



OCTOBER 13, 2020

**ONTARIO LEGAL CLINICS'
CONCERNS: LANDLORD AND
TENANT BOARD'S OPERATIONS
DURING THE COVID-19
PANDEMIC**

THIS REPORT IS DIRECTED TO:

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TO THE ATTENTION OF:

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EXECUTIVE SUMMARY

Legal clinics across Ontario are alarmed by multiple aspects of Landlord and Tenant Board (“LTB”) operations during COVID-19 and the impact on access to justice. Informed by our unique perspective of serving some of the most marginalized tenants in the province, we propose a number of practical, urgent reforms that would allow low-income tenants to participate meaningfully in LTB proceedings, both in the immediate context of the COVID-19 pandemic and beyond.

Clinics understand that the LTB must continue operations in a way that is reflective of our current context. However, this cannot be done at the expense of meaningful access to justice. The LTB must commit to operating in a manner that is compliant with its obligations – arising from, inter alia, the *Residential Tenancies Act, 2006* (RTA), *Canadian Charter of Rights and Freedoms* (Charter), *French Language Services Act*, *Human Rights Code*, *Statutory Powers Procedure Act* (SPPA) and the common law duty of procedural fairness.

The concerns being raised go to the very heart of the LTB’s legal responsibilities to the public; access to justice for the province’s most poor and marginalized tenants; and the broader, moral imperative of ensuring people are not left homeless during a deadly global pandemic.

SUMMARY OF CONCERNS

1 **Current LTB operations are not in keeping with duties of procedural fairness and equal treatment**

- Access to technology is highly unequal
The LTB cannot assume that all parties have equal access to computers; printers; internet; phone minutes; or even a private space from which to participate meaningfully in remote hearings
- Current hearing formats do not accommodate low-income tenants who, for reasons of poverty or disability, cannot participate in electronic hearings
The LTB's duties of procedural fairness and equal treatment cannot be downloaded onto legal clinics and other community agencies that do not have the resources to host a large number of electronic hearings

2 **LTB procedural issues have compounded difficulties of accessing remote hearings**

- Delivery timelines for Notices of Hearing have often been too short
There have been issues of delayed delivery of Notices of Hearing and delivery of Notices to incorrect addresses
- Short timelines result in an inability to comply with 5-day disclosure deadlines
Accessing legal assistance or advice during a pandemic when many legal clinic staff are working remotely is extremely challenging with such short timelines

SUMMARY OF CONCERNS

3 Delays in processing result in wrongful evictions

- Due to slow processing of important documents such as Motions to Set Aside Ex Parte Orders, tenants have been wrongfully evicted or have faced the stress of an imminent wrongful eviction when stays have not been issued in a timely manner
- Eviction orders have been issued ex parte without any effort by the LTB to enquire as to whether such an order remains appropriate after months since the original application was filed
- Wrongful evictions must always be avoided at all costs, but especially as we enter the second wave of a global pandemic
- The LTB must consider wrongful evictions in the context of a known, disproportionate impact of COVID-19 on racialized, Black and Indigenous residents of Ontario

4 Technical problems exacerbate existing access to justice barriers

- Parties, legal representatives and duty counsel have been denied access to virtual hearing blocks with no means to report this to the LTB in a timely manner
- The LTB has a limited ability to receive evidence electronically
- Audio and video problems have prevented parties, members and representatives from fully hearing proceedings, with the worst impacts upon persons with disabilities or without access to high-quality internet connections and other technology

INTRODUCTION

The Landlord and Tenant Board's (LTB) expansion of operations has had a dramatic effect on the clients and the low-income communities served by legal clinics and student legal aid services societies. We propose a number of reforms to address an access to justice crisis that, in unfairly limiting low-income tenants' ability to participate meaningfully in LTB proceedings, has serious ramifications for the health of our society – in the immediate context of the COVID-19 pandemic and beyond.

The past six months have been a challenging time for organizations across the justice sector. We appreciate the reality that the LTB has, like all of us, been forced to adapt to unprecedented circumstances. However, as the impact of recent developments at the LTB (in particular, those since the LTB began resuming “regular” (remote) operations on August 1) becomes clear, we are compelled to speak out. In addition to having a particularly devastating effect on socio-economically marginalized communities – the people who our clinics represent – the pandemic has underscored the importance of having a safe place to call home.¹ For example, members of many Black communities - already facing the brunt of the pandemic - are renters who live in the geographical areas with the highest rates of eviction filings.² Such geographical areas, at least in Toronto, have also been places where marginalized communities have faced the highest incidence of COVID-19, thus creating a dangerous situation of double jeopardy.

As the body tasked with adjudicating disputes over eviction and tenants' rights, the LTB has a unique responsibility to ensure that its response to COVID-19 does not unfairly exacerbate homelessness or the effects of the pandemic upon racialized, Black, and Indigenous communities, as well as renters living in poverty. It cannot operate outside of this real-world context. The injustices our clinics have witnessed, overheard and attempted to assist tenants with – far beyond the inconveniences to be expected from adjusting to remote hearings and service delivery – lead us to request that the LTB revisit its approach to “re-opening”.

1. See, e.g., Perri, Dosani and Hwang, “COVID-19 and people experiencing homelessness: challenges and mitigation strategies”, CMAJ 2020 June 29; 192:E716-9.

2. Leon, Scott and Iveniuk, “Forced Out: Evictions, Race, and Poverty in Toronto”, Wellesley Institute, August 2020.

INTRODUCTION

The LTB must carry out its mandate in a manner that complies with fundamental principles of fairness and equality, while being sensitive to the realities of an ongoing pandemic. COVID-19 must not be allowed to drive the LTB towards a “digital first” operation without regard for the human consequences. Nor must the direction of the LTB’s operations be motivated by the existence of a backlog of cases that pre-dates the pandemic and arose from circumstances largely outside the LTB’s control. By proceeding too quickly and with the wrong objectives in mind, the LTB risks promoting a narrow and one-sided conception of access to justice. To the extent that this might temporarily reduce the number of cases in the system, it would do so at the expense of fundamental rights.

THE LANDLORD AND TENANT BOARD'S DUTIES TO AFFORD PARTIES PROCEDURAL FAIRNESS AND EQUAL TREATMENT

The LTB has important obligations – arising from, inter alia, the *Residential Tenancies Act, 2006* (RTA), *Canadian Charter of Rights and Freedoms* (Charter), *French Language Services Act*, *Human Rights Code*, *Statutory Powers Procedure Act* (SPPA) and the common law duty of procedural fairness – to afford parties fair and equitable treatment in relation to its services and proceedings. Our clinics' experiences since the LTB began re-opening on a remote basis have disclosed systemic failings in the Board's process for expanding hearings that are inconsistent with those obligations and that require immediate remediation.

First and foremost, the LTB appears to wrongly presume that low-income tenants have reliable access to the required technology to participate in an electronic proceeding, and the wherewithal to use it effectively. On many occasions, legal representatives who are relatively well-versed in using phone and videoconference technology have been unable to access electronic hearings. That effect would be greatly amplified in the context of clinic clients and unrepresented tenants.

Access to technology is highly unequal. For example, there are documented disparities in internet access based on income³ and location⁴. While cellphone access is slightly more widespread⁵, access to a cellphone cannot be equated with having sufficient minutes to

3. "The vast majority of high-income households subscribed to Internet services in 2017, compared to less than two-thirds of the lowest-income households. Internet use from home in the first income quintile was 20.0 percentage points lower than the overall average of 89.0% and 16.3 percentage points lower than in the second income quintile." See Canadian Radio-television and Telecommunications Commission, "Communications Monitoring Report 2019" (Ottawa, 2020), p. 27. According to the same report, the lowest income quintile spent 9.1 % of household income on communications services versus 1.8 % in the highest quintile.

4. Ibid., p. 42. "The availability of 50/10 Mbps unlimited broadband was noticeably different from availability at 1.5 Mbps. Across Canada, 50/10 Mbps unlimited was available to 84.1% of Canadians. However, only 37.2% of rural communities and 27.7% of First Nations reserve areas had access to the faster speeds of 50/10 Mbps unlimited, demonstrating a divide between the various communities for faster broadband services."

5. Ibid., p. 28. "Overall, more households owned mobile phones (89.5%) than home computers (84.1%) in 2017. This trend was more pronounced in the lower income quintiles. For example, 73.1% of Canadian households in the first income quintile owned mobile phones ..., compared to 63.4% of households that owned home computers".

THE LANDLORD AND TENANT BOARD'S DUTIES TO AFFORD PARTIES PROCEDURAL FAIRNESS AND EQUAL TREATMENT

participate in an electronic proceeding, or a suitably quiet and private space from which to do so. Similarly, basic internet or cellphone access does not guarantee access to the requisite printing, scanning and uploading abilities one would need to exchange and file documents to comply with a time-sensitive disclosure order. Electronic proceedings may force already-overburdened tenants into impossible choices between paying unaffordable overage or usage charges to join a hearing; or paying rent and utilities costs, and feeding their families.

Problems in accessing remote hearings have also been compounded by the very short timelines in which many notices of hearing have been delivered. Short notice can make it practically impossible for a low-income tenant to make necessary arrangements to seek legal advice and representation, participate in an electronic proceeding or make a timely objection to the LTB's choice of hearing format. And, in numerous instances, our clinics have assisted tenants who did not receive any notice of hearing because documents were sent to the wrong e-mail address or because of delays with mail delivery.

Ironically, while the LTB has required that tenants act with great speed in order to participate in proceedings, tenants have been adversely affected by the slow processing times for important documents such as motions to set aside ex parte orders. Tenants have been wrongfully evicted or have faced the stress of an imminent wrongful eviction when stays have not been issued in a timely manner, contrary to RTA s. 78(10), which provides for an automatic stay upon receipt of a tenant's motion.

We will never know how many tenants have been prevented from participating in proceedings due to a lack of technology or lack of notice, and who were unable to seek out assistance from the LTB or a legal clinic before they were evicted. But we can say that we have overheard a tenant struggling to take part in a hearing from a payphone in the rain on a cold day before ultimately giving up and dropping the call. In another case, when a member became aware that an absent tenant did not have a telephone, the hearing proceeded after it was suggested that the tenant could have used a payphone to attend. We believe this is not an appropriate way for a party to be heard in a proceeding where important interests are at stake. If these tenants were evicted, they will have lost their homes contrary to the rules of natural justice, deprived of the statutorily-mandated opportunity to counter the landlord's allegations and/or to seek relief from eviction. This

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would be unacceptable during normal conditions, let alone during a pandemic that puts the inadequately housed and homeless at greater risk of disease and death.

Further, even in circumstances where a tenant is able to access a remote hearing by phone, the LTB's current preference for a hybrid hearing format is antithetical to principles of procedural fairness. In a hearing where one party appears by videoconference and another party, lacking that technology, appears by phone, the latter party is at a distinct disadvantage. And, given the disparities in access to technology, the person relying on phone access is more likely to be the tenant. To cite one recent example, a tenant who called in by phone struggled to understand what was happening during the hearing, and unlike his landlord who appeared by videoconference, could not respond to the member's cues or see that the member was becoming visibly frustrated with him. He was left apologizing repeatedly for having a difficult time in hearing instructions and following the proceeding. In those circumstances, how could a tenant be expected to focus on understanding the landlord's evidence and presenting their own case in response?

Non-verbal communication is important for a variety of reasons: developing a human connection between participants, understanding a member's instructions, gauging a witness' sincerity and thinking about how to pursue cross-examination, and assessing what evidence or submissions a member is most receptive to. A participant who is foreclosed from participating in the same format of hearing as the member hears the proceeding incompletely and is heard differently. Simply put, this is unfair. Even in the context of participation in videoconference hearings, research indicates that a remote participant is disadvantaged in terms of legal outcomes.⁶ In a comparison between proceedings where a party is heard at an oral hearing versus in a written hearing, research has indicated that the oral hearing resulted in a success rate that was 2.5 times greater than the written hearing.⁷ A policy of giving one party preferential access to a hearing cannot be justified.

There is a reason why SPPA s. 5.2(4) requires that "all the parties and the members

6. Diamond, Bowman, Wong and Patton, "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions", *Journal of Criminal Law and Criminology*, vol. 100, no. 3 (2010), 869 at pp. 897-88.

7. Genn and Thomas, "Tribunal Decision-Making: An Empirical Study", UCL Judicial Institute, UCL Faculty of Laws (2013).

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participating in [an electronic] hearing be able to hear one another and any witnesses throughout the hearing” and that RTA s. 183 requires the LTB to adopt the mostexpeditious method of determining “questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard”. All parties should be afforded an equal opportunity to be heard adequately.

The LTB’s statutory and common law duties to treat parties fairly are complemented by its obligations under the Charter and the *Human Rights Code* to refrain from discriminating against parties on the basis of protected grounds. Realizing the constitutional imperative of substantive equality requires different treatment in the form of accommodation to individuals who are members of protected groups. Just as the LTB’s approach to re-opening has unfairly restricted low-income tenants’ ability to effectively participate in a general sense, we are concerned that the Board’s practices have specifically impacted parties with accommodation needs that cannot be met through a remote proceeding on short notice. For example, tenants in receipt of public assistance who are entitled to equal treatment with respect to the occupancy of accommodation are denied that right if their limited income means they cannot afford the technology required to access an eviction hearing. Similarly, tenants with disabilities that limit their ability to be heard in an electronic proceeding – whether through the electronic filing of documents on short notice, or communicating through the phone or videoconference – are denied the right to access the LTB’s services and facilities on an equal basis.

Technological solutions that might be used effectively to accommodate some parties based on their particular needs cannot be imposed in a blanket manner that does not consider individual parties’ circumstances. The LTB must ensure that its processes afford parties sufficient time and opportunities to request accommodation in the hearing process. And it goes without saying that the LTB’s technological solutions need to work. In addition to problems where tenants lack access to appropriate technology or have been unable to get their own technology to work, clinic representatives providing Tenant Duty Counsel (TDC) services have observed proceedings where the presiding member has not been able to see or hear parties at various times during a hearing. And some TDC have been admitted to remote hearing blocks too late to provide assistance to unrepresented tenants.

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This is not to say that legal clinics are opposed to the idea of electronic proceedings in appropriate circumstances. Rather, such proceedings must be conducted fairly, and with particular regard to the realities of disadvantaged tenants who most require the RTA's protections against unlawful eviction, but face the greatest barriers in enforcing their rights.

THE ROLE OF ONTARIO'S LEGAL CLINICS

One of the primary focuses of legal clinic work is eviction prevention, meaning anything from summary advice, to provision of TDC services, to full representation in complex LTB matters. Clinics manage this work with limited staff and resources.

In the wake of COVID-19, this has been further complicated as we pivot to remote work and providing services to vulnerable clients with a challenging technological infrastructure. While clinic work will continue to be done in altered ways, we recognize that many of our clients cannot reach us due to limited access to phones, computers and the internet. The reality is that, despite our best efforts, our clients' technological limitations and public health requirements mean that it often takes us significantly longer to make contact with prospective clients, get retained, obtain and review documents, provide advice and get instructions than was previously the case.

As clinics across the province are in various stages of returning to their physical spaces and meeting with clients in person, we recognize the need to support client access to technology. Some clinics are creating dedicated spaces where clients can use computers (including programs such as Microsoft Teams and Zoom) and telephones, and potentially be supported in participating in remote hearings. Some clinics had already been doing this with the Social Benefits Tribunal even before the pandemic.

However, while clinics are committed to providing such access to clients, not all clinics will be able to do so due to lack of capacity – both in terms of financial resources and space. Where clinics are able to provide this support, it will be limited for similar reasons. Furthermore, clinics will only be able to host a small number of such hearings per week, while also balancing the demands of hearings before tribunals such as the Social Benefits Tribunal, Social Security Tribunal and others. Housing law is in no way the only area where such client support will be required. A further concern is that clinics will only be able to support some clients in this manner, leaving unrepresented litigants and those tenants who receive only brief advice to their own devices.

The clinic system is simply unable to supplement the LTB's ability to deliver remote hearings in any substantial way. While legal clinics will facilitate access to remote hearings for clients whom they represent to the extent that cost, space and scheduling constraints allow, the onus is on the LTB to ensure that parties have effective access to its proceedings.

RECOMMENDATIONS

In light of the foregoing, we make the following recommendations:

- 1.** All parties and the adjudicator should be required to participate in a hearing by using the same format (e.g. all parties participate in person, by video-conference, by telephone or in writing as the case may be for the particular stage of a proceeding), unless one party specifically requests to participate by another format as an accommodation; and hearings that cannot be fairly decided by videoconference, telephone or in writing should be adjourned to be heard in person.
- 2.** The LTB must facilitate access to hearings for parties that lack the necessary technology, whether through conducting in-person hearings that respect physical distancing and other public health requirements; or by providing access to the necessary videoconferencing or teleconferencing facilities in public locations situated near the rental unit that is the subject of the proceeding.
- 3.** The LTB must give sufficient notice of electronic hearings and adequate accommodation/objection procedures to enable all parties to request needed accommodations and/or to object to the selected hearing format (e.g. the Social Benefits Tribunal provides for the delivery of a notice of objection within 15 days of receiving a notice of hearing). Where there has not been a meaningful pre-hearing accommodation process, an adjournment should generally be granted. LTB members must take an even more pro-active approach than would be expected at an in-person hearing in exploring accommodation needs if there is any reason to believe that a party might be having difficulty participating in a remote proceeding.
- 4.** The LTB should not rely on e-mail for delivering notices of hearing unless the parties and/or representatives have requested this method of service and have confirmed that the e-mail they have provided to the LTB is a working e-mail address. Courier should be used to send notices of hearing, orders and other time-sensitive documents when e-mail has not been confirmed as a viable method of service, since mail delivery through Canada Post has been significantly delayed in many Ontario communities.

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5. When scheduling, the LTB should ensure that notices of hearing and dockets are distributed as early as possible (two weeks in advance at a minimum) to permit tenants an opportunity to seek assistance from legal clinics and attempt to make and obtain disclosure; to avoid scheduling conflicts with legal clinic representatives' other hearings before the LTB and other tribunals; and so that matters in the same area of the province are scheduled in the same hearing blocks, increasing the likelihood that local TDC will be available to advise tenants, and make referrals back to their local clinics and other local resources as appropriate). To facilitate the provision of TDC services, dockets should indicate the nature of the notice(s) of termination upon which an eviction application is based (e.g. stating L2/N5/N7 or L2/N12, rather than L2).

6. The LTB should not proceed with an electronic proceeding in the absence of a party unless it is satisfied that the party had knowledge of the proceeding and a reliable means of accessing the electronic proceeding. This process should include efforts to contact the absent party through available means of communication at the time of the hearing.

7. The LTB should provide an accessible, reliable method – such as a dedicated e-mail address – for reporting technical difficulties with respect to accessing and/or participating in electronic hearings. Calling the LTB's toll-free number to report such difficulties is not a timely or reliable option. Further, if the LTB is aware that participants are waiting to join a hearing block that remains closed due to an overlap with an earlier block, there should be a method to explain what has happened to waiting parties.

8. If it is apparent to the presiding member that one or more of the parties and/or adjudicators cannot properly hear the entire proceeding, the matter should be adjourned so that a proper hearing can be held.

9. The LTB should ensure that members receive consistent training on how to conduct remote hearings, including the importance of granting adjournments to permit a fair and adequate hearing, and waiting an appropriate amount of time before beginning an

RECOMMENDATIONS

unopposed hearing to ensure that persons experiencing technical difficulties have an opportunity to attend; and that members are instructed to provide an opportunity at the beginning of each electronic hearing block for TDC to introduce themselves and explain their role, and to facilitate tenants' access to TDC services.

10. When conducting video-conference or telephone hearings, the LTB should ensure that it provides an accessible and confidential mechanism for TDC or other legal representatives to confer with the party they are advising or representing. If it is necessary for the legal representative and party to leave the electronic hearing, the LTB should ensure that they are able to re-connect.

11. Adjournments at the request of a respondent should generally be granted at a first appearance, unless the applicant can establish grounds for urgency (e.g. ongoing safety concerns).

12. In an electronic proceeding, the LTB must provide advance notice of an effective and accessible mechanism by which parties may, at the presiding member's discretion, submit documents during the hearing that the party was not able to file in advance (provided it is also possible to effectively disclose the document to the other side). By the same token, the LTB must provide for a reliable and accessible method for parties to file and disclose documents prior to a hearing (e.g. e-mail has proven unreliable given limits on the size of attachments, and problems in ensuring that e-mailed disclosure is forwarded to the appropriate presiding member), bearing in mind that low-income tenants face particular challenges in making timely disclosure given such factors as a lack of access to technology, disability or language barriers.

13. For parties who lack access to necessary technology to file or receive documents before or during an electronic hearing, the LTB must act with flexibility and fairness in the exercise of its discretion to adjourn hearings to permit an adequate hearing to be held; and in the exercise of its discretion under RTA s. 201 to permit parties to file and respond to material after the hearing, when appropriate.

RECOMMENDATIONS

14. To facilitate the fair and expeditious resolution of matters, the LTB should ensure that it is able to provide timely access to documents in the LTB file via e-mail at the request of parties' legal representatives or TDC (there should be a mechanism for providing immediate file access to TDC during remote "hearing blocks"), and that mediators are available to facilitate alternative dispute resolution for remote hearings.

15. The LTB should clarify that e-mail is a permissible method for filing time-sensitive documents such as motions to set aside and requests to review (accompanied by a fee waiver request or an undertaking to pay the requisite fee); confirm whether it will be expanding its "e-file" platform to allow the filing all types of tenant application; and ensure that potentially urgent documents such as requests for reviews or motions to set aside are processed the same day they are received.

16. In any case where an eviction order is stayed (e.g. by an interim order on a request to review, upon the filing of a motion under RTA s. 78(9), upon the acceptance of a motion under RTA s. 74(11)), the LTB should immediately e-mail confirmation of the stay to the local Court Enforcement Office that would be responsible for executing the eviction order.

17. Where a landlord filed an L4 application under RTA s. 78(1) alleging breach of a repayment condition during the suspension of the LTB's regular operations, the LTB should generally schedule a case management hearing to get an update on the status of the tenancy before issuing an eviction order.

18. The LTB should, as soon as reasonably possible, communicate its plans for the resumption of in-person hearings, which must include plans to safely resume in-person hearings throughout the province once the LTB has tested this process at hearing sites in London, Ottawa and Toronto.