or a Notice of Hearing by email in appropriate circumstances.
> [emphasis added]

19. Previously, the LTB Rules were silent on whether evidence could be served by the LTB. In practice, where a key or crucial piece of evidence was necessary to understand the nature of the proceedings, the LTB would utilize its discretion on occasion to include these materials.

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20. In combination with the concerns about service by e-mail raised above, this approach could give rise to abuse by some landlords, by providing an application that is vague or ambiguous about the reasons for an eviction. This may limit or inhibit the ability of a tenant to properly respond.

21. The LTB should either retain its discretion to serve evidence, where it has been provided to them and it is just to do so, or ensure that LTB forms contain adequate detail to describe the nature of the proceedings. The use of e-mail service or an *ex parte* order should not be made where a landlord fails to do so.

Digital hearings

22. The LTB Rules provide for a new procedure to allow for digital or remote hearings. This is particular important due to social distancing measures during the COVID-19 pandemic:

> Form of Proceedings
> 7.1 The LTB may conduct all or part of any pre-hearing conference, CMH or hearing in person, in writing, by telephone or other electronic means, as it considers appropriate and as may be permitted in the circumstances.
> 7.2 An objection to an electronic proceeding must be in writing and explain why an electronic hearing will cause the party significant prejudice. The notice of electronic hearing will include the date by which an objection must be filed with the LTB.
> 7.3 An objection to a written hearing must be in writing and explain why there is good reason for not holding a written hearing. The notice of written hearing will include the date by which an objection must be filed with the LTB. The LTB may hold a written hearing unless it is satisfied that there is a good reason not to.
> 7.4 Rule 7.3 does not apply to an application under section 132 or 133 of the RTA or an application solely under paragraph 1 of subsection 126 (1) of the RTA.

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23. This is an important and necessary measure, in particular because low-income populations are more susceptible to acquiring COVID-19 and having adverse effects,[12] and because poverty, race and marginalization has been identified as significant factors in eviction filing rates.[13] However, many low-income populations do not have easy or readily access to stable Internet, professional webcam and audio technology, or personal situations and circumstances that are amenable to a professional and productive hearing.

24. Worthy of consideration is how the lack of accessible electronic hearings for low-income populations may affect their ability to present evidence, and any findings of credibility that a Member may make as a result of these limitations.[14] Members should receive training on how to interpret viva voce evidence in this context of low-income populations participating in remote hearings.

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[12] Jennifer Pagliaro, "New Toronto data reveals COVID-19's disproportionate toll on racialized and low-income groups," Toronto Star, July 30, 2020, available at: <https://www.thestar.com/news/gta/2020/07/30/new-toronto-data-reveals-covid-19s-disproportionate-toll-on-racialized-low-income-groups.html>.

[13] Victoria Gibson, "Toronto neighbourhoods hit hardest by COVID-19 also have the steepest eviction filing rates, says new study," Toronto Star, Aug. 19, 2020, available at: <https://www.thestar.com/news/gta/2020/08/19/toronto-neighbourhoods-hit-hardest-by-covid-19-also-have-the-steepest-eviction-filing-rates-says-new-study.html>; Scott Leon and James Iveniuk, "Forced Out: Evictions, Race, and Poverty in Toronto," Wellesley Institute, August 2020, available at: <https://www.wellesleyinstitute.com/wp-content/uploads/2020/08/Forced-Out-Evictions-Race-and-Poverty-in-Toronto-.pdf>.

[14] Betsy Powell and Alyshah Hasham, "Inside Ontario's first major criminal trial by Zoom," Toronto Star, July 19, 2020, available at: <https://www.thestar.com/news/gta/2020/07/19/inside-ontarios-first-major-criminal-trial-by-zoom.html>.

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25. If a hearing is being held by a Hearing Officer under the proposed Rule 1.7, special consideration should be provided to any orders made under Rule 1.7(b) for non-attendance, where the lack of attendance may be attributable to an unreliable Internet, technology problems, or other factors that routinely found with low-income populations.

Changes Due to Bill 184

26. The amendments to the *RTA* under Bill 184 appear to have prompted other changes to the LTB Rules as follows:

> 19.3 Unless the Board has directed or ordered otherwise, a tenant who intends to raise issues under sections 82(1) or 87(2) of the RTA during a hearing for a landlord's application about rent arrears shall provide the other parties and the Board with the following at least five business days before the scheduled hearing:
>
> a written description of each issue the tenant intends to raise; and
>
> a copy of all documents, pictures and other evidence that the tenant intends to rely upon at the hearing.
>
> 19.4 A tenant who fails to provide the Board and other parties with a written description of each issue they intend to raise at the hearing as required in Rule 19.3 shall not be permitted to raise issues under sections 82(1) or 87(2) of the RTA during a hearing for a landlord's application about rent arrears unless the LTB is satisfied that the tenant could not comply the requirements.
>
> 19.5 The LTB may permit a party to refer to electronic material (audio or video recordings, emails, text messages, social media posts) in the hearing if relevant to the issues in dispute and the Member is satisfied it is reliable. A party is expected to provide a copy to the other party and to the LTB at the hearing but where this is not possible due to the document's format or size, the Member will require the party to file a copy with the LTB by a specified date. If the copy is not filed as directed, the electronic material will not be considered part of the hearing record or considered when making the decision.

27. These changes create additional and significant evidentiary burdens on low-income tenants, and many will not be able to comply within the required timelines, especially without significant assistance.

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28. A significant number of low-income tenants never receive legal advice in advance, and when they do it is through tenant-duty counsel on-site, at the day of the hearing. The formal notice requirements for tenant issues under s. 82 of the *RTA* will not be a requirement that most tenants would even know exists prior to their hearing.

29. Unless the proposed LTB Rule 19.4 is interpreted in a manner that the inability to obtain legal advice is a sufficient basis for non-compliance, this proposed rule will have a significant impact on many low-income tenants making a tenant application.

30. If a member finds that a tenant's complaints have merit, the hearing for the tenant application will likely have to be held at a later date, to allow for the tenant to properly meet these notice requirements. These additional and unnecessary hearings will invariably increase the volume of proceedings at the LTB.

31. Imposing these notice requirements on low-income tenants also deprives these tenants from having important tenant issues addressed in a timely manner, which could have an adverse effect on their health and safety. It also prevents these matters from being heard together,

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which is frequently an opportunity for dispute resolution that does not require or involve multiple hearings treating these issues as discrete and distinct.

32. These concerns are also relevant for the proposed changes to LTB Interpretation Guideline 1 – Adjourning and Rescheduling Hearings.[15] Although the Interpretation Guideline indicates a form is available to help tenants comply with the disclosure requirements in Rule 19.3, the experience of DCLC is that many low-income tenants have existing difficulties with the volume and style of the current forms.

33. The likelihood of low-income tenants properly and consistently complying with these notice requirements, even with the assistance of these forms, is anticipated to be low. These difficulties are often worse for low-income tenants who do not speak English as a first language.

34. The Interpretation Guideline provides an example of "a satisfactory explanation" for non-compliance with the notice requirements, which would be a new issue arising within 5 days of a hearing. DCLC recommends that the Interpretation Guideline also make reference to

[15] Landlord and Tenant Board, "Adjourning and Rescheduling Hearings" [as proposed], Tribunals Ontario [the "Interpretation Guideline], available at: <http://www.tribunalsontario.ca/documents/ltb/consultations/LTB_Adjourning_and_Rescheduling_Hearings_Interpretation_Guideline_1_EN.pdf>.

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the social, cultural, and economic context in which LTB matters occur, and explicitly provide the LTB the discretion to account for these types of factors as well.

35. The requirement for independent legal advice, including the use of tenant duty counsel, should also a necessary component to the Payment Agreement Form, as many low-income tenants are unlikely to appreciate the significance of this form, and how it can be used to subsequently evict them. When combined with the procedural changes outlined above, inadequate warnings of the consequences of these agreements will invariably give rise to countless agreements and evictions conducted under duress and coercion.

Conclusions

36. Although the LTB may not have had control or input into the changes initiated under Bill 184, the Tribunal still has the duty to ensure natural law and procedural fairness in all of its rules, forms, and proceedings, and has an obligation to do so with special consideration for the grounds enumerated under the *Human Rights Code*,[16] and the unique circumstances of low-income populations.

[16] RSO 1990, c H.19.

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