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ADVOCACY CENTRE FOR TENANTS ONTARIO

Legal Opinion - Hamilton Apartment Rental Program

RE: The Director of By-law and Licencing Services, Planning and Economic Development Department Report to The Chair and Members, Emergency and Community Services Committee, dated August 17, 2023

DATE: October 6, 2023

Introduction

We are long past calling what we have in Ontario a housing crisis. According to Marcuse and Madden, with 96% of Ontario's housing stock in private hands, we have a market behaving exactly as it should: prices are too high; supply is too low; and any diversity of new housing stock seems insignificant.

While the province has clearly signalled its concern with respect to the housing crisis, specifically here with tenant interference and illegal eviction, the so called renoviction by-laws fall squarely within municipal authority to address. That is, to identify a local concern and come up with a municipal solution that does not frustrate but rather complements provincial legislation to solve a serious and growing problem – specifically, a housing problem that is greatly reducing the supply of affordable housing and is creating widespread community instability and misery.

The Paramountcy of the *Residential Tenancies Act, 2006*

The *Residential Tenancies Act, 2006* is provincial and paramount legislation setting the terms and regulating most residential tenancies in the province. It is remedial legislation. That is, it recognizes the power imbalances between landlords and tenants. It is intended to right societal wrongs and provide remedies and detailed methods for enforcing legal rights especially for the weaker parties.

For greater certainty, the *RTA* expressly sets out that provisions in any tenancy agreement conflicting with the Act are void. Subject to express limitations, the Act applies with respect to every rental unit in every residential complex in the province despite any other Act (other than the *Human Rights Code)* and despite any agreement or waiver to the contrary. See s. 3 and 4 of the *RTA.*

Under pre-Charter division of powers jurisprudence, property rights and landlord and tenant rights flowing from that have fallen to the provinces to regulate and enforce. Security of tenure is the hallmark of the legislation. See *White* v. *Upper Thames Conservation Authority,* 2022 ONCA 146 (CanLII). As set out in its purpose section, the *RTA* is intended to protect tenants against unlawful rent increases and unlawful evictions.

Under this security of tenure theme, tenancies can only be terminated in a very limited number of circumstances: for example, death, abandonment, agreement, a landlord's own personal residential occupation, demolition, and, most commonly, through some proven breach of a tenant's legal responsibilities connected to a process at the Landlord and Tenant Board that results in an eviction order being issued.

It is important to note at the outset, however, that given the total number of tenants in Ontario (approximately 1.7 million households) and the number of landlord applications that result in hearings filed against them (about 40,000 is the accepted pre-pandemic number), tenant misconduct is a statistically very rare occurrence. Most tenants faithfully pay their rent on time and in full, and most

tenants want or need to remain in their units indefinitely. Herein lies the seeds of our renoviction problem.

What is a Renoviction and Why is the Response of the *RTA* is Inadequate?

As property values increase, as the cost of borrowing increases, as scarcity pushes rents even higher, (particularly under our vacancy de-control regime instituted by the Harris government in 1998), the tactics by which a landlord regains possession from a sitting tenant under the guise of renovating their unit is colloquially known as a renoviction.

While the tenant has a right to re-occupy the unit after it has been renovated at the same rent that they would have otherwise paid had they not vacated, the landlord instead rents it to another tenant at a greatly increased rent. See s. 50 and 53 of the *RTA*.

On its face, the legislation is clear, reasoned, remedial and effective. Units will need repairs and renovations over time. Section 50 is the mechanism for allowing a landlord to obtain possession of the unit, compensate the tenant for the inconvenience, renovate it and provide the original tenant with the opportunity to return to the unit when the renovation is completed at the same rent as if the tenancy had not been interrupted. Fines and damages can flow if a landlord, in bad faith, is found not to have renovated or does not reinstate the tenant at the proper rent. See s. 54, 57 and 57.1 of the *RTA*. What could possibly be wrong with this? Well, in practice and on the ground, everything.

The simple economic truth is that a landlord will not invest in significant improvements to the unit without the ability to increase that unit's rent revenue.

Instead of following the law, the landlord defies it. He obtains possession of the vacated unit asserting that he is renovating it, he improves it or does not improve it, and then rents to another tenant happy and willing to pay more. The landlord then simply waits to see if there are any significant consequences to this flouting

of the law. If there are consequences, this is simply put down to the cost of doing business.

The economic benefits to a landlord for this kind of behaviour are irrefutable. In the words of one LTB adjudicator, they "profit enormously". The economics of this was outlined in a shocking decision of the Landlord and Tenant Board where several tenant households in downtown Toronto were displaced by a renovating landlord successful in re-renting the units for more than *three times* the original rent. See *[Tenants] v. 795 College Inc. (7 February 2019; Whitmore),* 2019 LNONLTB 57 (QL), 2019 CanLII 87012, File No. TST-90503-17 (LTB).

If a landlord re-rented a "fluffed" unit for $1000.00 a month more, it would take about two years to cover the cost of the *maximum* fines prior to the legislative changes made in 2020, about four years to recover the cost of the maximum fines prior to the legislative changes made in 2023 and about eight years to recover the cost of the *maximum* fine since those changes were made in 2023. It also goes without saying that fines enrich the provincial coffer and not the displaced tenant.

As was recently reported by CTV news, administrative fines related to these bad faith evictions are "rare and minuscule". It is indeed hard to find a case where a fine, let alone a significant fine, was ordered.

In 2021, the Mayor of Montreal spearheaded a by-law to encourage housing developers to include social and affordable units in their developments – A Bylaw For A Diverse Metropolis. As was widely reported in the Canadian press last August 2023, every single developer opted to pay the fines rather than comply with the by-law.

In sum, fines provide no incentive to stop this practice. Other approaches, like re-housing the displaced tenant while the unit is being renovated developed in New Westminster British Columbia both signal a landlord's genuine intention to renovate the unit and affirm their understanding of the obligation to house the tenant *during and after* the process.

The claim by Hamilton's Director of By-law and Licencing Services that there is no "silver bullet" to this problem is highly disputable. In British Columbia, the New

Westminster approach of requiring landlords to re-house their tenant during a renovation that required their absence from the unit worked and had a proven track record of success despite several legal challenges brought by landlords arguing that the municipality did not have the jurisdiction to do this.

> *On May 27, 2019, in response to numerous complaints regarding renovictions, City Council amended the Business Regulations and Licensing (Rental Units) Bylaw to include Part 6, a section that specifically aimed to deter renovictions and to provide protection to those tenants who may be displaced by large scale renovation work. The amendment was successful and resulted in a significant decrease in the number of reported renovictions and inquiries of concern. The City is considered a leader among municipalities across the nation for this work.*
>
> *See https://www.newwestcity.ca/housing/renovictions-tenant-protection-and-resources.*

Anecdotally, the by-law ground the renoviction problem to a halt in New Westminster, a bedroom community to Vancouver that has a well documented and ongoing housing crisis of its own. Unfortunately, the by-law was repealed when British Columbia addressed the problem in its provincial landlord and tenant legislation adopting a scheme similar to what is set out in Ontario's s. 50 of the *RTA.* This was an unfortunate decision but perhaps an expected one given landlord and developer opposition to it. Time will tell whether landlord non-compliance will become the same problem in New Westminster as it is in Ontario.

The Province Occupies the Field

The issue of how to renovate a unit occupied by a sitting tenant without prejudice to the sitting tenant has been legislatively considered by the province for over

thirty years. See, for example, *Landlord and Tenant Act*, R.S.O. 1990, c.L.7, ss. 1 – 130.

It has clearly been identified by the province as a matter worth regulating both in provisions of the Act itself and in the subsequent Bills stiffening fines and making more stringent the evidentiary requirements for the renovation and eviction to happen in the first place. See, for example, Bill 97.

As set out above, on its face, the legislation that the province has promulgated and *enhanced* over the years speaks to a tenant's security of tenure in the renovation process. The section is supposed to accomplish this because the law is supposed to be followed. Municipalities, governments closer to the ground of where people actually live, have noticed increasing trends that have undermined security of tenure and reduced the quality and affordability of existing rental housing in their communities.

Municipal governments in North Bay, Brampton, Toronto, Waterloo and London have acted to obtain more oversight in the rental housing area than the current legislation allowed. These attempts have succeeded despite legal challenges attacking the jurisdiction to do this. See *Toronto (City)* v. *Goldlist Properties Inc*., 2003 CanLII 50084 ON CA), *London Property Management Association* v. City of London, 2011 ONSC 4710 (CanLII), F*odor* v. *North Bay (City*), 2018 ONSC 3722 (CanLII), *1736095 Ontario Ltd. v Waterloo (City),* 2015 ONSC 6541 (CanLII).

Municipalities Can Also Occupy the Field

It is well established that municipalities can occupy the field of what is a provincial legislative concern when it complements that legislation in order to accommodate local concerns and conditions. As set out by the former Chief Justice in *Reference in Assisted Human Reproduction Act*, so long as complementary local laws do no frustrate other legislation, "in an area of jurisdictional overlap, the level of government that is closest to the matter will often introduce complementary legislation to accommodate local circumstances".

In the matter of housing which is crucial of any community's wellbeing and prosperity and where the circumstances might be unique or particular to that community – population trends, gentrification, quantity and quality of housing stock, housing costs, labour market issues, available land – a municipality would be hard pressed not to use its municipal powers to address particular and identifiable problems in the area of housing and rental housing in particular.

In the law related to landlord and tenant issues, we see this this kind of "jurisdictional overlap" everyday from landlord licensing, care home regulation, safe apartment building oversight and minimum and maximum unit heat issues.

There is also the express intersection between municipal by-laws and the *RTA.* For example, s. 50 (c) of the *RTA* references the requirement for a municipally issued building permit for the renovation to proceed, s. 4 of O.Reg. 571/06 referencing Maintenance Standards sets out that any municipal property standard by-laws regulating unit exteriors have paramountcy and Part XIII of the *RTA* supports direct municipal action respecting rental housing and the provision of vital services to it.

Chapter 667 of Toronto's Municipal Code

Chapter 667 of Toronto's *Municipal Code* deserves special mention. While demolition and conversation are expressly referenced in the *RTA*, Toronto places obligations on developers to re-house tenants displaced by redevelopment in complexes of over six units. This *Residential and Rental Property Demolition and Conversion Control* is basically the New Westminster by-law for bigger complexes and has survived the developer lobby's distaste for it. See *Toronto (City)* v. *Goldlist Properties Inc*., 2002 CanLII 62445 (ON SCDC), appeal to the Court of Appeal dismissed.

The Toronto initiative requiring developers of rental housing complexes to re-house displaced tenants failed at first instance before the Ontario Municipal Board. There, it was decided that the Tenant Protection Act, 1997 was a

complete code and the City's activities were at "cross purposes" with the legislation making them invalid and illegal.

On appeal, the Court took a very different view. They cited the Supreme Court of Canada on the issue of "dual compliance" – that is, by-laws that work in addition to provincial legislation and that might impose an even higher standard of control than those of the related statute. In other words, by-laws can "enhance" provincial legislation and they survive if simultaneous compliance is possible between by-law and provincial legislation and if the by-law does not frustrate the provincial legislation.

Given that the *RTA* does not encourage but restricts and regulates renoviction activity passing by-laws that support the objectives of security of tenure and rent regulation in the renovation process should pass jurisdictional challenge.

The context for the *Goldlist* challenge to Toronto's legislatively robust approach to security of tenure during redevelopment came during an earlier affordable housing crisis. As the Court noted in 2002:

> *The adequate supply of rental housing serves a very important role in the City of Toronto. Approximately 52 per cent of its total housing stock is rental housing. The current vacancy rate in the City is approximate 0.8 per cent and virtually no affordable rental housing is being constructed in the City.*

Alas, in the twenty years since *Goldlist* nothing has changed and arguably, things are much, much worse.

Hamilton's Proposed *Repairs and Renovations By-law*

At the April 2023 meeting of Council, the city solicitors were reminded of the request to provide options to the renoviction crisis that was happening in Hamilton. Specifically, Council wanted to consider a by-law akin to the New Westminster by-law where a similar affordable housing crisis has been underway for years.

The Housing Sustainability and Investment Roadmap passed by Council in April 2023 identifies four pillars of activity. The report of the Director of Licensing and By-law Services dated August 17, 2023, focusses on the preservation of existing affordable rental housing by addressing solutions to renovictions, tenant displacement and property standards.

The situation is bleak for Hamilton's 72,000 rental households. Once a Mecca of good and affordable housing, the report sets out that Hamilton is losing 23 affordable units of rental housing for every new affordable unit being built. Researcher Steve Pomeroy, and member of McMaster University's Canadian Housing Evidence Collaborative, says that over the last decade Hamilton has lost 15,000 units of affordable housing to market forces. The *Globe and Mail* reported that the Landlord and Tenant Board received double the N13 notices predicated on demolition, renovation and conversion in 2022 than it did in 2019 but these statistics do not show the real numbers of tenants who vacate just on the strength of receiving the notice.

Unfortunately, the proposed ***Repairs and Renovations By-Law*** does not form part of the Roadmap. It is up for alternative consideration and includes a pessimistic staff opinion that it would not withstand a legal challenge and present challenges with respect to its operation and enforcement.

The Details

Termination of Tenancies and Temporary Tenancies

Under the proposed New Westminster type by-law, a landlord must obtain the necessary permits before the N13 is served. Most importantly, the landlord must find a tenant equivalent temporary accommodation while the renovation of the tenant's unit takes place. The Director's Report quite rightly sets out the thorny issue of terminating tenancies under s. 50 of the *RTA* and what the proposed by-law sets out about temporarily re-housing the displaced tenant.

The *RTA* sets out how the tenancy is terminated while the renovation proceeds. This is how the landlord maintains control of the unit while the work is being done and how the tenant can live elsewhere without the obligation of paying rent. But termination is a problem because it legally severs the tenant from what was their home. As the August 17, 2023 report of the Director notes "staying in place" is one of the best strategies for discouraging renovations.

Significantly however, the tenancy is terminated on the good faith *bona fides* of the landlord asserting the need for vacant possession. It is very much a live legal question that if the tenancy is not terminated lawfully then it is not terminated at all. See *Ottawa-Carleton Association for Persons with Developmental Disabilities/Open Hands* v. *Séguin,* 2020 ONSC 7405 (CanLII).

The other significant legal issue at play is the requirement to re-house the tenant while the renovation is underway. Like what was set out in New Westminster, this is the major and unique feature of the proposed Hamilton by-law that should stop in its tracks any renoviction gamesmanship.

Under the by-law, the landlord can rehouse the tenant by creating a new tenancy in some other unit or by re-housing the tenant "temporarily". The *RTA* does not contemplate "temporary" tenancies nor can tenancies be commenced with future termination clauses contained within the agreement. See s. 37(4) of the *RTA*.

As for establishing whether the tenant has a new tenancy in the new unit while the renovation proceeds, the Divisional Court has again answered this question. In the case of an elderly woman who was moved temporarily to one unit when her complex was being totally redeveloped over many years, she refused to go back to her new unit as per her agreement with the developer asserting that she had a new tenancy at the unit where she was re-located.

The Divisional Court resolved this sticky wicket for us by deciding that Ms. Asboth's relationship to her first unit was not severed but only "suspended". They evicted her from her "temporary" unit because she refused to return to her original unit. See *Morguard Residential* v. *Asboth,* 2017 2502 (ONSC) CanLII. Leave to the Court of Appeal was denied.

The Building Permit

Under the proposed by-law, a renovating landlord cannot serve a notice of termination unless every building permit and authorization had been obtained with respect of the proposed renovation.

This requirement is in complete harmony with what is set out in the *RTA* at s. 50. There, vacant possession can only be sought if the renovations are so extensive that vacant possession and a building permit is required. The by-law simply asks for proof of what is already required while also reinforcing the "staying in place" strategies to defeat specious renovation claims.

Additionally, the *Building Code Act,* 1992, S.O. 1992, c. 23 sets out at s. 8 that that building permits shall be issued unless the construction will contravene any other applicable law. Considering the ramifications for sitting tenants protected by the *RTA* in the construction and renovation process acts in concert with following the law rather than breaking the law. Indeed, Building Inspectors could be better used in the policing of this issue. Their final inspections could include notifying the displaced tenants of the opportunity to return to their homes when the renovation was complete.

Hamilton's Proposed Renovations License and Relocation Listing By-law

In her report, the Director promotes a *Hamilton Apartment Rental Program* that "comprises four separate but interconnected new initiatives to address renovictions, tenant displacement and property standards in apartment buildings.

The *Renovations License and Relocation Listing By-law* features as a prominent piece of the strategy that is billed as innovative and "first-of-its kind" in addressing the crisis.

Pursuant to the requirements of the by-law, landlords must obtain a license to renovate *after* the N13 is served. Building permits and other information must be provided to the City setting out that vacant possession is required. Landlords

must provide sitting tenants will three apartment listings of comparable size and price *if* they exist.

The Concerns:

Tenant Information

The Report's clarion call is that "tenants must be aware of their rights". As set out, "tenant education and support are paramount in any and all efforts to address renoviction". With respect, this must be tempered with the acknowledgment that the landlord gains possession under the current renovation process, the landlord has the keys, the landlord has the control, and the landlord permits re-occupancy when the landlord wants it re-occupied. Tenants are simply kept in the dark about when the unit is re-occupied by another.

No amount of tenant education can actually prevent another higher paying tenant from re-occupying the unit if the landlord wants to make that so. This emphasis on tenant education is a waste of ink, and it blames the victim. We must find a way for landlords to follow the rules whether tenants know their rights or not. It is not a question of tenant education - it is a question of landlord education.....and compliance.

Building Inspections

As set out above, the Report fairly sets out that the best strategies "prevent the tenant from moving out at all". A strong, reactive and proactive use of Buildings and Inspections could address repair issues before the need for a major renovation arises. This is certainly a good strategy.

However, and with respect, this horse has already left the barn. Landlords have neglected their properties for years to the point of needing renovations to maintain them. Landlords also use s. 50 of the *RTA* to misrepresent to an adjudicator that vacant possession is required to renovate and repair.

Rigorous inspections going forward is certainly the way to go but there must be 1000's of units in Hamilton in need of extensive repairs and renovations and s. 50 still operates to displace tenants and install new tenants willing and able to pay more rent for a repaired or not repaired unit.

Section 50 can also be used by landlords to argue for vacant possession and while Bill 97 sets out the requirement that a report must be provided by a person with the "prescribed qualifications" to prove that claim, the mischief that will be involved with this is still to be determined. Amending the *RTA* directing that a Building Permit must be obtained outlining repairs that require vacant possession before the N13 could be served would have been a better way for the province to proceed. Hamilton's proposed licencing regime requiring a Building Permit is a positive step.

Available Listings

Increasingly, the evidence shows that there are no comparable and available units in Hamilton. According to the CMHC, the unhealthy vacancy rate in Hamilton stands at 1.9%. On the ground, if there were available units in Hamilton, the issue of renoviction would be a nonexistent issue because people, while inconvenienced, would simply move to other, similar units. The crisi*s is* that there are no available similar units at similar rents. The colloquial rule of thumb is that a displaced tenant of long tenure will pay double the rent for half the space. Under the proposed by-law, landlords do not have to comply with this requirement if no alternative listings exist.

The Need for a License for a Landlord to Renovate

As the Appendices to the Report sets out, it will be $715 to obtain a license to renovate and the fine owed for failing to obtain a license will be $400. It would seem that Hamilton is trying to incentivize the practice of *not* obtaining a license from the get-go.

Does the City have statistics of the number of people who build without obtaining the necessary permits? It seems commonplace that property owners proceed with their renovations without proper municipal authority. We cannot expect landlords to behave any differently and perhaps we can expect landlords to behave with even less compliance given the nature of the problem that this proposed by-law is trying to address.

Conclusion

It would seem that Hamilton's legal department is concerned about possible legal challenges to any legislative initiatives that fall anywhere near the New Westminster by-law. Some might legitimately posit that they overstate the concerns. There would certainly be a cost to any legal challenge to Hamilton's attempts to regulate in this area but there is an even greater cost to the city in not taking this kind of effective action.

As the Director has pointed out, it goes without saying that British Columbia's enabling legislation in these matters would not be identical to Ontario's legislation - British Columbia's *Community Charter* and Ontario's *Municipal Act*. But lawyers do not operate in the world of "identical". Lawyers analogize, compare, contrast, weigh, argue. There is sufficient legal authority to support defeating any legal challenge to what Hamilton is proposing to deal with the pressing renoviction issue at hand.

What is unequivocally true is that no person can predict what a judge will decide or how litigation will go especially when there is an egregious injustice afoot and the equities are so clear as in the instant case. The record that Hamilton would create would be persuasive - landlord greed and flagrant law breaking against the proven loss of thousands of units of affordable housing lost to the citizenry of Hamilton on account of renoviction and vacancy de-control. The express need for action is because landlords are not following the law. If this does not capture a decision-maker's interest, what will?

The City Director of Licensing and By-law Services is too casual in her assertion that a by-law akin to what was promulgated in New Westminster would not survive judicial scrutiny. It is wrong not to support such a by-law that would help the community of Hamilton very much and at least lands within the possible scope of success.

But sometimes, you just have to have the fight: you might have to make the other side account, you might have to send a message to the province or to the community that an injustice has been identified and that something must be done, or it might be the case that it would simply be wrong to stand by and allow flagrant breaches of the law to pass without lifting a litigation finger in reply.

There is precedent for success. ACTO urges you to try.