

Legal Clinics' Housing Issues Committee
c/o Kinna-aweya Legal Clinic
86 S. Cumberland Street
Thunder Bay, ON P7B 2V3

December 1, 2020

Vaia Pappas
Director, Operational Support Branch
Ministry of the Attorney General, Court Services Division

Sent via e-mail: vaia.pappas@ontario.ca

Dear Ms. Pappas:

Re: Enforcement of Landlord and Tenant Board Eviction Orders during Stay Period or Pending Decision on Request for Stay

The Legal Clinics' Housing Issues Committee is a province-wide group of lawyers and community legal workers who assist low-income tenants through Ontario's community legal clinics.

We write to express our concern about problems that have arisen in the Landlord and Tenant Board's [LTB] process for receiving and processing filings, and in particular for confirming that:

- an eviction order issued pursuant to sub-sections 77(4) and 78(6) of the *Residential Tenancies Act, 2006* [RTA] has been stayed upon a tenant's filing of a motion to set aside under s. 77(6) and 78(9);¹
- an eviction order issued pursuant to RTA s. 74(3), based on non-payment of rent, has been stayed upon the LTB's acceptance for filing of a tenant's motion to set aside under s. 74(11);²
- an eviction order issued pursuant to any provision of the RTA has been stayed pending the LTB's consideration of a request to review, pursuant to *Statutory Powers Procedure Act* [SPPA] ss. 16.1 and s. 21.2, and r. 26.11 of the LTB's Rules of Procedure.

These problems are directly relevant to the work of Court Enforcement Officers. Processing and communication delays at the LTB have resulted in the wrongful

¹ The content and recommendations in this letter apply equally in the context of co-operative housing eviction orders authorized by RTA s. 94.10(4) and s. 94.11, which are parallel provisions applicable to eviction applications filed by non-profit housing co-operatives.

² The content and recommendations in this letter apply equally in the context of co-operative housing eviction orders authorized by RTA s. 94.2(1)3, and 94.7(1) and (3), and to which RTA sub-ss. 74(2) to (19) apply with necessary modifications, pursuant to RTA s. 94.16.

enforcement of eviction orders that were stayed when the existence of the stay was not communicated by the LTB to affected tenants and/or the Court Enforcement Office in a timely manner. We note that one example of such an injustice was raised last week in the Legislative Assembly.³

In our view, and particularly in light of the risks posed by the COVID-19 pandemic, this situation requires the urgent attention of the Ministry of the Attorney General's Court Services Division to reduce the likelihood that tenants will be wrongfully evicted while a stay of an eviction order is in place, or is expected to be granted imminently.

The Enforcement of LTB Eviction Orders and Problems during COVID-19

Eviction orders issued by the LTB may be stayed for a number of reasons. In some circumstances a stay may arise by order of the LTB (often in the form of an interim order pending reconsideration of an eviction order) or the courts. In others the stay arises automatically by operation of statute. Section 78 of the RTA, authorizing landlords' applications to evict based upon a breach of condition in a mediated agreement or prior LTB order, contains one example of an automatic stay. As indicated in the following subsections of the RTA, the stay arises when a tenant's motion to set aside is received by the LTB:

Order terminating tenancy

78 (6) If the Board finds that the landlord is entitled to an order under subsection (1), the Board may make an order terminating the tenancy and evicting the tenant.

Motion to set aside orders

78 (9) The respondent may make a motion to the Board, on notice to the applicant, to have an order under subsection (6), and any order made under subsection (7) or (7.1), set aside within 10 days after the order made under subsection (6) is issued.

Motion stays orders

(10) When a motion under subsection (9) is received by the Board, an order under subsection (6), and any order made under subsection (7) or (7.1), are stayed and shall not be enforced under this Act or as an order of the Superior Court of Justice during the stay.

[Emphasis added.]

³ MPP Jennifer Stevens reported that a 70-year old woman was evicted from her home when, after many processing delays, the Landlord and Tenant Board granted a stay two days before Court Enforcement Officers executed the stayed eviction order. See Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, Parl. 42, Sess. 1 (25 November 2020), [No. 213A](#), p. 10872.

There is an equivalent automatic stay provision in RTA s. 77, which authorizes landlords' eviction applications on the basis of agreements to terminate and tenants' notices of termination. There is also a similar automatic stay, arising pursuant to RTA s. 74(13) when a tenant's motion to set aside an eviction order under RTA s. 74(11) is accepted for filing, based on the tenant's completion of the required affidavit respecting the payment of rent and other outstanding costs.

Prior to the COVID-19 pandemic, the LTB's practice was to promptly issue a document entitled "Notice of Hearing and Stay" if the tenant either filed a motion to set aside under RTA sub-ss. 77(6) or 78(9) within 10 days after the related eviction order was issued, or if the LTB granted an extension of time to permit the filing of such a motion beyond the 10 day limitation period. While the issuance of this document was not a prerequisite for the stay (since the stay arose at the time the motion was received⁴), it served the useful purpose of confirming that an eviction order should not be enforced.

Since the onset of the pandemic, the LTB's processing times have slowed drastically, as its regional offices have closed to the public, staff have transitioned to working remotely, and it has focused on implementing electronic hearings and the scheduling of applications. It has also become increasingly difficult to reach the LTB, whether by phone or e-mail, to confirm that documents have been processed and to obtain documentation certifying that an eviction order is stayed.

Over the past several months, community legal clinics have assisted tenants with motions to set aside where, despite the timely filing of the motions, the LTB has not processed the filing and issued the "Notice of Hearing and Stay" document in a timely manner. We are aware of cases in which tenants have been wrongly evicted from their homes despite the existence of a stay. In other instances, tenants have been at risk of imminent eviction only for confirmation of the stay to arrive at the last minute to satisfy the Court Enforcement Officer that the eviction should not proceed.

Unlike the Divisional Court, which, through the [Notice to Profession for Appeals from the Landlord and Tenant Board in the Divisional Court](#) (Effective August 24, 2020),

⁴ Note that r. 4.6 of the LTB Rules of Procedure provides that a document, such as a motion to set aside, is considered filed on the:

- a. day it is filed in person at any LTB Regional Office or ServiceOntario Centre that accepts service on behalf of the LTB;
- b. fifth day that is not a holiday after mailing [however, RTA s. 192(2) deems a document given by mail to have been given on the earlier of the fifth day after mailing and the day it was actually received];
- c. day received when filed by fax. The sender is responsible for ensuring the fax transmission is complete;
- d. day received when filed by email;
- e. day after it was given to the courier when filed by courier or on the next day that is not a holiday.

To avoid any absurdity, and to be consistent with the liberal and non-technical interpretation of the Rules mandated by Rule A3, a fax or e-mail must be considered to be "received" at the time it arrives at the relevant number or address regardless of whether an LTB staff member reviews and processes the document at the time of arrival.

has implemented a procedure to address the processing and issuance of time-sensitive documents in appeals under the RTA during the COVID-19 pandemic, the LTB has been unable to respond to the need to communicate the existence of a stay in a timely manner. We understand that the LTB has recently implemented a process for communicating electronically with Court Enforcement Offices to notify them about stayed eviction orders. While that would be a welcome step, it does not address the widespread problem of delays in processing filings and issuing documents.

In addition to facing delays in the processing of automatic stay documents, legal clinics have encountered major difficulties in having the LTB acknowledge the receipt of requests to review eviction orders – despite repeated e-mails, faxes and phone calls. Even where legal clinics have confirmation that particular faxed requests and motions were received, the LTB has often asserted that documents were not filed until days or weeks later, contrary to its Rules of Procedure. In extreme cases, it has taken weeks for the LTB to acknowledge that it received a request to review an eviction order, creating serious problems if a tenant has requested a stay to prevent an eviction while the matter is adjudicated. In cases where the LTB has failed to acknowledge receipt of requests to review despite multiple attempts to file, legal clinics have been forced to commence appeals to Divisional Court in order to stop evictions. It goes without saying that many unrepresented tenants will not have the ability to quickly appeal when the LTB does not respond to filings, placing them at serious risk of wrongful eviction.

Our Recommendations for Policy Reform

In light of the slow processing times and communication problems at the LTB, and given the severe consequences for a tenant who is wrongfully removed from their home during a pandemic while an order is stayed or while an urgent request for a stay is pending, we write to request that the Court Services Division implement a policy confirming that:

1. Court Enforcement Officers must not proceed with the enforcement of an eviction order under RTA s. 77(4) or s. 78(6) if they are presented with oral or written confirmation from the tenant, a legal representative or the LTB (which confirmation need not come in the form of the LTB's usual "Notice of Hearing and Stay" document) that:
 - a tenant has filed a motion under RTA s. 77(6) or s. 78(9) within 10 days after the order in question was issued; or,
 - that the tenant filed a motion after the 10 day period, and the LTB granted an extension of time or is considering the tenant's request for an extension (and any attempt to enforce in such circumstances should be postponed to determine whether the LTB has granted an extension of time).

2. Court Enforcement Officers must not proceed with the enforcement of an eviction order under RTA s. 74(3) if they are presented with oral or written confirmation from the tenant, a legal representative or the LTB that the tenant has filed a motion under s. 74(11) to set aside the eviction order. Any attempt to enforce in such circumstances should be postponed to allow the Officers to determine whether the LTB has accepted the motion for filing, resulting in an automatic stay pursuant to s. 74(13).
3. Court Enforcement Officers must not proceed with the enforcement of an eviction order if they are presented with oral or written confirmation from the tenant, a legal representative or the LTB that the tenant has filed a request to review an order that includes a request for a stay. Any attempt to enforce in such circumstances should be postponed to allow the Officers to determine whether the LTB has granted the stay.

Such a policy should also provide that if any questions arise about the LTB's receipt of a set aside motion, the receipt of a request to review that includes a request for a stay, or the existence of an automatic stay, the Court Enforcement Officer should seek directions from the Superior Court of Justice pursuant to r. 60.17 of the Rules of Civil Procedure, on notice to the landlord and tenant(s), thereby permitting a judge to make the determination of whether an eviction order is stayed (by operation of RTA s. 74(13), s. 77(7), s. 78(10) or otherwise), or whether enforcement of the order may proceed.

The adoption of such a policy is necessary to ensure compliance with the RTA's prohibitions against the enforcement of orders during a stay period and to prevent the wrongful eviction of tenants. As the current Associate Chief Justice of Ontario stated in ***Campbell v. Peel Housing Corporation***, [2016 ONSC 7591 \(CanLII\)](#), addressing the proper course of action where a Court Enforcement Officer is aware that a tenant has brought proceedings to stay an eviction order under the RTA:

[30] While it seems obvious, given the history of what happened in this case, it is unfortunately necessary to make the following observation. Where a party and the sheriff are on notice that a motion for the stay of an order is before the court, barring circumstances not present in this case, the order should not be executed. Rather, the party should appear in court and respond to the motion. Where a party is uncertain about the location of the motion, the party should make efforts to discover that location. Respect for the proper administration of justice requires nothing less.

[31] Justice eschews any notion of gamesmanship. In this case, it appears that the responding party and the sheriff were on notice of the motion to stay the execution of the eviction order. Even assuming that those present at the scene of the eviction were not informed by their colleagues that the motion was to be heard that day, inquiries should have been made. At a minimum, the sheriff could have easily done this by checking with the court, the location out of which the

sheriff works. There was nothing in the LLTB order that required the sheriff to effect the eviction on any particular day. To pause and show respect for the administration of justice is little to ask or require.

[Emphasis added.]

Justice Fairburn's direction that respect for the administration of justice requires a Court Enforcement Officer to pause enforcement when notified that a tenant has sought a stay in the Superior Court of Justice applies equally where a tenant has taken all necessary steps to bring an urgent request for a stay before the LTB. It applies with even greater force in the context of the stays that arise automatically by operation of RTA ss. 74(13), 77(7) and 78(10) and that do not require a judicial decision before the stay can take effect.

A Court Enforcement Officer does not have the discretion to decide not to enforce an eviction order.⁵ However, in the absence of an order mandating that eviction be carried out on a particular date, respect for the administration of justice requires an Officer to exercise discretion with respect to the timing of enforcement in a manner that permits a competent adjudicative body to decide whether to grant a stay. Any questions about whether a stay has arisen should be referred by an Officer for determination by the Superior Court of Justice.

Legal Clinic Contacts and Next Steps

In the event that you wish to reach out to some of the community legal clinic staff who have assisted clients with enforcement issues arising from problems at the LTB, you might consider contacting:

- Sally Colquhoun, Kinna-aweya Legal Clinic, Thunder Bay (colquhos@lao.on.ca)
- Dominique Conway, Community Legal Services of Ottawa (conwaydm@lao.on.ca)
- Aidan Johnson, Niagara Community Legal Clinic (johnsona@lao.on.ca)
- Emily Robb, Durham Community Legal Clinic (robbe@lao.on.ca)

Should you have any questions about the foregoing, or require any assistance in the development of enforcement policy in light of our concerns, please do not hesitate to contact us.

⁵ *Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York)*, [2020 ONSC 469 \(CanLII\)](#) (Div. Ct.) at paras. 70 to 72, citing *Central Guaranty Trust Co. v. McRae*, [1993 CanLII 8542](#) (Ont. Gen. Div.) – a case that is readily distinguishable from circumstances where a stay arises by operation of law or where a tenant has requested that a competent adjudicative body issue a stay.

We would ask that you kindly inform of us of your intentions with respect to the development of such a policy at your earliest convenience. This issue is of particular urgency given the arrival of colder weather and the particular risks to public health arising from the escalating “second wave” of the COVID-19 pandemic.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caycie Soke', enclosed within a large, loopy circular scribble.

Caycie Soke
Staff Lawyer, Kinna-aweya Legal Clinic
On behalf of the Legal Clinics' Housing Issues Committee
sokeca@lao.on.ca