Long-Term Affordable Housing Strategy Update

Proposal to Encourage Small Landlords to Provide Rental Housing

Consultation Paper Comments

1.1 Proposal: Allow landlords to pursue unpaid utility arrears at the Landlord and Tenant Board (LTB) during a tenancy

LSHC recently surveyed small landlords in Ontario to provide quantitative data to inform our response. The survey results indicate that 77**%** of respondent landlords require their tenant to pay the cost of one or more utilities such as gas, electricity and/or water separately. In addition to these traditional utilities, survey respondents identified many other charges tenants are often responsible for, such as hot water tank rental, garbage tags required by municipalities, sewer, cable, internet and telephone.

Survey respondents were asked how tenants are required to pay for these separate utility costs:

- 80% of survey respondents indicate the tenant is required to arrange an account with a utility provider.

  18% of these respondents indicate they had been told by a tenant they were unable to set up an account with the utility provider. Many cited the large deposit required by some utility providers as a reason which often defaults back to the landlord's name.
- 11% of survey respondents indicate the landlord pays the cost of utilities and the tenant reimburses the landlord amounts as billed.
- 9% of the remaining survey respondents fall into the "other" category which is comprised of a variety of hybrid payment arrangements.

37% of survey respondents who indicated their arrangement requires the tenant to pay the cost of utilities directly to the landlord indicated they had difficulty collecting from tenants.

Survey respondents provided the following examples of their utility arrangements with tenants:

- The tenants were required by the Rental Agreement to reimburse the utilities costs as billed. They never did
- The tenant arranges their own accounts except water. We have to collect separately from the tenant. Town won't bill to tenants anymore
- The tenant must arrange with the utility provider, except for water, tenant reimburses me
- Heat and electricity are in name of main floor tenant. Basement tenant pays him
- Tenant pays heat and electricity with provider. Water bill is in landlord's name and passed to tenant
- I take with the monthly rent an amount approximately equal to the tenant's share of the utilities and we square off twice a year. I got tired of chasing a tenant who had moved on for the utilities....
- Hydro + Water tenant arrange with utility, Gas paid by the landlord and tenant reimburse landlord.

1. *Should landlords be allowed to seek remedies for unpaid utility arrears at the LTB?*

Unpaid utilities are a common problem for small landlords, whether the tenant is required to establish an account with a utility provider or reimburse the landlord their apportioned share of utilities. Landlords face a challenge in finding a forum to address the issue of unpaid utilities when they are to be paid separately from rent. Any residential tenancy agreement requiring the tenant to pay for utilities separately from the rent therefore includes the possibility of non-payment without any remedy for the landlord.

LSHC's survey of small landlords asked "*Do you think the Residential Tenancies Act should be changed to allow landlords to make an application to the LTB when a tenant fails to pay their utilities as they can do when the tenant fails to pay the rent?*"

97% of survey respondents replied "yes".

The root of the problem is the Board's Interpretation Guideline 11,[1] which currently provides:

> In the case of a building containing not more than six rental units where the landlord supplies a utility to each of the rental units in the building, the tenancy agreement may require the tenant to reimburse the landlord for a portion of the cost of the utility in accordance with rules made under Ontario Regulation 394/10. In any such case, the utility is not considered a service that falls within the definition of "rent".
>
> The landlord cannot include amounts for which the tenant fails to reimburse the landlord for the utility charge in an application for the payment of rent arrears or in an application for termination of the tenancy and eviction of the tenant based on the tenant's failure to pay the utility charge.
>
> Therefore, any unpaid amounts for utilities will not be included in the calculation of arrears of rent, although they may be a debt owing to the landlord that may be recovered by the landlord in the courts. [*Emphasis added*]

This portion of Guideline 11 seems to attempt to reflect section 138 of the Act and sections 13-15 of O. Reg. 394/10 (Suite Meters and Apportionment of Utility Costs). Section 138(1) provides that for a building containing not more than six rental units, utilities may be charged by the landlord on the basis of apportionment between the units, with the **written consent of the tenant** and on certain other conditions. Section 138(2) states that such apportioned utility costs are not to be considered rent. When read in combination, these sections are awkward and seem to contradict each other.

However, the wording of Guideline 11 is not consistent with how rent is defined by the Act:

> "rent" includes the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord or the landlord's agent for the right to occupy a rental unit and for any services and facilities and any privilege, accommodation or thing that the landlord provides for the tenant in respect of the occupancy of the rental unit, whether or not a separate charge is made for services and facilities or for the privilege, accommodation or thing… [*Emphasis added*]

[1] http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/11%20-%20Eviction%20for%20Failure%20to%20Pay%20Rent.html

The term “services and facilities” is defined by the Act as follows:

> “services and facilities” includes … (m) utilities and related services …

Those two definitions read together clearly define rent to include utilities, whether or not charged separately, and to therefore give exclusive jurisdiction to the Board over such charges.

Policy-wise, this makes sense – there is no rational basis for making a distinction between charges for utilities that are embedded in rent and those that are paid separately to the landlord based on actual use. They are equally charges related to the provision of the rental unit.

Furthermore, courts have held that utilities constitute “rent” whether they charged back by the landlord to the tenant or paid directly by the tenant in their own name to the utility:[2]

> 38. The fact that the parties informally agreed that the tenants were to pay the utilities directly to Kitchener Utilities is of no legal significance. The landlord simply directed that those payments be paid to Kitchener Utilities instead of to her directly, and accepted that such payments would satisfy the tenants’ obligation to pay the utilities to her pursuant to the lease. By doing so she appointed the tenants as her agents to make such payments. The Tribunal itself has acknowledged that rent is not always payable personally by the tenant to the landlord: see *Parkway Realty Ltd. v. Jani*, [2000] O.R.H.T.D. No. 46 at para. 26.
>
> …
>
> 66. … (b) That definition [of rent] in s. 2 catches hydro regardless of whether it is payable directly by the tenant to the utility company. Failure to pay is a failure to pay consideration due under the lease and gives the landlord a common law cause of action for breach of contract …

However, based on their interpretation of Guideline 11, administrative staff at the LTB routinely turn away landlord applications seeking payment of the portion of rent involving unpaid utilities without allowing the Board to make a proper determination of whether the particular utilities in question are in fact rent. This thereby deprives landlords of their right to recover unpaid utilities before Board. A court has found:[3]

> 39. … Taking that Interpretation Guideline at face value, it is inconsistent with the actual practice of the staff of the Landlord and Tenant Board. The practice that appears from the evidence in this case, and in others I have heard, is to reject applications in which amounts for hydro are claimed as part of the rental arrears alleged.

Meanwhile, landlords who seek recourse in Small Claims Court are again stymied. Several well-reasoned decisions of civil courts have thrown out landlord actions against tenants for non-included utilities, concluding that such charges fall within the exclusive jurisdiction of the Board pursuant to the definition of “rent” and section 168(2) of the Act which gives the Board exclusive jurisdiction with respect to all matters covered by the Act.

Landlords are therefore left without any remedy. Since the definition of “rent” in the RTA includes utilities, the Board is failing to fulfil its mandate to provide a forum to resolve disputes of matters that fall under the RTA. Meanwhile, every unscrupulous tenant in Ontario has been effectively provided a means to avoid reimbursing their landlord for utilities.

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[2] *Luu v O’Sullivan*, 2012 CanLII 98396 (ON SCSM) (Winny J.)

[3] *Luu v O’Sullivan*, adoping comments made in *Settle v. Punnett*.

As stated in the *Luu* decision:

> 41. … it defies common sense to suppose that the legislature intended a situation where a simple claim for arrears of rent for a given period of time would require two separate proceedings: an application to the Landlord and Tenant Board for arrears of base rent, and an action in the Small Claims Court for arrears of the utilities component of that same rent for that same period of time.
> …
> 57. … there is no aspect to this problem which could not be addressed by amendment to the RTA or its regulations.

Guideline 11 clearly needs to be amended to effect the intention of the Act, along with a clear example of how the exemptions described in sections 13 (1) 3 and 15 (1) 3 of Regulation 394/10 (apportionments pre-existing as of January 1st, 2011) might work. In an amended Guideline 11, guidance should also be given as to how to claim unpaid utilities on an N4 termination notice so that landlords can effectively seek a remedy for unpaid utilities which they are entitled to by law.

Further caselaw on the topic:

- *Spirleanu v. Transglobe Property Management Service Ltd*., 2015 ONCA 187 (CanLII) (Court of Appeal) - http://canlii.ca/t/gqgqr
- *Mackie v. Toronto (City)*, [2010] O.J. No. 2852 (S.C.J.), Perell J. - http://canlii.ca/t/2bf5v
    - Sets out test for determining whether a matter falls within jurisdiction of the Board. Repair claims fell within jurisdiction of the Board.
- Efrach v. Cherishome Living, 2015 ONSC 472 - http://canlii.ca/t/gg2dv
    - Applied *Mackie* test. Found that a dispute regarding a landlord leaving a door unlocked was within the exclusive jurisdiction of LTB.
- *Luu v O'Sullivan*, 2012 CanLII 98396 (ON SCSM) (Winny J.) - http://canlii.ca/t/g0pzq
    - Tenant obligated to pay utilities, but it was not clear whether tenant was to be register for utilities in their own name or reimburse landlord. LTB staff refused to accept landlord's application. Court strongly criticized guideline 11 (para. 39). *Held*: plaintiff's claim for arrears of utilities falls within the exclusive jurisdiction of the Landlord and Tenant Board (para. 43).
- *Campbell v Macdonald*, 2015 Small Claims Court (Marshall J.) http://canlii.ca/t/gn7bs
    - Review of case law on issue of jurisdiction of court versus LTB.
- *Finney v Cepovski*, 2015 CanLII 48918 (ON SCSM) (Winny J.) - http://canlii.ca/t/gkl15
    - "In my view the board had jurisdiction over the claim for unpaid utilities." (para. 12)

2. *If yes, what remedies should be available to landlords (e.g. repayment of utility arrears, termination of tenancy?)*

Since utilities are "rent", the provisions in the RTA for utility arrears should be identical to the remedies available for rent arrears and include remedies for repayment and termination of the tenancy. The N4 termination notice should be revised to include a separate section for unpaid utilities which can then be added to unpaid rental arrears (or claimed as standalone unpaid

rent). With minor modifications, the same L1 application could be brought, and a hearing held to determine the remedies related to utilities and/or rent arrears. The exact same payment timelines and general process as for any other arrears should be followed by the Board.

3. *In seeking repayment of utility arrears, should the landlord be compensated for other utility charges (e.g. service fees, connection fees, late payment interest, infrastructure charges, etc.)*

Yes. The landlord should not be penalized for the tenant's failure to pay. It makes sense that all of the fees related to a utility account would be the responsibility of the tenant and not the landlord. The tenant's failure to comply with his/her obligation to pay these utility charges should not become an additional expense for the landlord.

Just as the landlord may file for charges related to NSF fees on an L1/L2 application (Section 87 (5)), the landlord should be able to file for costs incurred as a result of the tenant's contractual breach related to the utility portion of rent – typically these include deposit amounts, connection or reconnection fees, utility account late payments, and payments made in order to reinstate a discontinued service (to enable the landlord to re-rent, prevent the pipes from freezing etc.).

The Board should apply a "but for" test – any cost or expense that would not have been incurred *but for* the tenant's non-payment of utilities should be recoverable at the Board.

As stated above, landlords who incur such fees and penalties late or post-tenancy will typically be faced with no remedy in Small Claims Court due to the LTB's exclusive jurisdiction. Indeed, the issue is not whether such costs are recoverable by the landlord, but rather providing a proper forum and means to recover those costs.

The survey asked respondents to share their experiences respecting the tenant's obligation to make utility payments during a tenancy and the following feedback was provided:

- Since the water bill cannot be put in the tenant's name, lots of the tenants end up leaving an unpaid bill at the end of the tenancy.
- dispute in their usage and portion of bill payment
- They never even tried to set up an account. Instead they reported the landlord to Investigation and Enforcement Unit of LTB claimed the Landlord cut off the "vital services". The I.E.U. officer stated that is all right for the tenant to give false and misleading information and his duty is just to make sure the tenants are supplied with utilities.
- Regularly lose last payment for water bill $250 - $350. Filing Fee $170 to try to collect the uncollectable. Why bother?!
- Tenants misuse hydro and water and few months later take off and go elsewhere.
- When tenants abandon their units, not only is the landlord responsible for unpaid rents, huge clean-up costs, LTB costs if any, they are also burdened with utility payments between tenants.
- I do however conside[r] the extra charge the water and sewer utility charges the tenant for the extra bill to be excessive.
- We state in our lease that the utility must be set up before the tenant receives a key to the property without confirmation from the utility the lease is null and void.

- My understanding is that a landlord could use something as the non-payment may cause financial strain on landlord and/or may impact services to other tenants
- I charge all in, I just assume there will be abuse.
- The challenge is with multi-units on one met[er] and splitting the cost between tenants.
- I found out my main floor tenant was running a catering business out of the unit and had 2 extra fridges on back porch in the sun!!! Cost a fortune in hydro.
- In my experience, a landlord CAN collect unpaid utility costs when a tenant fails to honour the obligation within the lease to set up a utility account and pay for usage.
- Water gets charged to owners property tax in Hamilton if unpaid.
- Tenant was in default with utility company and I was contacted by the municipality for the amounts owing. Thankfully the balance owing was paid by the tenant without needing to pay or take legal action.
- I had a tenant who moved prior to the end of his lease and informed the utilities. The utility bills were then charged to us. Apparently the lease arrangement is not honoured. The utility companies simply went ahead and switched the account to us on the phone call from the tenant.
- When it's included in the rent, their usages are too high to pay the bills.
- Even when tenants set up their own account with a utilities company, some companies simply charge landlords if tenants stop paying bills. This can happen at any time but is likely more common when tenants don't pay a final bill.
- No challenges. But RTA should allow collection of utilities, just like it does for rent.
- If tenant fails to pay water city adds the amount to the tax bill I have argued this as it has been over $1000 at one point as the city did not even collect the account deposit (I did recoup a little over half the amount eventually).
- Most of our tenants must pay for their utilities. We have one building that has only one water meter for the entire building. We find that some tenants waste so we have to factor this into the rent amounts. In the past we had tenants who made arrangements for us to keep the utilities in our name until they could save enough to pay the deposit. Of course they never did and we had to keep the accounts in our name & according to council could not shut off their utilities when they didn't pay us. In some cases we would have to actively try to collect the payments that we did not lose money. Now we never keep utilities in our name and tenants don't get the keys until we have proof that they have the account in their name. Of course tenants can take the account out of their name whenever they want, according to the utility companies so again we set rents to help offset any potential losses. Currently I have a tenant who may have their utilities turned off soon. We are concerned about freezing of pipes but we don't want to put the utilities in our name since we will probably not be paid. Also we have been advised that if we do, then we can't turn them off once the warm weather comes and we cannot collect any utility cost if we aren't paid by them. We may be taking legal action due to other infractions but I will be adding in the issues of non payment of utilities if it comes to it.
- The utilities company has threatened to turn off the water to both units when one unit hasn't paid.
- I take good care of our buildings and tenants. I have been quite lucky with my tenants and their understanding of the agreement.
- late payment but finally paid
- The challenge is not complaining because the tenants are careless with utilities. They don't pay, so there is no conservation.
- Have been left to pay for the tenant's share 2 or 3 times then implemented a sharing arrangement.
- This payment is usually the last to get paid out of all bills. Huge headache. Also need two separate cheques per month, one for rent and one for utilities.

- We wrote the following clause into our lease, to cover utility costs in a way the tenant felt comfortable with. However, the tenant now says the monthly amount we agreed on is too high, so she does not make her utility payments. As the landlord, I pay the utility bills for our 3 units which are not separately metered. Here is what is written into our lease: Lessee agrees to pay a maximum of $150/month for utilities (Electricity, Gas, Water, Sewer.) This $150 will be included in the Lessee's monthly rent payment which will total $1239 ($1089 for rental of the furnished unit + $150 for utilities.) The landlord shall provide to the Tenants a copy of each utility bill upon receiving and at the end of the term of this agreement, said utility bills will be used to calculate the total yearly cost of utilities. If the Tenants have paid more than their proportionate share of the utility expenses, the Landlord will refund the Tenants the difference. In the event the Tenants have paid less than their proportionate share of utilities, the Landlord will not require the Tenants to pay the difference. This cap on utilities will be in effect for only one year. As this is a new rental property, the Landlord cannot provide the Tenants an accurate estimate of annual utility costs. After one year, when actual utility costs are known, if the Tenants opt to renew this lease, this arrangement with the cap will no longer be in effect. Tenants' proportionate share of the total cost of utilities will be thus calculated: -Months during which no apartment on the premises other than the third floor apartment is leased out: 60% of the total bills. -Months during which one other apartment on the premises is leased out: 40% of the total bills. -Months during which all three apartments on the premises are leased out: 27% of the total bills.
- Utility take more and more portion of rent.because utility goes up very much and will goes up. LTB should deal with it.
- That's why I include them in the rent-although they then don't care about how much they use.....
- Non-payment has resulted in re-routing of payment back to me.
- At this point, if the tenants cannot get utilities, you MUST include it in the rent amount. Charge more if need be, but keep the amount constant and claim it as rent. It's the only way (at present) to get any leverage on the scammers.
- Most of my tenants don't see utilities as their responsibility. Payment is always late, and often skipped entirely for several months. We send an N5, and this helps, but I have never been to Tribunal over unpaid utility.
- $800 bill to repair hot water tank because rental agreement had not been signed.
- Tenants cancel their personal account and the utility starts billing landlord without notice. "its not their responsibility to verify if the tenant has moved"
- My tenant did not want to pay utility cost closer to the end of tenancy. Even if tenancy board was helping, they would not do it after the tenancy termination.
- Have had none. But one tenant's hydro account is in his mother's name, so I have an "always seal" order on that unit in case the mother closes her account, in which case I could be liable for the hydro bills while the tenant continued to live there.
- Electricity cut off due to non-payment... or a load limiter installed outside of building for limited electricity use in winter.
- Most of our tenants pay directly to the utility except the occasional bill which they pay directly to us. We have more than 100 tenants (we are property managers) Only one has difficulty paying a water bill. Usually we include the water bill in the rent as this is a difficult one.
- I haven't had any issues with regards to tenants and utility companies

These comments reflect many of the difficulties landlords face in dealing with unpaid utilities, and show that many landlords resort to including utilities in rent to avoid these problems. Unfortunately, including utilities in rent encourages wasteful and unnecessary usage (which runs counter to the province's goals of energy conservation and reducing greenhouse gas emissions), drives up rent for all tenants (thereby reducing affordability), and discourages

renting out properties where the owner is not comfortable taking on the risk of paying unpredictable utility bills when they have no control over usage (and cannot recoup costs through rent increases that do not reflect rising utility costs). Even where utilities are not included in rent, landlords often increase rent in anticipation of tenants who won't fully pay their utilities (at the expense of those who do).

This anomaly can be expected to have an even greater impact in the future as the cost of utilities (especially electricity) escalate in the province and become a larger and larger proportion of total rental costs.

1.2 Proposal: Explore whether to allow landlords to pursue certain issues (e.g., rental arrears, utility arrears, damage) at the LTB for up to 12 months after a tenancy has ended

4. Should landlords be allowed to apply to the LTB after a tenancy has ended?

Tenants are permitted to file applications with the Board up to one year after vacating the rental unit for things such as maintenance, bad faith notice, harassment, etc. A landlord's right to file an application at the Board ends when the tenant is no longer in possession of the rental unit, even if notices of termination have been served while the tenant was in possession.

Landlords would benefit and the system could be simplified if landlords could file with the Board for issues such as rent, utilities and damage for that same one year period rather than using the more costly and time-consuming Small Claims Court process to pursue for monies owing.

LSHC published an online survey and invited small landlords to participate and share their views on many of the topics open for discussion in this consultation. According to LSHC's online poll, 96.95% of respondents support changes that would allow landlords to file an application with the Landlord and Tenant Board up to 12 months after a rental unit is vacated.

If yes, for what issues should landlords be allowed to apply?

LSHC's online survey asked:
What applications should landlords be allowed to file with the LTB during these 12 months?
and the survey provided the following multiple choice options for responses:

- Arrears of rent 98.45%
- Arrears of utilities 93.48%
- Damages 98.45%

The survey also permitted respondents to share their comments. The following is a sample of the 49 comments which were received:

- What's considered fair for one should be fair for the other side.
- garbage left on the site.
- Alternatively, both parties move to SCC which hopefully is less biased towards the tenant, and also where contract law is more respected. Further, I've had no success with skip trace agencies.
- For anything wrong that tenant did. Anything that is opposite of what was signed in the lease.
- harrassment of landlord and other tenants
- Removal of garbage & junk furniture etc.

- theft.
- punitive damages
- any default specified in the lease in addition to the LTB clauses
- advertising
- service calls re tenant misadventure eg "lost my keys!"
- application and sheriff fee
- All financial claims.
- Long term affect that the tenancy has caused but wasn't surfaced on the move out date
- any expense caused by tenant, such as tenant does not cleanning premius, does not remove garabage, Landlord has spent money to do the work.
- cleaning of unreasonably dirty vacated unit; cost of disposal of bulky personal items left behind
- If a tenant does not provide a 60-day notice.
- simplify making claims for "damages"
- Costs/Inspections - for cleaners, to get rid of flees, etc, smells (smoke, pet urine, etc)
- Any issues within LTB's jurisdiction
- Costs and interest incurred by landlord
- Other legitamite recourse tenants liable
- I would like to also add that the costs associated with filing should be THE SAME for both the landlord and the tenant
- anything that caused material loss
- Late payment fees, interest on unpaid balance
- Costs associated with removing items the tenant deliberately left behind
- Upgrades, utility expenses, renovations and number of people in the unit.
- Costs of evictions; Any other costs incurred by tenant.
- None - LTB supercedes contract law sometime and usually inequitably. We would be better off in small claims is the rental contract would be treated as a contract.
- no choice for small landlord, LTB is always give favor to the tenants and have one sided decision.
- willfull harrasment of a landlord yes it does happen
- Tenants should not be allowed to file after they vacate.
- Any loss that can be directly attributable to the tenant, which was caused through negligence, carelessness or deliberate intent.
- Especially for damages when they bring in pets that they were not allowed to do. They laugh in your face and say ha ha nothing you can do. It's not responsible of them especially when the landlord has worked with other tenants, good decent tenants, who have been honest and up front about pets. It gives these tenants a bad name when you have a tenant who flaunts the rules and does not care. What about the neighbours who do not wish to have so many pets next to them and what happens to the pets when they these so called tenants decide they have had enough or move on and don't take the pet or let it loose? Actually the landlord should be immediately allowed to ask for a damage deposit.
- removal of personal property, garbage and recycling charges
- LTB fees such as Sheriff; administrative fees for chasing tenants during the eviction process
- Utities are 90% of losses
- Anything that the tenant can file about.

5. There may be barriers that limit the effectiveness of post-tenancy applications (e.g., serving a notice to a former tenant who has not left any contact information, ensuring former tenant participation at hearings, enforcing orders). How can these obstacles be addressed?

Unpaid rent, unpaid utilities and/or damage to the rental unit are routinely written off by small landlords for two reasons: either they do not know the tenant's new residential address, or the likelihood of successfully recovering the monies owing is very low. The option of filing with the LTB to recover monies owing would most likely be used by small landlords in situations to

counter applications filed by a former tenant. In a scenario such as this, the landlord would become aware of the former tenant's address upon receipt of the former tenant's application.

LSHC polled small landlords with the following question:
When a tenant vacates the rental unit, the landlord often does not know where they have moved. In order to file a claim or application, the landlord is required to determine the former tenant's address for the purpose of serving documents. Would you be willing to pursue the tenant and hire a Skip Trace Agency (ex. investigator) to determine this information?

The results indicated that a majority of survey respondents, 77.24%, would hire a skip trace agency to help locate the former tenant for the purpose of serving a claim or application.

In order to not deprive landlords of their rights, landlords should be permitted to commence applications within the one year period even if they have not yet been able to locate a former tenant.

1.3 Proposal: Allow landlords to apply to the LTB to resolve landlord-tenant disputes without seeking to terminate the tenancy

The government's proposal to allow landlords to apply to the LTB to resolve landlord-tenant issues, without serving a termination notice, does not seem to offer significant benefit to the small landlord community, particularly since the proposal will not include the termination of tenancies or the payment of money.

The majority of small landlords can access community-based mediation and alternative dispute resolution services through community organizations and service providers. LSHC respectfully suggests that these services would better meet the needs of both landlords and tenants by providing a forum which allows the landlord to address issues such as hoarding or disturbing neighbours prior to issuing a notice of termination.

Further, since many small landlords have day jobs, they may have difficulty attending the LTB during regular business hours for the mediation services proposed. In addition, small landlords tend to resist involving the LTB in tenancy matters until absolutely necessary as they are intimidated by this official forum.

2.1 Proposal: Require tenants to disclose any issues that they intend to raise at rental arrears eviction hearings to the landlord prior to the hearing.

A respondent, landlord or tenant, should have a right to be aware of the case against them before they arrive at a hearing, particularly with the tenant's right to raise section 82 issues at a rent hearing. Trial by ambush is not a facet of our judicial system and it should not be a part of the Board's practice.

8. *Do you think this proposal will reduce any undue delays at LTB hearings?*

It is a fundamental tenet of natural justice and fairness that parties know the case they have to meet before the case is heard. LSHC believes the proposal will reduce delays caused by adjournments caused by tenants raising issues on the day of the hearing.

With the current no-disclosure system, landlords can have the matter adjourned while the arrears mount or proceed and try to respond effectively to issues raised at the eleventh hour (if they even have the chance to proceed, which usually they do not since these issues are generally raised at arrears applications which the Board schedules for a full five minutes along with dozens of other files on "arrears day" at the Board). This change would certainly reduce the number of adjournments granted.

9. *How long before a hearing should a tenant be required to disclose issues they plan to raise at the hearing?*

Currently, the Board makes sure that there are at least 10 days between the service of the application (allowing 5 days for mailing as the Board now mails out all the applications) and the hearing. However, in practice, hearings are generally scheduled 3 to 4 weeks after the tenant receives the application.

Tenants should be required to provide both the Board and the landlord with a detailed list of section 82 issues that they intend to raise at least five days prior to the hearing.

10. *With respect to this proposal, are there any other considerations to ensure that tenants continue to have fair access to justice?*

This proposal does not in any way undermine tenants' fair access to justice. It merely provides the landlord with a fundamental right to procedural fairness by preventing a trial by ambush and giving the landlord the ability to know and prepare for the case against them. The proposal does not abrogate a tenant's rights or access to justice in any way – tenants can continue to raise their issues at landlord's application hearings (in addition to their right to commence their own applications).

Tenants are already informed of their right to raise what they believe to be relevant matters at rental arrears eviction hearings. For example, page 7 of the "Important Information About Your Hearing" brochure (which every tenant would receive from the Board in their Notice of Hearing package) states:

> **Tenant can raise other issues on an application involving arrears of rent**
>
> If the landlord files either:
> • an Application to Terminate the Tenancy for Non-Payment of Rent (Form L1), or
> • an Application for Arrears of Rent (Form L9)
> the tenant can raise issues at the hearing that they could have raised had they filed their own application - such as maintenance concerns, illegal charges, etc.

For more information on this topic, see the separate brochure on Issues a Tenant Can Raise at a hearing for a Landlord's Application for Nonpayment of Rent (Form L1 or L9). A copy of this brochure is available from the Board.

Furthermore, even though the "Issues a Tenant Can Raise at a Hearing…" brochure provides information to both landlords and tenants on how to prepare for a hearing, landlords are disproportionately prejudiced by the necessity of preparing for all possible arguments by the tenant, whereas the tenant merely has to disclose evidence about specific matters they wish to raise during the hearing, see: *TSL-62983-15 (Re)*, 2016 CanLII 12084 (ON LTB) - http://canlii.ca/t/gnpbx.

2.2 Proposal: Clarify that only motions that indicate the full amount was paid will be accepted and treated as a "stay" of the eviction order.

11. Do you have any comments on this proposal?

Currently, a tenant can bring a motion to void a Board order for payment and termination by filing the motion supported only by an affidavit sworn by the tenant (with no supporting material) stating that all arrears and costs have been paid to the landlord, and the Board will then issue an order voiding the order. If the landlord disputes this, the landlord must bring a motion to the Board to reinstate the order. Tenants can say as little as "I paid" in their motion and the matter will be set down for a hearing.

The tenant's affidavit should be required to refer to the amount of the payments made, the dates they were made, a confirmation that no payments (if uncertified) were returned by the bank as NSF, stop payment, etc., and proof of payment should be required to be attached (i.e. copies of money orders, receipts, evidence of on-line payments etc.). These statements should be within the affidavit and not simply unsworn statements.

Otherwise, motions to void and set aside motions are easily abused delay mechanisms that cost unscrupulous tenants nothing and waste the Board's time and resources.

LSHC suggests that an even more effective solution would be to require the tenant to pay the arrears and costs into the Board to void the order, as currently permitted by subsection 74(11). The Board accepts cash, certified cheque, money order, credit cards and debit cards.

The proposal should also extend to set aside motions where a tenant who has failed to comply with a payment plan receives a termination order pursuant to a landlord's L4 application.

2.3 Proposal: Explore whether any changes should be made to the process for appealing decisions of the Landlord and Tenant Board to the Divisional Court

Every Ontario landlord faces the risk of a tenant defaulting in the payment of rent and potentially having to navigate the process of a Landlord and Tenant Board decision being appealed to the Divisional Court. For small landlords who rent one or two units, the prospect of an appeal to Divisional Court could put them in a difficult or untenable financial position.

Many small landlords mistakenly believe that obtaining an order from the LTB signals the end of the case. However, for some this heralds the beginning of a nightmare if the tenant opts to appeal an order made by the Landlord and Tenant Board. If the LTB decision is stayed, the tenant is able to remain in possession of the premises pending the outcome. During this time the tenant is not required to pay the rent owing or the rent that becomes due. The landlord will endure the appeal process that could last six months or longer and require the assistance of lawyer which means additional costs. Landlord's Self-Help Centre believes that changing the rules for appeal will positively impact all Ontario landlords and provide the mechanism required to stem the abuse of the automatic right of appeal.

12. What information do you have available or are you aware of with respect to the scope of the concern that has been raised, including the number of tenants involved and the number of landlords impacted annually?

Filing an appeal of a Landlord and Tenant Board order with the Divisional Court will prolong the amount of time a tenant can stay in the rental unit without paying rent. Section 210 of the *Residential Tenancies Act, 2006*, (RTA) provides an automatic right to appeal decisions of the Landlord and Tenant Board to the Divisional Court on questions of law. According to subsection 25(1) of the Statutory Powers and Procedure Act and Rule 63 of the Rules of Civil Procedure, any provision of the Landlord and Tenant Board order that requires payment of money and/or evicts a person is stayed until the disposition of the appeal.

Justice Ted Matlow released the following reasons in his decision of Hitti v. D'Amico heard on July 26, 2012 in Toronto. The purposeful language used by Justice Matlow clearly reflects his frustration with the abuse of the legal process as he calls on the Government, the Landlord and Tenant Board and the Court to address the situation:

[1] My recent experience sitting as a single judge of this Court to hear motions has convinced me that there is a growing practice by unscrupulous residential tenants to manipulate the law improperly, and often dishonestly, to enable them to remain in their rented premises for long periods of time without having to pay rent to their landlords. It is practice that imposes an unfair hardship on landlords and reflects badly on the civil justice system in Ontario. It calls for the Government, the Landlord and Tenant Board and this Court to respond.

[2] I have chosen this case, which is one of many similar cases that came before me during a five-day period hearing motions, as an example of the problem that I describe. I could easily have chosen many others.

[3] The motion before me was brought by the landlord to dismiss the appeal of the tenant, Hitti, (the "tenant"), the sole appellant, from an order of the Board made on March 16, 2012, which finally permitted the landlord to enforce the eviction of the tenant and his co-tenants who had not paid any rent right from the start of the term of their lease on October 11,

2011, to the present. The agreed rent pursuant to the lease was $3,600 per month and, at the time of the motion before me, the tenants remained in occupation of the rented premises and were in arrears of rent of approximately $25,000.

[4] There is no better way to describe the background of this case, including the impact that it has had on the landlord, than in the words of the landlord herself in her affidavit in support of this motion. Her affidavit, as copied, reads as follows… see http://canlii.ca/en/on/onscdc/doc/2012/2012onsc4467/2012onsc4467.html

The news media regularly reports on flagrant abuses of the residential tenancy termination process and monitors the legal antics of Nina Willis, also known as Nay Lancelot. However, there are many other individuals who have appealed Landlord and Tenant Board decisions others as illustrated in the list of cases below:

CITATION: Lingbaoah v. Abagi, 2016 ONSC 3474
DIVISIONAL COURT FILE NO: 121/16
LTB FILE NO.: TSL-68528-15
DATE: 20160524
https://www.canlii.org/en/on/onscdc/doc/2016/2016onsc3474/2016onsc3474.html?autocompleteStr=Lingbaoah%20v.%20Abagi%2C%202016%20ONSC%203474&autocompletePos=1

Motion by landlord to quash tenant's appeal. Tenant did not pay rent aside from the first & last month upon moving in. Tenant is in arrears and failed to attend the Landlord and Tenant Board hearing. The landlord contacted the Court Enforcement Office to enforce the eviction order; however the tenant commenced an appeal and obtained an automatic stay. The tenant's appeal was found without merit.

CITATION: D'Amico v. Hitti, 2012 ONSC 4467
DIVISIONAL COURT FILE NO: 130/12
DATE: 20120802
https://www.canlii.org/en/on/onscdc/doc/2012/2012onsc4467/2012onsc4467.html?autocompleteStr=%20D%E2%80%99Amico%20v.%20Hitti%2C%202012%20ONSC%204467&autocompletePos=1

Tenants refused to pay rent. Landlord filed and withdrew the application once the tenants provided a cheque. Cheque was found to be dishonoured prompting the landlord to file a second application. The Board awarded an eviction order and costs. A second cheque given by the tenant was also dishonoured due to insufficient funds. The tenant failed to pay the amount required by the Board order and did not vacate the rental unit. The tenant appealed the Board's decision; costs were awarded to the landlord.

CITATION: Regan v. Latimer, 2016 ONSC 4132
DIVISIONAL COURT FILE NO: 231/16
DATE: 20160622
https://www.canlii.org/en/on/onscdc/doc/2016/2016onsc4132/2016onsc4132.html?resultIndex=1

The landlord is asking for the tenant's appeal to be quashed. The tenant has not paid rent since moving into the rental unit. The tenant later brings up issues involving claims that the landlord failed to comply with their maintenance obligations as outlined in section 20 of the RTA. The landlord's motion to quash was allowed.

CITATION: Eldebron Holdings Limited v. Mason, 2016 ONSC 2544
DIVISIONAL COURT FILE NO: 47/16
LTB FILE NO: TSL-68712-15
DATE: 20160414
https://www.canlii.org/en/on/onscdc/doc/2016/2016onsc2544/2016onsc2544.html?resultIndex=1

The landlord is asking for the appeal to be quashed and stay to be lifted. The tenant has been in arrears since the second month of the tenancy. The landlord filed an application to evict the tenant for non-payment of rent and to collect rent the tenant owes. Both parties agree with the claims and the landlord is awarded a Board order. The landlord is instructed to contact the Court Enforcement Office if the unit is not vacated according to the date on the order. The tenant does not comply with the order and initiated an appeal to prevent landlord from proceeding with eviction. The landlord's motion is allowed.

CITATION: Arsenault v. Thevathurai, 2015 ONSC 5357
DIVISIONAL COURT FILE NO: 15-DC-2110
DATE: 20150825
https://www.canlii.org/en/on/onscdc/doc/2015/2015onsc5357/2015onsc5357.html?resultIndex=1

The Board has ordered for the tenant to be evicted, and the tenant is appealing this decision. The landlord relied on the case "National Life Assurance Company of Canada v. McCoubrey, 1926 CanLii 73 SCC" which sets out the test to be applied on a motion to quash.

CITATION: Soloman v. Levy, 2015 ONSC 2556
DIVISIONAL COURT FILE NO: DC-00764-00
DATE: 20150417
https://www.canlii.org/en/on/onscdc/doc/2015/2015onsc2556/2015onsc2556.html?autocompleteStr=2015%20ONSC%202556&autocompletePos=1

The landlord is seeking an order to quash the tenant's appeal and lift the stay. The tenant has continued to refuse to pay rent and did not vacate the unit. The Board ordered the tenant to pay the rent owing to void the termination order. Instead the tenant proceeded with an appeal.

CITATION: Lomico 188 Inc. v. Mouritsen, 2014 ONSC 2442
DIVISIONAL COURT FILE NO: 541/13
DATE: 20140417
https://www.canlii.org/en/on/onscdc/doc/2014/2014onsc2442/2014onsc2442.html?resultIndex=1

The Board had made an order for the tenancy to be terminated and the tenant was ordered to pay arrears, to which the tenants appealed. The appeal was quashed which negated the automatic stay of the Board's order.

CITATION: Lau v. Liu, 2011 ONSC 5433
DIVISIONAL COURT FILE NO: 331/11
DATE: 20110915
https://www.canlii.org/en/on/onscdc/doc/2011/2011onsc5433/2011onsc5433.html?resultIndex=1

The landlord wants to quash the tenant's appeal. The Board terminated the tenancy based on non-payment of rent. The tenant filed an appeal claiming harassment by the landlord. The ground of appeal was found to have no merit.

CITATION: Houle v. Hayes, 2010 ONSC 924
DIVISIONAL COURT FILE NO: DC09-00089-00
DATE: 20100218
https://www.canlii.org/en/on/onscdc/doc/2010/2010onsc924/2010onsc924.html?resultIndex=1

The landlord is asking for the tenant's appeal to be quashed since it does not include a question of law. The tenants were ordered to pay rent owing to the landlord. The tenant filed an appeal to divisional court after their request to review an order was denied. The appeal was quashed and the automatic stay of eviction order was lifted.

CITATION: Falconer v. Manufacturers Life Insurance Company, 2008 CanLii 9368 (ON SCDC)
DIVISIONAL COURT FILE NO: 59/08
DATE: 20080307
https://www.canlii.org/en/on/onscdc/doc/2008/2008canlii9368/2008canlii9368.html?resultIndex=1

The landlord wants to quash the tenant's appeal and lift the certificate of stay. The tenant brought a cheque to void the non-payment of rent order; however the cheque was linked to a closed account and was dishonoured. The tenant brought an appeal to void the eviction order from the Board. The landlord's motion to quash was granted.

The SJTO (Social Justice Tribunals of Ontario) Annual Report for 2012-13 indicates that a total of 151 Notices of Appeal were received for LTB orders. LSHC has obtained while attending a consultation meeting with the Ministry of Municipal Affairs and Housing which indicated a total of 83 LTB orders were appealed to Divisional Court in 2013-14. The disposition of the cases appealed is as follows:

- 5 cases were abandoned;
- 51 cases were dismissed [no data regarding the type of case (arrears) and who was the appellant (landlord or tenant); and
- 3 cases were allowed
- 24 cases are not reflected

13. What changes could be made to the appeal process to address the concern raised?

As a result of the statutory scheme (Section 210 of the RTA, Subsection 25(1) of the Statutory Powers Procedure Act and Rule 63 of the Rules of Civil Procedure provide that an appeal from a final order made under the RTA stays, until the disposition of the appeal) that gives a tenant an automatic right to appeal LTB decisions to the Divisional Court on questions of law, there is a growing practice among dishonourable tenants of moving into rental units, not paying rent, and abusing the automatic right of appeal and accompanying stay to frustrate landlords' legitimate efforts to evict them for non-payment of rent. That is, tenants can initiate frivolous appeals that are devoid of any merit for the purpose of delay so that they can live rent-free at their landlords' expense for long periods of time.

LSHC proposes a change which would eliminate this practice by requiring tenants to pay the amount required to void an eviction order, together with prospective rent, into the Divisional Court pending the disposition of the appeal.

14. Are there any changes, other than changes to the appeal process, which could be made to address the issue in a targeted or more proactive way?

Alternatively, as a condition of being able to appeal an order that evicts a tenant for non-payment of rent, the tenant could be required to obtain leave to appeal from the Divisional Court. This would provide a mechanism to deter those tenants who are seeking to abuse the system from legitimate appellants.

3.1 Proposal: Explore whether to allow landlords to terminate a tenancy based on violation of no-smoking provisions in tenancy agreements

While the RTA does not prohibit a landlord from including a no-smoking clause in a tenancy agreement, smoking in violation of a no-smoking clause is not currently a ground for eviction. However, where smoking may be an issue, a landlord may terminate a tenancy on the ground that the tenant has caused undue damage, seriously impaired the safety of any person, or substantially interfered with the reasonable enjoyment of the landlord or other tenants.

Landlords and some tenants have advocated for enhanced rules that would provide for completely smoke-free environments. Small landlords, especially those providing a second unit in their home, may have a particular interest in having better means to enforce no smoking rules to accommodate their families' and tenants' preference for a smoke-free environment.

The government is exploring whether to allow to landlords to terminate a tenancy, if a tenant violates a no-smoking agreement. In these cases, landlords would not be required to prove that smoke has caused damage, impaired safety, or interfered with reasonable enjoyment. This would better support landlords to provide for smoke-free environments.

15. Should landlords be able to terminate a tenancy and evict a tenant based on violation of a no-smoking provision in a tenancy agreement?

We recommend that the landlord be able to more easily, and with the support of the legislation, more effectively restrict smoking inside their building and on their complex.

Small scale landlords are not always aware of the importance of reserving their rights in a tenancy agreement or lease. But even where efforts are made to advertise and rent a building or property as smoke-free, and where they include within the contract a general prohibition against smoking in the rental unit or on the residential complex, the tenant or their guest may still choose to smoke.

The present remedy for a persisting problem requires the landlord to serve a very detailed termination notice, apply to the Board for termination, attend the hearing and lead evidence about how the smoke substantially interfered with the reasonable enjoyment (or another lawful right, such as the right to good health) of another person in the property. In applying Section 202 of the RTA

> "*the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants…*"

Board members should, but often do not give weight to a lease wording in determining such good faith. The current process all but ignores the landlord's good faith efforts to prevent such

problems through the screening process and lease negotiations. Such a counterintuitive approach to the blending of statute and contract is a huge disincentive for current and prospective landlords.

A more equitable process would place greater emphasis on the existing restrictions within the tenancy agreement, and would ensure that tenants are held to account for such a blatant disdain for the agreement, and disregard for the wellbeing of occupants of neighbouring units.

Our online survey shows 98% support for a landlord having the right to serve a termination notice to a tenant who is smoking in the unit contrary to a no-smoking clause in the lease.

Similarly, as reported in the Toronto Star article[4] of May 14, 2016:
"An ongoing Centre for Addiction and Mental Health study found that in 2014, 89 per cent of adult Ontarians believed that smoking should not be allowed in apartment buildings, rooming houses and retirement homes — up from 73 per cent in 2005."

Given the reality that the secondary rental market[5] makes up more than 50% of rental households Canada wide, and that the occupants of these rental units typically share common spaces and ventilation systems with the homeowner or other tenants, it follows that both the homeowner/landlord and other tenants in the property should be entitled to a smoke-free environment if they so choose.

The intent behind the **Smoke-Free Ontario Act, 2006**, since it protects home health care workers from second-hand smoke when offering services in private residences, and restaurant patrons on outdoor patios, is clear. It touches on the balancing of private/public rights in situations that are obviously for the greater public good, once those situations have been properly considered. When discussing the prohibition of smoking in multi-unit housing situations presently under discussion the same logic should prevail.

16. Should no-smoking provisions apply to all types of smoking (e.g., tobacco, e-cigarettes)? What, if any, exceptions should apply?

When discussing the prohibition of no-smoking provisions in multi-unit housing situations, we recommend that these provisions should apply to all tobacco products as defined in the Smoke Free Ontario Act whether for tobacco smoke, marijuana smoke or vapour, or e-cigarette vapour.

See the March 10th, 2016 news release from the Ministry of Health and Long-Term Care "Ontario Taking Further Steps to Protect People from Second-Hand Smoke and Vapour - Strengthening Ontario's Smoking and Vaping Legislation"

https://news.ontario.ca/mohltc/en/2016/03/ontario-taking-further-steps-to-protect-people-from-second-hand-smoke-and-vapour.html

[4] https://www.thestar.com/life/homes/2016/05/14/torontos-first-non-smoking-apartment-building.html
[5] https://www.cmhc-schl.gc.ca/en/hoficlincl/observer/observer_068.cfm?obssource=observer-en&obsmedium=link&obscampaign=obs-20160613-rental-market

17. Should the RTA specify where no-smoking provisions can apply (e.g., indoor spaces, balconies, within certain distance from residential complex)?

We recommend that the landlord, with the support of the legislation, be able to more easily restrict smoking inside their building and on their complex. We recommend this restriction should apply to smoking on the complex or within a 9 metre radius of any entrance to, or exit from their property.

3.2 Proposal: Explore whether to allow landlords to prohibit pets in tenancy agreements in small buildings where the landlord also resides

The RTA currently voids any provision in a tenancy agreement that prohibits the presence of animals in or about the residential complex. However, where a pet has caused problems, a landlord may terminate a tenancy on the ground that the tenant has caused damage, seriously impaired the safety of any person, or substantially interfered with the reasonable enjoyment of the landlord or other tenants.
If the notice of termination is grounded on the presence, control or behaviour of an animal in or about the residential complex, the RTA requires the LTB to be satisfied that certain criteria are met to terminate the tenancy and evict the tenant, for example – the species or breed is inherently dangerous, the past behaviour of an animal of that species has substantially interfered with reasonable enjoyment, or an animal of that species has caused a serious allergic reaction to the landlord or another tenant.
Some landlords and tenants have advocated for enhanced rules that would allow pet-free environments. This may be particularly important for small landlords concerned about allergies, pet odours, or damage, and any resulting cost implications.

The government is exploring whether to allow landlords to prohibit the keeping of pets in small buildings where the landlord also resides. This would allow small landlords to provide pet-free environments and terminate a tenancy if a tenant violates a no-pet agreement without having to prove that the pet has caused damage, impaired safety, or interfered with reasonable enjoyment.

18. Should landlords be able to prohibit the keeping of pets in small buildings where the landlord also resides?

To mirror LSHC's position on proposal 3.1, and in keeping with the Legislature's intent behind implementing Section 65 of the **Residential Tenancies Act, 2006** it is our position that landlords living in the same property as the tenant should have access to a more timely termination remedy where their tenancy agreement restricts the presence of animals within the complex and the tenant keeps a pet. This proposed change is also important given that Ontario does not allow for the charging of refundable pet damage deposits, and repair and clean-up and pet urine remediation can be prohibitively expensive.

When considering whether to rent for the first time, or choosing to continue renting their property, the issues of personal choice and the safety and well-being of their family are paramount for small landlords. For many, it is a "deal breaker", especially where the landlord has already had a negative experience with the Landlord and Tenant Board's application process.

Again, a more equitable process would uphold the good faith intentions of both parties by placing greater emphasis on the existing restrictions within the tenancy agreement, and would provide meaningful and timely enforcement remedies where the terms of the agreement are breached.

Case of note:

CITATION: Riddell v. Eldridge, 2016 ONSC 1542
DIVISIONAL COURT FILE NO.: 024/16
L&T File No: TNL-51096-13
DATE: 20160304
https://www.canlii.org/en/on/onscdc/doc/2016/2016onsc1542/2016onsc1542.html?searchUrlHash=AAAAAQANbGFuZGxvcmQgcGV0cwAAAAAB&resultIndex=5

Note: As is common, the landlord and the tenant in this situation live on different floors of the same house, sharing a heating system (and central vacuum system). The unit was advertised as "absolutely no pets", and the lease was modified to include a "no pets" provision due to the landlord's asthma. The landlord's LTB application for termination was filed **Oct 15, 2013** (asthma and severe allergic reaction to the dog brought in by the tenant shortly after occupancy), and the LTB order granting termination was issued on April 16, 2014. The Div. Court decision order upholding the LTB decision was **issued March 4, 2016**.

Even if the appeal process made up the greater part of the time involved, two and a half years is a disgracefully long time for a health-related termination of tenancy process to conclude. This case is at once indicative of the prejudicial nature of unnecessary delay upon the resident landlord, and illustrates a failure on the part of the Landlord and Tenant Board to "*to balance the rights and responsibilities of residential landlords and tenants*" as set out in Section 1 of the **Residential Tenancies Act, 2006.**

19. Some tenants may feel that the current right to keep a pet is central to their reasonable enjoyment. Do you have any comments on this?

Landlords who reside in the same small building as their tenant(s) should be allowed to restrict the presence of animals within their property. Some small landlords operate pet-friendly buildings, and tenants with pets can self-select to live in such properties. Tenants with pets are also free to explore larger purpose-built multi-unit rental buildings or unit rentals in condominium buildings.

3.3 Proposal: Explore opportunities to protect Ontario tenants from the potential health-related impacts of radon

The province should initiate an education campaign to raise awareness to the presence of radon gas in all homes which are at risk, how it occurs, the health risks it poses and how unsafe levels of radon gas should be addressed.

20. What approaches could be considered regarding radon safety in rental housing, particularly in basement apartments?

The province, in partnership with municipalities, should provide test kits free of charge to Ontarians to assess whether radon gas levels are high enough to pose a health risk.

The province should support homeowners in the management of high levels of radon gas by assisting them to identify an effective radon reduction solution by offering financial support in the form of loans and or grants to remedy the problem.

4.1 Proposal: Allow emailing of certain landlord and tenant notices, upon consent of both.

The RTA permits personal service and "any other means allowed in the Rules".[6] Rule 5 permits other forms of service, including by fax, courier, and affixing on the unit door.

LSHC supports the proposal to recognize that landlords and tenants commonly communicate by e-mail, as well as by text message or by other electronic means, and rarely by fax or letter mail.

In reality, countless notices are already being delivered electronically without incident and for the mutual benefit and convenience of landlords and tenants alike. Tenants should not later be able to use outdated service rules as a "technicality defence" where there is no real prejudice and the parties have agreed (expressly or impliedly) or acquiesced to the use of electronic communications.

21. *What notices should landlords and tenants be allowed to deliver by email?*

Routine notices such as notices of entry into a rental unit are particularly appropriate for electronic service.

However, the legislation should be responsive to the growing use and reliance on electronic communications and should also provide for notices of termination, notices of hearing, etc. to be delivered electronically provided adequate safeguards are in place to ensure effective service (see below).

22. *Should other forms of electronic communication be considered for the delivery of notices (e.g. texting)?*

Just as fax has almost become an obsolete form of communication, e-mail is rapidly declining in use, especially among young people. Even text messaging (SMS) is now declining and giving way to instant messaging platforms such as Facebook messenger, WhatsApp, iMessage, BBM, Skype, Google Messenger, Yahoo Messenger, Viber, Kik, etc.

[6] RTA, s. 191(1)(g).

Any proposed reform should be technology neutral and "future-proof". Rather than specifying which media and platforms can be used, the Rules should permit electronic service of notices and forms generally subject to rules addressing things like:

- **Consent**. Both parties should agree to the use of electronic communications. Consent to use a particular electronic means of communication may be express (e.g., addressed in the lease, or agreed to subsequently), or implied (e.g., an ongoing history of communication by an electronic means). Consent should be revocable by either party.
- **Proof of delivery**. Some electronic forms of communication provide built-in proof of receipt (such as message-delivered indicators in WhatsApp and BBM) while others do not (such as e-mail, unless a read-receipt is requested and granted by the recipient). Wireless carriers generally provide message delivery failure notifications if text message cannot be delivered, but not always. LSHC suggests a rebuttable presumption that an electronic message has been received if the sender provides some evidence that it was sent. Delivery should be presumed where the recipient responds to the communication or can be assumed to have received it based on their conduct or actions. To protect against allegations of not receiving a notice or document, prudent landlords would use electronic forms of communication that provide confirmation of delivery or would use e-mail (which allows printouts of sent e-mails with routing information) or take screenshots of messaging histories before they disappear. Another possible solution for notices related to hearings would be for the Board to set up an e-mail address to which e-mails to the other party could be cc'd, thereby providing the presiding Board member a means to verify that an e-mail was sent.

4.2 Proposal: Further clarify provisions for substantial compliance with the RTA with respect to the content of certain forms, notices and other documents.

23. ***In what instances can non-compliance with RTA-related documentation requirements cause potential delays? Provide specific examples, if possible.***

Many applications to the LTB brought by both landlords and tenants are dismissed as a result of minor errors in completing the notice on which the application is based or in the application itself. This causes serious prejudice to the party who brought the application and wastes the Board's limited resources in issuing and serving these applications and in having a member deal with the application in his/her busy hearing block due to a minor error that does not prejudice the tenant one iota.

Typical non-compliance issues which result in dismissed applications include:

- The landlord has written the 30th day of the month as the last day of a month that contains 31 days;
- The landlord has failed to sign a notice in the appropriate box;
- The landlord or tenant has calculated a notice period that is one day short;

- A notice period that is supposed to have a termination date on the last day of the rental period but sets out a different day even though the proper notice period (i.e. 60 days) has been given;
- A minor mistake in the address of the rental unit even when the notice was personally served or the notice was slipped under the door or put in the mailbox; and
- Both landlord and tenant applications at the Board are often dismissed for failing to serve a document or notice properly on the other party, thereby delaying proceedings, forcing the party to re-commence the proceeding and/or needlessly preventing a hearing on its merits.

Additionally, many small landlords have to deal with the common problem of short or otherwise improper termination notice from the tenant, which seriously limits their options and remedies. Landlords are often unsure whether they should consider the notice as being at least partially valid so that they may begin to mitigate losses by re-renting the unit (as the Act requires under section 16), or whether they should instead file an L3 application to terminate the tenancy based on the invalid notice of termination. Essentially, section 88(1)1 recognizes the problem but neither the Act nor the Board offer any clear or effective instruction or remedies for landlords caught in this kind of situation where the tenant has "one foot out the door".

The *Residential Tenancies Act* provides a curative provision – section 212 – which provides that "[s]ubstantial compliance with this Act respecting the contents of forms, notices or documents is sufficient," and the Board is required to "adopt the most expeditious method of determining the questions arising in a proceeding."[7]

This is reflected in the Board's Rules of Practice, which provide:

> **A3.1** The rules and procedures of the tribunal shall be liberally and purposively interpreted and applied to:
>
> (a) promote the fair, just and expeditious resolution of disputes,
>
> (b) allow parties to participate effectively in the process, whether or not they have a representative,
>
> (c) ensure that procedures, orders and directions are proportionate to the importance and complexity of the issues in the proceeding.
>
> **A3.2** Rules and procedures are <u>not</u> to be interpreted in a technical manner.

This is in keeping with the *Interpretation Act*, which provides:

> **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and <u>shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit</u>.

The Legislature could not have intended for applications to be dismissed based on minor non-compliances with the rules or technicalities.

[7] RTA, s. 183.

24. *What approaches could be considered to address these concerns?*

The Ministry could create a guideline directing Board Members to interpret the above statutory provisions and rules more broadly and specifically list the examples set out above as situations where the Board should exercise its discretion under the RTA to waive minor non-compliances and allow curative actions so that hearings can proceed on their merits so long as there is not undue prejudice to the other party.

Additional amendments to the RTA and the Rules may also be helpful to address the over-emphasis on technical compliance by Board members to provide greater access to justice for both landlords and tenants.

4.3 Proposal: Allow landlords and tenants to file unsworn statements in support of applications and motions, rather than affidavits.

The LTB has already switched from affidavits of service of documents to unsworn certificates of service and there has not been a run on false certificates of service.

25. *Do you have any concerns with a change to the LTB process that would allow unsworn statements to be filed in support of application and motions, rather than affidavits?*

In theory, the legal consequences for swearing a false affidavit are far more severe than the consequences for making a false (unsworn) statement. However, in practice, those who swear a false statement are rarely taken to court and found in contempt – typically the only consequence that the Board Member finds them "less credible" than the other side or "not credible" and they lose the case.

26. *Is there another method of supporting the truth of the information filed?*

LSHC suggests that LTB forms include a statement or warning to the effect that by signing this statement, the signatory attests to the truth of the contents of the statement. This will serve as a deterrent even if there are no effective sanctions.

4.4 Proposal: Allow the LTB to combine a conditional order with a subsequent eviction order to simplify enforcement.

27. *Do you have any comments on this proposal?*

This proposal is wholeheartedly supported by LSHC. Currently, if a landlord and tenant enter into a payment agreement and it is by way of consent order, then the arrears to the date of the order are included in the order. If the tenant subsequently breaches a month or two later (after

further rental payments come due that were not included in the order), then the Board issues the landlord two orders for money which tend to confuse landlord and tenant alike. The parties often think that the second order replaces the first and landlords often think the Board has made a mistake and a significant portion of the arrears have been wiped out.

4.5 Proposal: Allow the LTB to include payments owing for damage from prior mediated agreements in eviction orders.

28. ***Do you have any comments on this proposal?***

LSHC supports this proposal which encourages parties, especially landlords, to resolve all their issues in mediation, including matters that aren't "properly" before the Board because they are not included in the application. Any agreement between the parties addressed in the context of Board mediation should be enforceable in case of a breach. This supports and encourages mediation and may reduce the bringing of unnecessary applications that could have been dealt with under the umbrella of a previous application.

PART II: RENT INCREASE GUIDELINE REVIEW

29. Is the rent increase guideline formula fair and effective?

In 2012, LSHC polled the client community to gather information about how small landlords manage annual rent increases, do they take the guideline increase or seek Above Guideline Increases. The respondents to the poll included a full range of landlords, from small scale who provide basement apartments and units above retail, to those who rent as many as 34 units. In total, 240 landlords participated in this survey.

The data indicated that only 7.2% (17 respondents) had ever sought a rent increase above the annual guideline; indicating that 92.8% of the respondents settled for the annual guideline amount.

The respondents were asked whether they had taken an increase in the previous year (2011) and only 42% indicated they had. The guideline in 2011 was a mere .7% and numerous respondents indicated that the amount was so low it wasn't worth the paperwork, administrative work, hassle, bother, effort, or time to increase. Some indicated that they did not want to irritate the tenants or risk that they would leave.

Landlords were also asked if any of their costs increased more than the annual guideline cap of 2.5%. A staggering 96.1% indicated that their operating costs had increased more than 2.5% from the previous year:

Electricity	58.97%
HST	38.46%

Property tax	59.83%
Heating (gas/oil)	46.15%
Water	55.98%
Legal fees	25.64%
Maintenance	71.37%
Landscaping	26.92%
Other:	20.94%
Accounting	
Insurance	
Solid waste	
Capital improvements	
Water	
Pest control	
Snow removal	

LSHC recently polled the client community regarding issues contained in the current consultation. The online survey posed the question regarding the formula for the annual increase guideline:

ANNUAL RENT INCREASE GUIDELINE Section 120(2) of the Residential Tenancies Act, 2006 helps determine the Annual Rent Increase Guideline. It averages the monthly Ontario Consumer Price Index over a twelve month period that ends at the end of May of the previous calendar year. The RTA was amended in 2012 when a maximum cap of 2.5% was implemented for all guideline increases. This means that if the formula for calculating the annual guideline amount exceeds 2.5% in any given year, it will be reduced to 2.5%. Do you think the annual rent increase guideline formula is fair?

82.07% of respondents indicated they did not think the formula was fair.

The survey respondents were also asked what should be considered when determining in the guideline and the following responses were received:

37.58%	Age of building
44.90%	Actual percentage calculated compared to the cap
58.28%	removal of the maximum cap
44.59%	Other

140 respondents offered a variety of comments and suggestions, some of which are reproduced below. Some of the main themes in the survey responses include the following:

- Increases should reflect actual costs incurred by landlords, such as taxes, utilities, insurance and maintenance costs (with potentially different rates depending on whether utilities are included in rent). Actual cost increases for landlords are almost always higher than CPI because of rapidly rising utility costs and property tax in many municipalities.
- Caps should be regional rather than province-wide, to better reflect regional differences in costs.
- Rental rates should be determined by the market rather than arbitrarily capped.

Rent increases that do not reflect actual costs will make renting that property less attractive to landlords. This effect is compounded over time by even one year of an unreasonably low

allowable rent increase. This means less money available to reinvest into a property. Eventually, it may even become uneconomic for a landlord to continue renting out the unit, leading to a loss in rental housing stock.

Some actual survey respondent comments:

- price of cost of living as taxes, utility bill, insurance
- Renovation maintenance
- Local real estate values
- Repairs, Renovations, Increases in price of utilities especially if they are included in rent
- maintenance, repair, services, charges to pets, i.e $50/pet,
- Market rental rates; costs of servicing. Any cap should be regional rather than province-wide.
- Utility increased costs, maintenance & repairs
- the actual CPI
- If major renovations or investments were made to the apartment and/or building.
- Average cost of living in the city
- rising cost of expenses
- Inclusive .. Take in consideration the hike by the utilities
- rate of inflation, percentage of increase of utilities costs including garbage removal & water
- Rate of inflation. If you go all inclusive and the price of gas or electricity goes up you should be able to raise accordingly
- Utilities such as hydro and water have increased almost 8-10% each year for the past 3-4 years, so utilities a landlord pays are a factor as are realty taxes.
- Inflation
- if the rate is more than 2.5% then it should be exactly what the percentage is not rounding it down
- Municipal property tax increases, Insurance premium increases.
- utility rates, municipal taxes, insurance rates
- Cost of utilities such as water and gas that are usually paid by the landlord in a duplex that shares these utilities. There should be a way to subsidize the landlord on seperating units fully so that tenants are pesponsible for there own utilities. I pay water at my duplex since Of a shared water heater and the tenants absolutely abuse the utilities $400 water bills for 5 ppl with no leaks present. Why wouldn't you take a 2 hr shower when you don't pay for it. The water company has no way to separate without the house being torn apart there should be a way to enforce a rule that says I will pay $100 of the bill everything else is your problem and then be able to collect that money because you can't now.
- Improvements to the unit made during occupancy
- current market pricing of the unit. As the tenant is living there for 10 yrs as much as he paid 10 yrs back.
- if tenant is hard on unit ... premature wear & tear
- Hydro is included and wifi, and the increases are huge
- Similar to a condo building, owner should put aside appropriate maintenance fees, then be allowed a regulated return on investment.
- increase in property tax, hydro, gas, utilities
- condo and 3 or less owners should be exempted
- increase in insurance/utilities/taxes building upgrades
- newer buildings don't have a cap just older, right? so why not remove the cap for all landlords and make it fair. And just allow the market to decide if they want to remain despite the rent increase or not. consumers should decide/choose.
- Condo fee increases, parking fee increases
- real costs of operations, i.e. tax, gas, water/waste, insurance, hydro. These are the real cost of landlords and are have increased, and likely to continue to increase, at rates far higher then the current guidline maximum.
- Increase in expenses to run a well kept building
- Utility and property tax increases
- Upgrades

- Costs associated with operating a bldg. taxes, insurance, utilities, maintenance, etc. These costs are more in line with operating a bldg.
- inflation and utility increase, the electricity increase 30% every year, but landlord does't allow to increase to cover the cost
- market rents in area
- Market pricing!
- Catch up years, one year was 0.08% increase which was a joke. Should have the ability if we did not increase that year to merge previous year with current year and ask for that increase.
- Should be based on average Cost of Living or average Ontario COnsumer Price Index, no cap
- Investment in upgrades, consumer inflation, increase in property tax, sewer and water, other utilities, regulatory changes e.g. fire retrofit which make the building operation more expensive.
- Provable Capital Improvements to the unit or building and utility rates are not limited
- Utilities, taxes etc
- Increase in utility
- Rise of utilities, taxes, cost of maintenance
- inflation either CPI or possibly new index for rental cost factors
- rapidly rising utility costs, property taxes
- Property tax, insurance, utilities increases
- Increases by region across the province - eastern Ontario would be less than downtown Toronto
- Based on inflation variables such as increase in utilities if include as well as taxes, insurance and maintenance factors.
- calculate cost that pertain to rental properties - taxes, heating, hydro, etc. These accumulate to higher amount than OCPI
- Actual increases in relavent costs like utilities, building materials, insurance, etc.
- Local rent average for property and location
- the true inflation rate
- utities, e.g. hydro & water are increasing faster than inflation, esp. hydro is very expensive now
- Utility goes up how many percent in one year? The rent should go up match with the utility prices raising
- increase in property taxes and utilities
- economics of the area e.g avg rent compared to income
- sudden high increase in utilities including property tax and insurance
- Cost of utilities. My tenant does not pay for utilities. My utilities have gone up 8% yet I am restricted to increase the rent by 2% for this year. Also, if I want to go to the Landlord and Tenant Tribunal to request a higher rent increase for my tenant, I have to pay a $200 filing fee. This fee consumes the entire rental increase - it makes no sense.
- Market rent. If landlords can't charge market rent, then they have an incentive from getting out of the rental market.
- According to increase of realty tax, utilities and repairs
- round off rent to nearest dollar amount
- While long term tenants have value, their rents can be significantly lower than market. For a business to stay viable costly renovations of suites is necessary. Market rates can then come into play. However there is no advantage in renovating occupied suites of long term tenants. It takes a number of years to get pay back on renovations and essentially what transpires is that in our xase the average of our long term tenancy rents is 60% of current market, As I have told the premier on several ocassions we did not get into this business 60 years ago to support subsidized housing.
- rising costs of utilities (ours are included in rent)
- Cost of living increase, taxes utilities etc
- Utility costs.
- whether improvements have been made
- length of tenancy.
- Utilities, property tax increases, etc. CPI is based on a basket of goods including food, common services, etc. that are irrelevant to determining costs to a landlord. Increase should be based on group of costs relevant to landlords.
- What the market will accept. Owners risk/reward.

- Utilities cost increase, Taxes increase.
- Market
- Market adjustment Supply and Demand
- Utility rates if Landlord Paying
- taxes, insurance, utilities, repairs
- Maintenance costs
- Utilities, renovations and upgrades in materials and appliances
- My 2nd suite was constructed recently and so is not affected by the guidelines, but I still use the guidelines and forms to inform the Tenant, rather than higher numbers. I have replaced major appliances without charge.
- COST of Hydro increase, services increase
- Inflation in the rental area
- All factors may impact the rent of the property
- Cost of utilities if included in rent
- Inflation and vacancy rate.
- Market rent increase range
- Value of the property
- The increase of house market value
- Municipal or local specific increases, vs. a single province wide number. Economic situation in Thunder Bay is very different than downtown Toronto (as an example).
- Increased costs due to increase in Maintenance fees, property tax and cost of utilities
- The market competition
- It's important to look at the increases in utilities, property taxes, money the landlord has spent on the property
- overall inflation, utilities costs and change in interest rate
- peg to current economic indicators: GDP , or inflation.
- Renting properties is a business; landlords should be allowed to compete in a free market like any other enterprise.
- If we were undercharging to find good tenants and find that they are terrible, we need to be able to charge up to market rates to urge them to leave.
- Special conditions such as an additional resident int he unit, tenant behaviour with respect to utility usage., and local micro-economic changes which create abnormal increases such as tax changes.
- it should be base on cost expenses increases such as property tax, price increase of utilities, repairs and maintenance
- Many factors Bad Tenant good Tenant small buildings must have complete control by the owner
- the annual increase should be matched to property tax increase. To the water and waste and to hydro and enbridge. The bylaw for land and tenant is onsided. The land lords are taking advantage off and sbusedby their tenant. There should a major change in the bylaw. As a landlord I'll advise people everyone not invest in rental unless they protect themselves in their lease ,
- Capped values should carry over to the next year
- Taxes also come into the picture. I do not know of any utility company, charge card, bank, etc. that has a guideline or cap on the percentage they charge. Landlords have increases all the time and bills to pay. Revenue Canada figures into the picture as they get to say yes or no to certain expenses. As a landlord we have tried to keep our rents down and affordable for our tenants. We try and help them. Our rents are usually lower than most in the area and we offer more. We try not to raise rents until they have been there at least two years and if we do most of the time we do not give the full percentage allowed. When we have good tenants we want them to stay and try and work with them even if they get behind on their rent. But lately with taxes going up, more and more things needing to be done at the building and revenue canada saying you're can't use that expense, you are spending too much on the building and the extra damage and wear and tear the pets that aren't supposed to be there are creating or the expense we have to go through to get rid of these tenants, we find we are falling farther and farther behind. We are asking ourselves why are we doing all this work when we as landlords have no rights or say. Just tenants. Has anyone who has ever made these rules for the tenants had a small rental building? I

understand there are bad landlords out there but deal with them. If landlords don't start getting more say in their own building then there aren't going to be many places for tenants to rent anymore. It is not their home. They are renting a space and therefore must abide by rules and show a common courtesy to those around them.

- Market forces alone. Market forces determine the price of a home, so why not the rent !
- Municipal tax increase . Electricity cost increase. Water and sewer increase
- extremely low rent due to long term leases. Does not allow landlord to improve building. Example we have some tenants paying $800. Our new rent for these same units is $1340.
- Increase should be equial to the increase in property taxes, utilities and a percentage of gross for maintenance. Plus an increase equivalent to what politicians give themselves in raises.
- taxes, utilities, insurance, repairs all go up far more then2.5% so we should be able to up rent to accommodate these increases
- Rate of inflation
- market rates
- Increase on utilities

Given that the majority of small landlords rely on the guideline amount for rent increases rather than seeking a higher increase, the formula must be fair in order to retain the housing provided by these small scale private owners.