Community Legal Assistance Society

Advancing Dignity, Equality and Justice Since 1971

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July 6, 2018

By E-mail
Rental Housing Task Force
Spencer Chandra Herbert, Chair
Ronna-Rae Leonard
Adam Olsen

To the Rental Housing Task Force,

Re: Final Submissions from Community Legal Assistance Society (CLAS)

To begin, we are thankful for this opportunity to provide our input on our organization's priorities for change in the rental housing context, however, we would be remiss if we did not emphasize the importance of continued, ongoing dialogue regarding housing priorities for tenants. Moreover, including the voices of indigenous communities and marginalized individuals is a vital component to ensuring the housing system in British Columbia operates inclusively, fairly, and effectively, and we believe that there is more work to be done by the government to bring these voices to the table.

For the last 47 years, CLAS has provided legal services to low income and other disadvantaged people living across the province, specializing in housing, income security, workers' rights, mental health and human rights. We provide both service work, such as legal advice and representation within all of our programs, and systemic work on broader legal issues and legal reform that will assist our clients over the long-term. Although CLAS provides services in a variety of legal areas, housing issues continue to be a large portion of our work. Given the exceptionally high volume of evictions encountered by our office, we are uniquely positioned to identify the systemic barriers to secure, adequate housing affecting low-income and vulnerable people.

In making the recommendations that follow, we must emphasize that this is a *housing crisis for tenants*, not landlords and developers. This crisis is reflective of a system wherein property rights are secured and maintained, while the welfare, security and safety of tenants is degraded and dismantled. This is evidenced through the submissions provided to the Rental Housing Task Force from organizations representing landlords and developers. In reviewing the various submissions from these groups, their priorities are primarily focused on preserving the current law and/or implementing changes that allow them to secure a further economic advantage. Comparatively, the priorities outlined by organizations representing tenants include significant and substantive legal change and reform aimed at increasing housing security and protection. This difference between the two positions cannot go unnoticed—landlords and developers appear to be satisfied with the status quo, while tenants are calling for meaningful change. While striving to balance our tenancy laws to ensure safe, secure and affordable housing is laudable, the government cannot begin this work when the current situation exemplifies imbalance. Tenants' rights must first be protected and then enhanced in order to meet the government's ambitions. Only then can we begin a conversation premised on balance.

For any meaningful change to occur in this context, tenant protections and housing security need to be strengthened through the prevention of unjust and unmerited loss of individual housing and affordable housing stock. This must also include the creation of a fair and meaningful dispute resolution process. Above all, the housing needs and interests of marginalized people who are homeless or in danger of being homeless must be understood as a top priority. The impacts of homelessness on the lives of this population are particularly complex and significantly compound the barriers and challenges they may already face. You will find our priorities and recommendations appended to this letter.

The new government has pledged to alleviate the rental crisis, to strengthen tenant protections and to bolster the services provided by the Residential Tenancy Branch. In order to make good on these promises, sweeping reforms as outlined in our priorities and recommendations are required in order to rectify the harm that has been experienced by tenants across the province.

Yours truly,

Danielle Sabelli, Barrister and Solicitor

Samrah Mian, Intake Coordinator

Enclosure: Residential Tenancy Recommendations and Priorities

I. Rent Control

Linking rent to the rental unit

The *Residential Tenancy Act* limits the amount of rent landlords can collect from tenants during the course of their tenancy. Once a tenancy ends, landlords can increase the rent for an incoming tenant by any amount they desire. Given the current housing market, this creates an economic incentive for landlords to evict tenants who may be paying below market rate. As a result, there has been a significant increase in unjust evictions and abuse of process by landlords for these purposes, which has led to the continued erosion of affordable housing stock.

Other Jurisdictions

Quebec's housing tribunal, the Regie Du Longment, recognizes that rent control is necessary to foster the preservation and improvement of housing stock. Accordingly, Article 1896 of the *Quebec Civil Code* states that a landlord must inform a prospective tenant of the lowest monthly rate paid for the unit during the previous 12 months. Pursuant to Article 1950, if a new tenant's rent is higher than the lowest monthly rate, the tenant can apply to the court to have the rent adjusted.

Recommendation

We recommend that the amount of rent should be linked to the rental unit and not the individual tenant. We believe this simple and straightforward solution could have a wide ranging positive impact, which may alleviate many of the overall concerns highlighted herein.

Although rent tied to the rental unit in all circumstances is the preference, a proposed alternative could include limiting the amount of rent between tenancies by the annual allowable amount in circumstances where the tenancy ends on some of the grounds enumerated in Section 44 (1) of the *Residential Tenancy Act.*

Right of first refusal at the same rent

The recent *Residential Tenancy Act* amendments that have come into force include the option of "right of first refusal" for tenants who are given a notice to end the tenancy for renovations or repairs. However, the "right of refusal" exists in name only, it does not provide an additional benefit to the majority of tenants, rather it functions to maintain and preserve the status quo. Although the amendments will theoretically allow a tenant to move back into the rental unit once renovations and/or repairs to the rental unit are complete, there is no obligation on the landlord to continue to limit the rent to the annual allowable amount. The landlord will still retain the ability to charge the tenant an exorbitantly high amount of rent to return to their home, which most tenants (especially those who are low income) will not be able to afford.

Other Jurisdictions

Section 99 of Manitoba's *Residential Tenancies Act* provides that if a landlord is evicting a tenant in order to renovate rental property, the tenant can indicate to the landlord in writing that they wish to exercise the right of first refusal to re-rent the unit when renovations are complete. The tenants have the right to rent the newly renovated unit at the lowest rent that would be charged to any other tenant for the same unit.

Section 53 of Ontario's *Residential Tenancies Act* provides that if a landlord evicts a tenant in order to repair or renovate the rental unit, the tenant has the right of first refusal to rent the unit when the repairs or renovations are complete. The tenant must notify the landlord in writing prior to vacating the unit that they wish to exercise the option of right of first refusal. If the tenant exercises this right, the rent cannot exceed what the landlord could have lawfully charged if there had been no interruptions in the tenancy.

Recommendation

Similar to the Ontario model, we recommend that the recent inclusion of a right of first refusal into the *Residential Tenancy Act* be amended so that tenants exercising their right of first refusal are able to do so at the same amount of rent they paid for the rental unit prior to the renovations and/or repairs. We also recommend that the tenant exercising the right of first refusal retain exclusive possession of the rental unit while renovations and/or repairs to the rental unit are being completed.

Limitations on allowable rent increases	Under the *Residential Tenancy Act*, a landlord can raise a tenant's rent no more than once per year by an amount that is capped by an allowable percentage that is based upon an outmoded formula: inflation plus 2%. Since the *Residential Tenancy Act* allows landlords to increase rent annually at 2% above inflation, housing costs increase faster than the costs of other consumer goods. In addition, the average cost of rental housing in this province has continually increased at a rate above inflation. Given the affordable housing crisis in British Columbia, all tenants (especially those on fixed incomes) continue to fall behind as housing costs become less affordable. ***Other Jurisdictions*** In Ontario, the allowable annual rent increase is capped at inflation rates based on the Ontario Consumer Price Index. In Manitoba, the rent increase guideline amount is set by regulations and takes into account cost increases such as utilities, property taxes and other expenses in the operation of a residential complex. In recent years, it has been significantly lower than BC's annual allowable increase. ***Recommendation*** We recommend that the annual rent increase be limited to inflation.
Limitations on security deposits	The *Residential Tenancy* Act limits the amount a landlord can collect for a security deposit to half a month's rent. Given the current rental housing market, many tenants would not be able to afford anything more than half a month's rent. Low income individuals and people receiving social assistance struggle to gather funds for security deposits. The Ministry of Social Development and Poverty Reduction may provide recipients of income assistance with the cost of securing a rental accommodation. However, in order to receive this assistance, the tenant must agree to repay the Ministry of Social Development and Poverty Reduction the amount provided to them for these purposes. The repayment to the Ministry of Social Development and Poverty Reduction usually occurs in the form of a monthly deduction to their income, which is already grossly inadequate for their basic core needs. An increase in the amount a landlord can collect for a security deposit will unnecessarily lengthen the repayment period to the Ministry of Social Development and Poverty Reduction, leaving individuals with less income to survive on each month for a longer period of time If the amount of unpaid rent or the cost of repairing damage caused by tenants exceeds the amount of the security deposit, landlords are able to recover the excess costs through dispute resolution. More expedient solutions for landlords to recover costs from tenants should not be given priority over a tenant's ability to secure safe, affordable housing. Security deposits already enable landlords to recover all or partial costs owed to them by tenants without having to go through the dispute resolution process, yet there is no comparable mechanism by which a tenant is able to similarly recover costs from landlords—tenants are expected to go through the lengthy process of dispute resolution and, if necessary, enforcement at Small Claims Court. Allowing landlords to increase the amount of security deposits beyond the allowable amount will create a further, disproportionate advantage to landlords, while deepening the disadvantage to tenants. ***Recommendation*** We recommend that the maximum allowable amount collected by landlords for security deposits should not exceed half of one month's rent.

II. Eliminating Unfair Evictions

48-hour orders of possession

When a tenancy is ending, the *Residential Tenancy Act* allows arbitrators to grant orders of possession, which can be used by landlords to evict tenants. In issuing these orders, arbitrators have discretion to choose when the orders become enforceable. Most arbitrators default to issuing orders that require tenants to vacate the rental unit in two days' time. This unreasonable amount of time seems to be tied to an assumption that there is financial risk to landlords if tenants are able to remain in their homes for longer. In many cases, there is minimal or no financial risk to the landlord if the tenant is able to remain in their home for a longer period of time. For example, in cases where the basis for the eviction is that the landlord would like a family member to move into the rental unit at some point in the future and the tenant is up-to-date with rental payments.

Clearly it is very difficult for anyone, no matter their situation, to vacate a rental unit on two days in today's scarce rental market. This difficulty is exacerbated for tenants who have special housing needs (subsidized housing, affordable market housing, or housing that is accessible if the tenant has a disability). Tenants with disabilities or small children may not be able to secure new housing, or pack up and transport their belonging in two days. Orders of possession effective on two days' notice can plunge a tenant into crisis and put them at risk of homelessness. In these situations, fairness requires a true balancing of the potential hardship for both parties.

Other Jurisdictions

Section 83 of Ontario's *Residential Tenancy Act* provides discretion for decision-makers to delay an eviction, and mandates decision-makers to consider all the circumstances, which may include fairness to each party.

Recommendation

We recommend that the *Residential Tenancy Act* be amended to require that arbitrators balance all the interests at stake to arrive at an eviction timeline that is fair to both parties. To accomplish this, the amendment should mandate that arbitrators consider all the circumstances of both landlords and tenants when issuing an order of possession, and provide an eviction timeline that minimizes unnecessary hardship for tenants. Notwithstanding the above, ideally the standard practice should be one month from the date the order of possession is issued to vacate the unit in any given situation.

Automatic evictions for unpaid rent

A tenant who has received a notice to end tenancy for unpaid rent only has five days to either dispute the notice to end tenancy for unpaid rent or provide the amount of rent that is overdue to the landlord. If a tenant fails to take either step within the five day grace period, they are conclusively presumed to have accepted the end of the tenancy on the effective date of the notice. This is true even if the tenant was only short by a few dollars, or a day late for the first time due to circumstances beyond their control. In these circumstances, even if the tenant disputes the notice to end the tenancy for unpaid rent within the 5 day grace period, arbitrators do not have the discretion to set aside the notice to end the tenancy for unpaid rent where it is fair and just to do so.

Prior to a British Columbia Court of Appeal decision issued few years ago, superior Courts had the authority to grant equitable relief to tenants who were being evicted for unpaid rent. Tenants who had missed the five day deadline to pay outstanding rent, but who were able to make up the arrears within a reasonable amount of time could apply to the Court for relief from forfeiture. Courts had the ability grant relief, and reinstate the tenancy, where, having regard to all the circumstances, it was fair and equitable to do so.

Since arbitrators no longer have the ability to set aside notices to end the tenancy for unpaid rent and the court no longer has the ability to grant equitable and reinstate the tenancy in these circumstances, tenants may experience an inequitable loss of their housing, despite being able to pay all rent arrears within a reasonable amount of time without countervailing hardship to the landlord.

Other Jurisdictions

	Other Canadian jurisdictions have recognized a "fair and just" approach to unpaid rent evictions: Section 70 (6) of Saskatchewan's *Residential Tenancies Act* provides decision-makers with broad discretion to make any order that is "just and equitable" in such circumstances. Section 95.1(5) of Manitoba's *Residential Tenancies Act* allows a decision-maker to void the notice of termination if the tenant pays the total amount of arrears before an order of possession is granted. In regards to the grace period for providing unpaid rent, pursuant to s 29(3) of Alberta's *Residential Tenancies Act,* a tenant who has been served with a notice to end tenancy for unpaid rent has at least 14 days to cancel the notice by paying the overdue rent. Pursuant to section 57(1) of Saskatchewan's *Residential Tenancies Act*, a landlord may end a tenancy if rent is unpaid for a period of 15 days or more after the day it is due. Pursuant to section 59 of Ontario's *Residential Tenancies Act,* a tenant who has been served with a notice to end tenancy for unpaid rent has at least 14 days to cancel the notice by paying the overdue rent. A tenant may also apply to have an eviction set aside up until the eviction is enforced. Pursuant to s 10 (1)(6)(a) of Nova Scotia's *Residential Tenancies Act,* A landlord may serve a tenant with a notice to end tenancy for unpaid rent where rent is in arrears for 15 days. A tenant who has been served with a notice to end tenancy for unpaid rent has 15 days to cancel the notice by paying the overdue rent. ***Recommendation*** We recommend an approach that is similar to the other Canadian jurisdictions noted above, and to provide arbitrators with broad discretion to set aside or refuse to grant an order of possession to a landlord if it is just and equitable to do so. We also recommend that the 5 day grace period to provide unpaid rent to a landlord be extended to 15 days.

Direct request process for non-payment of rent	Pursuant to the *Residential Tenancy Act*, if a tenant has not paid rent or disputed the eviction notice for unpaid rent within the 5 day grace period, a landlord can apply to the Residential Tenancy Branch for a process called "direct request." This is an expedited process that allows arbitrators to make a decision and/or grant an order without an in-person hearing and without the tenant's participation. Arbitrators also consistently apply a low evidentiary standard in these proceedings and are often satisfied that landlords have met their evidentiary burden through unsworn, written testimony. Given the interests at stake and the general lack of procedural safeguards, tenants should be afforded every opportunity to be heard in all proceedings. The convenience of expediting the eviction process and securing a financial benefit to the landlord should not come at the expense of a tenant's housing security and safety. ***Recommendation*** We recommend eliminating the Direct Request Process for non-payment of rent in favour of participatory hearings for all evictions.
Seal the 'fixed term' loophole	Recent amendments were introduced to the *Residential Tenancy Act* that aim to close the fixed term tenancies "loophole." This included limiting the use of vacate clauses in residential tenancy agreements to particular circumstances. Currently, the use of a vacate clause is only permitted in situations where the landlord or a close family member intends to occupy the rental unit at the end of the fixed term tenancy agreement. However, the *Residential Tenancy Act* allows for the Lieutenant Governor in Council to prescribe additional vacate clause allowances on an ongoing basis. In this sense, the new government did not close the loophole but rather, left a gap that can continue to widen over time. Further, the exemption allowing a landlord or close family to occupy the rental unit at the end of the fixed term can easily be exploited and effectively removes a tenant's ability to challenge the good faith end to tenancy in the manner that is otherwise normally available if served with a 2 month notice to end the tenancy for landlord's use of the property. This is so because when the parties are entering into a tenancy agreement there is no opportunity to scrutinize the landlord's intentions. Even if a tenant attempts to do so, the landlord could very easily decline to enter into a tenancy agreement with that tenant. Given the scarce rental market, tenants are often pressured into signing residential tenancy agreements regardless of whether the terms are less that favourable to them. Further, we do not believe that the increase in tenant's compensation for bad faith evictions will act as an effective deterrent against this practice. Even if a tenant was successful and awarded compensation for a bad faith eviction, if the landlord increased the rent for the rental unit to a subsequent tenant, the cost benefit of a bad faith eviction may outweigh the potential risk of the prescribed penalty. ***Recommendation*** Completely remove all forms of vacate clauses that are currently prescribed, as well as the opportunity to prescribe vacate clauses entirely.

III. Create a Fair and Effective Dispute Resolution Process

Grounds for review

Under the *Residential Tenancy Act*, a party's ability to ask the Residential Tenancy Branch to internally review decisions and orders that contain serious errors is limited to three narrow grounds including: the party was unable to attend the hearing because of circumstances that could not be anticipated or outside the party's control; the party has new and relevant evidence that was not reasonably available at the time of the original hearing; and the decision was obtained by fraud. The *Residential Tenancy Act* does not provide a statutory review or appeal process to address other kinds of serious errors such as procedural fairness, or obvious mistakes of law or fact.

Because the grounds for statutory review at the Residential Tenancy Branch in this province are currently very limited, a party that experiences a serious error that does not fit into the narrow review grounds has no accessible recourse, even if the error is obvious and simple to fix. Their only option is to file a judicial review in the Supreme Court of British Columbia. This process can be extremely difficult to navigate for most people. Additionally, for many tenants, the risk of having to pay court costs to the landlord if the petition for judicial review is unsuccessful is not one they are willing or able to bear. Filing superior court judicial reviews to remedy obvious administrative errors also results in unnecessary costs to the justice system and the Residential Tenancy Branch.

It would benefit landlords, tenants and arbitrators if an additional ground were added to review consideration. This ground should address those decisions and orders that are based on serious legal, factual or jurisdictional errors or breaches of procedural unfairness. This will allow the Residential Tenancy Branch to correct its own decisions without needing to respond to a costly judicial review.

Other Jurisdictions

Section 21 (2) of Ontario's *Statutory Procedures Act* and R29.2 of the Ontario Landlord and Tenant Board's Rules of Practice empowers the Landlord Tenant Board to review its own decisions and orders for "serious error." A serious error can include an error in jurisdiction, procedure, fact or law, or when a party was not able to participate in the Board process. If the review board member finds a serious error, they can confirm, vary, suspend or cancel the original order. The party applying for review can also request a stay of the decision from the Board when the review is filed.

Recommendation

In addition to the current grounds for review, we also recommend incorporating similar grounds for review as the Ontario model, as well as issues of procedural fairness.

Timeline to file for review consideration

A tenant who receives a decision from the Residential Tenancy Branch to terminate the tenancy only has two days from the date they receive the decision and/or order to apply for review consideration with the Residential Tenancy Branch. An arbitrator's decision to grant a review consideration hearing is entirely dependent on the tenant's written application for review consideration. Two days is not nearly enough time for a tenant or their legal advocate to gather evidence and submit legal arguments to support their application for review consideration. This short timeframe to appeal poses a significant barrier to access to justice, especially for persons with disabilities, persons who may be illiterate or have a language barrier. This is further complicated if the supportive evidence is only within the possession of third-party agencies (police agencies, Ministry of Social Development and Poverty Reduction) whose processing times may not align with the short timeframe to appeal.

Other Jurisdictions

Pursuant to R29.5 of the Ontario Landlord and Tenant Board's Rules of Practice, any party may request a review from the Landlord Tenant Board within 30 days of the date of the order. If the application is late, they may ask for a time extension.

Recommendation

We recommend that the timeline to apply for review consideration for decisions related to notices to

	end tenancy and/or orders of possession be extended from two days to 15 days.
Recording hearings	The Residential Tenancy Branch does not currently record its hearings and its Rules of Procedure prohibit landlords and tenants from recording hearings themselves. The only record of a hearing that may be allowed is an official transcript by an accredited court reporter. The party requesting the transcript must undertake an onerous process that includes outlining the reasons for making the request to an arbitrator 7 days prior to the hearing. If granted, the party requesting the transcript must make all the necessary arrangements with the court reporter, including securing the necessary equipment and paying for the all associated costs. Most often, the need for a transcript is unlikely to be apparent until during or after the hearing, and the costs and procedural requirements for obtaining an official transcript, is overly burdensome. Both landlord and tenant stakeholders have observed that because hearings are not recorded, there is little to no accountability for the behaviour of individual arbitrators. Discourteous and even verbally abusive behaviour by arbitrators, unfair procedures, and unfair allocation of hearing time among the parties are commonly reported problems that could be better addressed on review if a recording of the hearing were available. Additionally, the law in British Columbia and across Canada is clear that the absence of a record can render a tribunal's proceedings unfair and can result in the tribunal's decision being overturned on judicial review. The Supreme Court of British Columbia has remitted decisions of the Residential Tenancy Branch for rehearing where it could not resolve conflicting evidence as to what occurred at the hearing because of the lack of a record. A shift towards recording hearings would increase fairness for all parties appearing at the Residential Tenancy Branch. ***Other Jurisdictions*** Mechanisms for recording hearings are in place at similar administrative bodies in throughout British Columbia, including the Workers' Compensation Appeal Tribunal and the Employment Assistance Appeal Tribunal. It is also common practice at the Landlord and Tenant Board in Ontario and at the Residential Tenancy Dispute Resolution Service in Alberta to create audio recordings of hearings, which a party to the dispute may access upon request. The recordings are kept for a minimum of ten years after the hearing date, and any party to the dispute may request a copy of the recording upon payment of a fee. ***Recommendations*** We recommend that the Residential Tenancy Branch implement an automated recording system for hearings. The recordings should be kept on file at least until the deadline to apply for judicial review of the decision has passed and allow the recording of a hearing to be accessed by the parties to the dispute upon request.

IV. Supportive Housing

Retain the applicability of the *Residential Tenancy Act* to supportive housing

The *Residential Tenancy Act* currently applies to supportive housing. The *Act* already recognizes that certain types of housing cannot be appropriately accounted for in the legislation; this includes but is not limited to, assisted living in facilities, shelters, temporary transitional housing, hospitals, correctional facilities etc. The types of housing that are exempt from the *Act* share similar characteristics and objectives. Therefore, the *Residential Tenancy Act* properly recognizes that supportive housing is distinguished from the types of housing that are already exempt from the *Residential Tenancy Act* and that tenants living in supportive housing are entitled to all the rights and protections afforded to them.

Perceived vulnerability has historically been used by authorities as a mechanism to justify the denial of individual agency, and to erode, if not completely remove individual rights for the sake of imposing protections. The deployment of the concept of vulnerability in this way is often derived from stigmatizing and stereotyping processes without any meaningful participation from the vulnerable groups. Additionally, the position of some supportive housing providers may tread dangerously close to discrimination against a person or group or class of persons.

Supportive housing providers have advocated for either the complete exemption of supportive housing from the *Residential Tenancy Act* or for supportive housing to be provided with special consideration under *the Residential Tenancy Act*, which would include the removal of some rights and protections provided to tenants under the guise of building-wide security and safety. Exempting supportive housing from the *Residential Tenancy Act* will result in the complete loss of all rights and protections for tenants and will undoubtedly lead to unfairness and unchecked abuses

Providing supportive housing with special consideration under the *Residential Tenancy Act* will likely erode some of the rights and protections tenants are currently afforded. Accordingly, we have become aware of certain practices already undertaken by supportive housing providers that contravene the legislation and common law including the imposition of blanket, building wide restrictive guest policies, which include banning guests under the age of 18 from buildings or restricting the number of guests or hours the guest may visit, as well as check-in inspections, wherein landlords or their representatives will enter a tenant's apartment without notice if they have not observed them outside their unit during a given amount of time. While there may be good reason to restrict an individual's guest from the building, or conduct a check-in for an individual who has requested it, it is unfair and unwarranted for supportive housing providers to impose restrictive and invasive policies on all tenants. Although we recognize that supportive housing providers may have legitimate safety concerns for their building, there are mechanisms already available in the *Residential Tenancy Act* that will enable supportive housing providers to address their concerns. Landlords are able to restrict individual tenants' guests when there are reasonable grounds to do so. Landlords are also able to bypass the entry requirements when an emergency exists and entry is necessary to protect life or property. Therefore, there is no need to either exempt supportive housing from the *Residential Tenancy Act*, or provide it with special consideration. e. The rights of tenants should not be dismantled or limited for the sake of making supportive housing operations easier to manage and control when such housing providers are already able to achieve their safety objectives through the available mechanisms at the Residential Tenancy Branch.

The complete removal or erosion of tenant protections and tenant rights in supportive housing can have devastating consequences for tenants housed in supportive housing beyond the practical effects noted above. The deprivation of individual rights can also lead to compounded feelings of loss of dignity, value and respect.

Recommendations

We recommend that the *Residential Tenancy* Act continue to apply to supportive housing without any special consideration beyond what is currently entrenched in the *Residential Tenancy Act.*