Delays Threaten Effectiveness of Board

Disclaimer: This article is written for informational purposes only and should not be relied upon as legal advice. In each case, specific advice should be obtained which will be responsive to the circumstances of the individual requiring it.

You've all heard the expression "Justice delayed is justice denied". While a cliché, it's true in most instances. Delays in getting to Court or having a decision rendered cause unfairness including:

- *Not having important interim decisions made that preserve the status quo*
- *Having evidence become stale as people move on or their memories fade*
- *Having issues become moot, as they resolve themselves, not always correctly*
- *Increasing prejudice to one party, such as a landlord where rent arrears mount*
- *Danger to the landlord and other tenants if dangerous and unsafe activity continues*

The Landlord and Tenant Board's predecessor, the Ontario Rental Housing Tribunal, was borne out of the civil justice review process which sought to streamline the courts and remove backlogs. It was believed that administrative tribunals could be used to resolve landlord and tenant issues in a manner that was less expensive, more accessible and faster, while not reducing fairness.

Over the last year, the "*time to hearing*" statistic has been creeping up at the Landlord and Tenant Board. It used to be that in the Toronto Region, you could get a hearing about 19 days after filing the application with the Board. Today, at the Toronto South region where the bulk of my work is, it's about 32 days based on my experience, and about 40 days when filing bulk applications. Worse than "*time to hearing*", are the "*time to order*" numbers. The former only describe the time taken from the filing of the application to the first hearing, but those numbers are deceiving as they don't take into account adjournments and multiple appearances. Time to an order can easily double if the tenant attends the hearing and asks for an adjournment, a typical tactic for delay. More often than not, the matter will not return for another month. Most adjudicators hesitate to order that rent be paid into the Board to preserve the status quo and act as security against a potential judgment. Worse, Members who do order payments into the Board rarely if ever impose remedies available to them under the *Residential Tenancies Act,* if the tenant fails to make those payments.

Conduct applications, and my practice is top-heavy with conduct claims, take the brunt of the delay, as do tenant applications. These matters are held to the end of the hearing block, rightly so, but as often as not if the matter doesn't settle on the courthouse steps, an adjournment is required. The legal aid certificate system seems designed to encourage long trials with multiple appearances. The Board's over-sensitivity about ordering costs against tenants, sends the message that delay with no downside is the answer for those wishing to remain housed.

It's ironic that Board Members are working harder than ever and doing more hearings than in the past. Yet Board Members unwittingly encourage delay and protracted proceedings by:

- *Not granting costs against those who bring frivolous claims or who don't present their case with some level of efficiency*
- *Granting just about every adjournment request by a tenant which on conduct applications, leaves a gaping hole of an hour or more that could have been used to resolve the matter, but instead goes unused*

- *Asking tenants in front of them who have entered into a consent order with the landlord "are you sure you agree to this", and "are you sure you don't want to see duty counsel". This practice which is quite common destroys large numbers of agreements negotiated in good faith, and puts complex cases back into the hearing block*
- *Taking disputes that are meant to be summary matters with simple issues, and allowing agents and counsel to turn them into inquiries unrelated to the central issues at trial*

But there are lots of factors other than adjudicative practices that produce backlogs. These include:

- *The growing knowledge among tenants of s.82, that is, their ability to raise any issue at a hearing, without notice to the landlord, that they might have otherwise raised in an application filed ahead of time.*
- *The growth of the Tenant Duty Counsel program, funded by Legal Aid Ontario, which provides advice for tenants, but not landlords, and at times, staffs three lawyers concurrently at the Toronto South office. This delays matters immeasurably, similar to the way the criminal defense bar has increased costs and delays in the Courts.*
- *The growth of the legal clinic system in Ontario, which seems to have evolved over the years from giving summary advice to a system whereby tenants get full-blown representation, generally resulting in long trials*
- *The excellent Board call centre and online documents, together with a web-savvy population of tenants, that provide information on delay and defense to landlord claims.*
- *Ontario's growing population*
- *The current recession which may evolve into a depression, resulting in high unemployment numbers. If you are unemployed, then the unemployment rate for you is 100%, and most people are just a paycheck or two from eviction.*
- *An increasingly complex statutory regime, which results in greater complexity in decision-making*
- *Decisions from the appeal courts that create windfalls for tenants who are in the know.*

Whatever its causes, the Ministry needs to put more resources into the Board both for administration and adjudication. The Board needs more hearing rooms and more adjudicators. Yet, with the recession and the government's funding freezes across the ministries, there is actually talk of a reduction in the number of members, confirmed to this writer by the Chair.

In addition to more Board Members, other solutions might include:

- *More Member training on expeditiously handling files, adjournments and interim orders for payment*
- *One central Toronto hearing location, instead of 3, in which resources could be used more effectively*
- *A motions process to resolve pre-hearing issues, directions for disclosure and perhaps for summary dismissals on motions to quash*
- *Costs imposed more frequently and even-handedly when appropriate*
- *A change to the Boards Rules regarding disclosure, so that parties come to hearings prepared and don't need to seek adjournments*
- *A legislative change to s.82, scrapping it and requiring tenants to file applications, serve and disclose prior to the hearing of the landlord's application, or at very least a requirement for notice and disclosure prior to the hearing*

- *A close examination of LAO funding, with the goal of determining if both legal clinics and the Tenant Duty Counsel program are required*

So when my brethren legal representatives send you notice of a hearing date 6 weeks off, don't shoot the messenger. The only effective course of action is to write the Premier, the Ombudsman and the Chair telling them that the current wait times and delays in the system just won't do.