

RESIDENTIAL TENANCIES ACT - TRIBUNAL MAY GRIND TO A HALT

At the time of writing, Bill 109 has received third reading and the government is finalizing the Regulations. The Bill will likely come into force in January of 2007. If there was ever a piece of legislation that had no public policy benefit, but was enacted solely for the purpose of keeping an election promise, this is it. Almost all the changes are tenant-centred, ignoring landlord's legitimate interests and concerns.

Default Orders

Those working in the system fear that the Tribunal will grind to a halt, with the elimination of default orders and with the introduction of section 82, which allows a tenant to initiate a full-blown tenant's application about maintenance or harassment, without filing an application or giving the landlord any notice of his or her intention to raise the issues. Even now, tenants use the system for delay, as delay is often the only tool at their disposal. With a system encouraging trial-by-ambush, and hearings without the respondent being aware of the case, the Tribunal will have sunk to a new low.

The issue of the elimination of default orders is not as simple as it seems. Yes, every application will now go to a hearing, and will result in a hearing order, either for eviction, dismissal, or something in between. A full 60% of all arrears applications are resolved by default orders currently. Without default orders, all applications will fall into the lap of the adjudicator of the day. Hearing rooms will be packed. Waits for hearings will increase. People will be sent home without being heard. Tenants who formerly didn't file disputes won't show up, wasting your time at the hearing. But what happens to all those tenants who don't show up, and then decide that they want to contest the eviction order. Certainly, the tenant can file a review of the hearing order, but that's currently a \$75 cost. Believe me, the government will NOT make tenants pay \$75 if they were not served, if they were in the hospital, on vacation etc. and did not attend the hearing. But the Tribunal can't reduce the general fee for reviews, since it would result in thousands of frivolous reviews where there is no cost disincentive. My understanding is that prior to third reading, the Bill was amended to state that the review process can be used when the tenant was not reasonably able to participate in the hearing. No kidding! But what they have not said, and what many suspect will happen, is that it will be free for tenants in these circumstances. In effect, they will have a process for review of "hearing orders" where before, they were setting aside "default orders". So if my guess is accurate, not only will we have to attend a hearing for every application, but we may have to return when the tenant claims he never got served.

Voiding Eviction Orders

From beginning to end, the eviction process for a rent arrears application takes about 3 months before the Sheriff knocks on the door. But under the new RTA, if you do manage to achieve an eviction order, the tenant has one new remedy and delay tactic up his or her sleeve. Currently, the tenant has until a certain date, usually 11 days after the Tribunal order is issued, to bring the rent current, including costs, in order to void a Tribunal eviction order. Under the RTA, the tenant may still void an order, by a motion to the Tribunal and with a hearing, AFTER the order is enforceable but prior to it being enforced by the Sheriff. The tenant can only do this once in the life of a tenancy, and for the tenant to void the

enforcement of the order, ALL money owing including Sheriff's fees if already paid, would have to be paid into the Tribunal and ultimately out to the landlord.

Settling without a Hearing

The government states that increasing mediation is one of the goals of their new legislation. Reading the Act carefully, it seems just the opposite. Take the new section 77 provisions that allow, as the current *Act* does, for a tenant to give notice, or a landlord and tenant to make an agreement to terminate the tenancy, and then if the tenant doesn't move out, the landlord can make a free application to the Tribunal to get an eviction order without a hearing. The landlord may have already paid hundreds of dollars to the tenant in exchange for him signing the N11 agreement, and may have already re-rented the unit for the start of the next month.

But in the new Bill, if the tenant files a motion to set the *ex parte* eviction order aside, the Tribunal is directed that it may deny termination after considering all the circumstances if it is not unfair to do so. Under the current Act, both at the Tribunal and at the Courts on appeal of Tribunal decisions, tenants are NEVER granted relief from eviction after the parties had turned their minds to an agreement, unless there was coercion, duress, misrepresentation etc. Now, the Member is told to consider the same words, and therefore the same test, as he would on an arrears or conduct application. Is it a single mother, a mental health issue, a person who lost his job since he signed the agreement? Any of those circumstances that Members now consider on rent arrears applications, will be considered even if the parties have agreed to part company. Under the *TPA*, agents would often guarantee their clients that if they and the tenant signed an N11 agreement, eviction was guaranteed. Now, they can't make that bold claim, which means they can't settle. Instead, they need to go to a hearing. Some emphasis on dispute resolution!

Fast-Track Evictions

And then there is the myth of the new fast-track eviction for undue damage. It will rarely if ever happen. There will be a new notice of termination intended to be used for damage claims of an unusual nature, inconsistent with the normal use of the rental unit. The new N5 notice will be non-voidable, with a shorter period between the date the notice is served and the termination date. Theoretically, you could even get an order terminating a tenancy prior to the termination date in the notice. But this is all smoke and mirrors. The number of days between service of the notice of termination and this theoretical termination date is meaningless, since tenants NEVER move out on being served a notice. They challenge your notice, and force you to file an application and attend a hearing. With hearings taking at least one month to schedule for conduct applications today, the termination date is well in the past when the matter is heard. In other words, the termination date in the notice is a non-issue.

But it gets worse. At the hearing, the tenants will have been advised by the clinics or tenant duty counsel, to claim that the new section 63 notice is defective, as the landlord was over-zealous in using the fast-track notice of termination which gives the tenant no opportunity to void. There is no benchmark or criteria to determine where this mythical line should be drawn to separate normal willful damage, from special willful damage. If the adjudicator agrees that it was an abuse of the new section 63 notice provisions, and that the landlord

should have used a section 62 notice for the damage, he will dismiss the application entirely, resulting in a new notice being required, a new \$150 application fee and another month waiting for a hearing.

The new provisions for small landlords, those with 3 units and less with the landlord living on the premises, will also be ineffective. Having a non-voidable N5 notice will take 7 days, the voiding period, off the time required for an eviction. But it is the one month wait for a hearing and the 3 to 4 week wait for the Sheriff at an outrageous rate of \$325 that are the real delays in the system. And nothing will prevent this tenant from hell simply saying "I need time to obtain counsel", and the Member will grant the adjournment 9 times out of 10. Return dates are never quick, even for impaired safety issues, as the Tribunal has a one-month backlog for hearings.

Another change includes Tribunal orders preventing rent increases if there are serious unresolved property standards orders against a property containing a rental unit. This will also lead to an increased load at the Tribunal, as parties argue about what is a deficiency of a "serious" nature, versus a minor maintenance issue.

Above Guideline Rent Increase Applications

Above Guideline Applications will see the most changes. Having the most impact will be the inclusion of "*costs no longer borne*" provisions on "Above Guideline Rent Increase" applications. This will mean that if costs for capital expenditures have been paid back over the amortization period from a previous rent increase based on such an application, then that component of the rent increase that resulted from the capital expense will have to be rolled back. In other words, rents will go "*down*" for tenants whose rent went up years earlier. There will also be requirements to reduce rents if there were increases to the rent based on extraordinary increases in utility costs, and then the cost declines by a prescribed amount. Many in the industry are concerned that these changes will hamper the ability of landlords to modernize and update their buildings. Not only is the "cost no longer borne" provision new, but the finance rate has been reduced, there are new tests for reasonableness of expenditures, a narrower interpretation of "*capital expenditure*" removing items of a cosmetic or esthetic nature, longer useful life factors, no management and administration allowance permitted in the cost and the annual increase is limited to 3% going forward a maximum of 3 years.

Minor changes include:

- Interest on the last month's rent deposit will be tied to the Consumer Price Index
- Expanding the rules for discounting of rents used as an incentive
- Increasing the time for evicted tenants to collect their property from 48 to 72 hours
- Changing the name of the Tribunal to the Landlord and Tenant Board
- Landlords will be required to give new tenants a pamphlet from the Landlord and Tenant Board when a new tenancy commences

- The definition of tenant will likely change to include the spouse of a tenant, even if they are not listed on the tenancy agreement
- Allowances are made in the *Act* and the Regulations for the coming of smart metering and sub-metering of hydro.

There is some good news. Vacancy decontrol remains, thank goodness. The interest landlords are required to pay on the last month's rent deposit, currently 6%, will now be tied to the annual rent guideline, which in turn is tied to the Consumer Price Index. That does NOT mean it will be equal to the Consumer Price Index, only that it will be based on it. Landlords are specifically permitted to top up the last month's rent deposit to the current rent, by deducting part of the interest they owe.

The rules about entry will be relaxed and clarified somewhat. Landlords and realtors with the landlord's authorization will be permitted to enter with proper notice if the landlord is showing the property to a prospective purchaser. And the landlord will now be permitted to do an inspection to see if the unit complies with maintenance and health standards consistent with the landlord's obligations to maintain under section 20 of the new Act, with the proviso that the entry must be reasonable. This will make it easier for landlords to do periodic inspections to find out what's happening in the rental unit.