Landlord and Tenant Board
Ontario

Order under Section 21.2 of the
Statutory Powers Procedure Act
and the **Residential Tenancies Act, 2006**

File Numbers: TSL-50630-14-RV2
TST-57285-14
TST-57947-14

Review Order

ISSUE:

1. This decision addresses the relationship between HPA, a private commercial landlord, HCH, a supportive housing provider, and IM, a residential occupant and client of HCH, under the provisions of the *Residential Tenancies Act 2006*, S.O. 2006 c.17 (RTA).

2. The issue of the correct characterization of the relationship between these types of parties, as well as the Landlord and Tenant Board's ('the Board') jurisdiction to deal with disputes between such parties is not uncommon. However, there have been divergent and sometimes inconsistent rulings from panels of the Board, which has led to uncertainty within the community it serves.

3. For the reasons that follow, the Board finds that there is a single residential tenancy in respect of the unit occupied by IM. That tenancy is between IM, as the sole Tenant, and HPA and HCH as Co-Landlords. The Board has no jurisdiction over the commercial relationship between HPA and HCH, except to the extent that the relationship may be relevant to, and arise in a proceeding dealing with the residential tenancy covered by the RTA.

PROCEDURAL HISTORY:

4. HPA applied for an order pursuant to section 69 of the RTA to terminate the tenancy and evict HCH because it, another occupant of the rental unit or someone it permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant. The rental unit in question is occupied by IM.

5. A hearing was held in Toronto on May 6, 2014 to consider this application. HPA and HCH were both represented by Legal Representatives. IM also appeared and represented himself.

6. At that hearing HPA and HCH agreed that they were the landlord and tenant respectively for the purposes of the application before the Board, and their relationship was governed by the RTA. IM was not identified as a party to the application by HPA, but was permitted to participate in the hearing by the Board Member. IM opposed the application to terminate HCH's tenancy, and took the position that the relationship between HPA and HCH was not a residential tenancy falling within the scope of the RTA and therefore, the Board had no jurisdiction to hear the application.

7. Following the oral hearing and the receipt of written submissions by the parties and IM, the Board held in order TSL-50630-14, issued on June 19, 2014 and now reported at TSL-50630-14 (Re), 2014 CanLII 49217 (ON LTB), that it did not have jurisdiction to hear the application to terminate the tenancy and evict HCH. It held, notwithstanding that HPA and HCH had chosen to characterize their relationship as residential landlord and residential tenant, and had agreed their relationship should be governed by the RTA, it was in fact a commercial tenancy, and outside the scope of the Board's jurisdiction. In rejecting previous Board jurisprudence involving HCH, the Board Member held that the RTA prevented HCH from being both a landlord and a tenant in respect of the same residential unit.

8. HCH appealed the order to Divisional Court, and also requested that the Board initiate a review of the order pursuant to the Board's Rule 29.1.1. By an interim order dated October 17, 2014, now reported at TSL-50630-14-RV-IN, 2014 CanLII 61347 (ON LTB), the Co-ordinating Vice Chair held:

> I have reviewed the Order and considered HCH's request. I am satisfied that the Order may contain a serious jurisdictional error. Further, I am mindful of the importance consistency and predictability of result has for parties who appear before administrative tribunals. Like cases should be decided alike and, where a different result is reached, parties are entitled to clear reasons distinguishing or departing from the earlier decision. While the Member clearly disagreed with the result reached in TSL-39638-13 there was no attempt to explain the basis for her disagreement.
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> Given the important jurisdictional and public policy issues raised, I direct this review to proceed as a Board Initiated Review pursuant to Rule 29.1.1.
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> The Board controls its own procedures to ensure its proceedings are fair, just, expeditious and proportionate to the importance and complexity of the issues in dispute. Rules A4, 2.2. In these particular circumstances I agree with H that the issues in dispute will benefit from consideration by a three Member panel.

> The occupant of the residential unit is invited to participate in the review or, if he wishes, may ask to be added as a party to the application as a person directly affected by the application in accordance with section 187(1) of the Act.
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> In addition, having regard to the jurisdictional and public policy questions to be considered on the review, the Registrar will deliver a redacted version of this Interim Order to the following organisations: CERA, ACTO, ARCH, FIRPO, ONPHA and MMAH. The Board will consider requests to provide written submissions on the jurisdictional issue should any of those organisations wish to provide them.

9. Subsequent to the Board's decision to hold a Review hearing, IM filed two applications with the Board pursuant to section 9(1) of the RTA: TST-57285-14 seeks a determination of whether the RTA applies to the tenancy between IM and HCH; and TST-57947-14 seeks a determination of whether the RTA applies to the tenancy between IM and HPA. The Board received written submissions from HCH and IM, as well as from a number of interveners.

10. The Board held an oral hearing on December 22, 2014. HPA was represented by its Legal Representative, Elaine Page. HCH was represented by its Legal Representative, Kiel Ardal. IM was represented by his Legal Representative, Dale Whitmore. All three parties provided oral submissions. In addition, with the consent of the parties, the Board joined the two section 9(1)(a) applications (TST-57285-14 and TST-57947-14) with the Review proceeding.

BACKGROUND:

11. HPA owns the rental unit and the residential complex in question, which is a multi-unit apartment building.

12. HCH is a charitable, not-for-profit corporation, established under the laws of Ontario. Its objects include:

> (…) to create, assist, promote, provide and develop housing, education, employment, recreation and related services for needy and deserving low to modest income members of the community in the Province of Ontario.

HCH serves individuals with severe mental health disabilities and individuals marginalized by poverty, who may have been or are at risk of being homeless. HCH provides stable housing along with individualized support

services. HCH receives funding for its work from federal, provincial and municipal levels of government.

13. HCH owns and operates approximately 270 residential units, and has also entered into agreements for approximately 170 additional units with a number of different private landlords such as HPA. HCH rents these units to individuals such as IM. While HCH referred to the individuals it serves as "members", it was not alleged that this term has any legal significance for the purposes of the proceedings before the Board. HCH "members" are not employees, agents, officers or directors of HCH.

14. HPA and HCH entered into a "rental" agreement dated September 1, 2005 in respect of a number of units at the residential complex. This agreement is a standard form residential rental agreement which names HPA as the Landlord and HCH as the (sole) Tenant. The rental agreement is silent with respect to the fact that HCH will not occupy the rental unit, but will instead rent the unit to individuals such as IM. However, the parties agree that HPA was aware of HCH's intended use of the rental unit at the time the agreement was signed. The rental agreement states that the tenancy is to be governed by the RTA.

15. IM is the sole occupant of the rental unit that is the subject of this eviction application. It is not disputed that he has exclusive use and possession of the rental unit. IM is an individual with a mental health disability, and receives support services from HCH. IM moved into the rental unit on May 1, 2012. Prior to that date, the rental unit was occupied by other persons who received support services from HCH.

16. IM occupies the unit by virtue of an "occupancy agreement" with HCH dated May 1, 2012. The occupancy agreement makes a number of references to the application of the RTA, including the applicability of the entry provisions and HCH's ability to evict the Tenant for the reasons contained in the RTA. The occupancy agreement also describes IM as the Tenant. The occupancy agreement requires IM to pay rent to HCH, albeit at a reduced rate. HCH provides IM with a rent subsidy, and in turn pays HPA the full rent in accordance with the rental agreement between HPA and HCH. There is no dispute between the parties that for all practical purposes, IM deals with HCH as his Landlord. HCH exercises its rights as a Landlord in respect of its members such as IM by, among other actions, serving notices of entry in accordance with sections 26-27 of the RTA, and serving notices of termination under the RTA and filing applications with the Board for termination of the tenancy. With respect to this specific rental unit, HCH has in fact filed an application (TSL-57300-14) with the Board on October 28, 2014 to terminate IM's tenancy. That application is currently in abeyance pending the outcome of this matter.

17. As noted above, HPA brought an application against HCH pursuant to section 69 of the RTA alleging that the Tenant (HCH) "…another occupant of the rental unit or someone it permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant."

POSITION OF THE PARTIES:

18. The parties (and the interveners) all take a variety of differing positions on the question now before the Board:

    a. HPA takes no position with respect to its relationship with HCH. It simply seeks clarity with respect to how the Board views the relationship and so that it can govern itself accordingly. It likewise takes no position on the relationship as between HCH and IM, except to say that IM is not, and cannot be found to be its Tenant;

    b. HCH takes the position that there are two, simultaneous tenancies, both covered by the RTA. There is an "upper tenancy" in which HPA is the Landlord and it is the Tenant, and a "lower tenancy" in which it is the Landlord and IM is the Tenant. It argues that the Board's finding that it could not be both a landlord and a tenant was incorrect as HCH is not caught by the exclusion in the definition of landlord in the RTA. HCH argues, in the alternative, that the relationship between it and IM is one of head tenant and sub-tenant, pursuant to the sub-tenancy provisions contained in section 97 of the RTA. Finally, it argues there are important public policy reasons, including the ability of supportive housing providers to secure housing for vulnerable individuals, and the objectives of the *Human Rights Code*, that favour an interpretation that its relationship with HPA falls within the scope of the RTA.

    c. IM takes the primary position that only the tenancy between him and HCH is covered by the RTA. He argues that the Board's original decision was correct, but that if HPA is successful in terminating its commercial tenancy agreement with HCH, then HPA would become his residential landlord by virtue of an assignment. IM also put forward a number of alternative arguments, including the position taken by the intervener, Advocacy Centre for Tenants Ontario (ACTO), that there is a single tenancy agreement either with HPA as Landlord and IM as Tenant or HPA and HCH as Landlords and IM as Tenant.

19. In addition to ACTO, the Board received submissions from the Federation of Rental Providers of Ontario (FRPO), ARCH Disability Rights Centre (ARCH) and Mainstay, another supportive housing provider in Ontario. We will not set out the various positions of these interveners in detail, but their submissions

were helpful and have been considered in coming to our decision.

DECISION AND REASONS:

20. It is evident from the various positions of the parties and interveners, and the divergent decisions of the Board, that the legislation does not speak directly to the particular circumstances present in this case. Nonetheless, it is incumbent on the Board to make a determination that is consistent with the provisions of the RTA, and best accords with the purposes of the Act.

21. Sections 1, 2(1) and 202(1) of the RTA are central to our consideration, and provide as follows:

> 1. The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.
>
> 2(1) In this Act,
> (…)
> "landlord" includes,
> (a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit,
> (b) the heirs, assigns, personal representatives and successors in title of a person referred to in clause (a), and
> (c) a person, other than a tenant occupying a rental unit in a residential complex, who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent;
> (. . .)
>
> "tenant" includes a person who pays rent in return for the right to occupy a rental unit and includes the tenant's heirs, assigns and personal representatives, but "tenant" does not include a person who has the right to occupy a rental unit by virtue of being,
> (a) a co-owner of the residential complex in which the rental unit is located, or

> (b) a shareholder of a corporation that owns the residential complex
>
> 202(1) In making findings on an application, 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 and in doing so,
>
> (a) may disregard the outward form of a transaction or the separate corporate existence of participants; and
> (b) may have regard to the pattern of activities relating to the residential complex or the rental unit.

22. These sections taken together suggest that the necessary starting point for the analysis in this case is the protection of the rights of the Tenant residing in the rental unit, and the rights and relationships as between the Tenant and the party or parties who meet the definition of Landlord in respect of this residential tenancy. The "tenant protection" focus of the RTA is well established, and has been affirmed by numerous Board decisions and the Courts: *Matthews v. Algoma Timberlakes Corp.,* 2010 ONCA 468 (QL), 102 O.R. (3d) 590; *Metropolitan Toronto Housing Authority v. Godwin,* [2002] O.J. No. 2514 (ONCA) (QL), 161 O.A.C. 57; *Price v. Turnbull's Grove Inc*., 2007 ONCA 408 (CanLII), *MacDonald v. Richard,* 2008 Carswell Ont 638 (Ont. Div. Ct.).

IM is the Tenant:

23. The rental unit that is the subject of this application is IM's home. He pays rent for the right to occupy the unit. There is no dispute that under the arrangements between the parties, IM has the exclusive right to occupy the unit, and no other person or entity, including HCH, has that right. He fits squarely within the definition of Tenant in section 2(1) of the Act.

24. In addition, because of his disability, and the social and economic consequences of his disability, IM is particularly vulnerable in regards to housing. These factors support a finding that IM should be seen as the primary beneficiary of the protections the RTA is designed to provide. In order to enjoy the protections offered by the RTA, and to achieve the RTA's statutory purpose it follows that IM must be a Tenant, and party to a tenancy agreement which is governed by the RTA. In turn, this also means that his tenancy agreement cannot be terminated, except in accordance with the relevant provisions of the RTA.

Both HCH and HPA are Landlords:

25. We next turn to the question of who is the Landlord in respect of IM's tenancy. In our view, from a purposive, as well as a practical or realistic perspective, both HPA and HCH are the Landlords of IM. Each is responsible for certain obligations of a landlord. Similarly, in the relationship with IM, each may exercise certain rights of a landlord. This is not uncommon in residential tenancies governed by the RTA. For example, it is common for both a property owner and a property manager or building superintendent to play some role in the management of a residential complex. Given the broad definition of "landlord" contained in section 2(1) of the RTA, both parties can be considered to be the landlord. Here, IM pays his rent directly to HCH, and interacts with HCH in regards to all, or nearly all, aspects of his tenancy. HPA continues to have various rights and responsibilities in relation to IM's tenancy. For example, it continues to have responsibility for maintenance of the rental unit and the residential complex in which the unit is located and it, not HCH, has rights such as to seek above guideline rent increases under the RTA.

26. Further, as IM points out in his submissions, at the heart of HPA's eviction Application against HCH is an allegation by HPA that the conduct of IM interfered with the reasonable enjoyment of HPA and/or other tenants residing in the residential complex, or the lawful rights of HPA. That type of dispute, and the respective rights of residential landlords and residential tenants, is at the very heart of the purpose of the RTA. Viewing the relationship between the parties as anything other than a single tenancy as between IM as Tenant and HPA and HCH as Co-Landlords creates a circumstance which undermines, or has the potential of undermining, fundamental rights and responsibilities established by the RTA. That does not, in our view, accord with the true reality of the relationship.

27. We acknowledge, as the original Hearing Member did, that HPA and HCH have characterized their relationship as residential landlord and residential tenant. We accept that pursuant to section 202(1)(b) we may have regard to the parties' own practices. We also accept that, viewed in isolation from the relevant facts described above respecting IM's tenancy, HCH might fall within the definition of tenant under section 2(1). However, we must conclude that these arguments, along with alternative arguments advanced by HCH are not determinative, and do not reflect the reality of the parties' respective roles in these circumstances.

28. First, HCH is not, and never intended to be, a residential tenant occupying the rental unit, and is therefore not the type of person which the RTA was designed to protect. It is true that a corporation has been found to be a legal person, and a corporation may exercise a right to occupy a residential unit through an officer, director or agent: *York Region Condominium Corporation*

No. 639 v. Lee, 2013 ONSC 503. Relying on that decision, the Board, in the earlier application involving HCH, TSL-39638-13, referred to in the Interim Order granting the review, held that HCH could "hold a right to occupy" the rental unit within the definition of tenant under the Act, and could exercise that right through its members. However, this does not alter the fact that HCH never intended to be or become a residential tenant and does not occupy the unit through IM, or any other person it serves. HCH is an organization that secures stable housing for individuals with severe mental illness or persons living in poverty. It provides supportive care to those individuals. It is not a residential tenant, but exactly what it purports to be, a supportive housing provider.

29. Second, to characterize the circumstances in the present case as being an upper and lower tenancy creates unnecessary confusion and undermines the rights afforded to both IM and HPA. For example, if we were to accept there was an upper tenancy as between HPA and HCH, then where HPA seeks to evict HCH as it has done here, IM will not be afforded the full rights of a party to that proceeding. While the Board in this case granted IM the opportunity to participate, that is not the same as being a party as of right, and there remains uncertainty as to the range of rights IM would have in the proceeding under the RTA. In particular, an "occupant" who is not party to an upper tenancy is not entitled to a notice of termination, which is an important protection afforded to tenants. It permits a tenant to remedy any alleged breach of a tenancy agreement, and in many cases, void the Notice of Termination thus preserving the tenancy. It is also a mandatory precursor to an eviction Application.

30. The difficulty arising under the notion of an upper and lower tenancy was highlighted in a recent case before the Divisional Court: *Transglobe Property Mgt. Services Inc. v. Supportive Housing in Peel*, 2014 ONSC 6211. In that case, the "upper landlord" brought an application to evict Supportive Housing in Peel, the "upper tenant." Prior to the hearing, the "parties" to the upper tenancy agreed to terminate the tenancy agreement, but the occupant ("lower tenant") was not given notice or an opportunity to participate in the application before the Board. The Divisional Court held that the occupant was not afforded procedural fairness, and that the occupant was entitled to standing on the matter. The matter was remitted to the Board. However, the rights of the occupant were not determined, and the question remains, in the circumstance of a purported upper and lower tenancy, what standing and status a "lower tenant" has with respect to the "upper tenancy".

31. In addition, accepting the notion of an upper and lower tenancy does not afford the parties, including a landlord, with expeditious and effective remedies where disputes arise pertaining to the residential tenancy. For example, as in the present case, where an "upper" landlord wishes to evict

an occupant because of the occupant's conduct, it must first seek to evict the "upper" tenant, even if the alleged breach upon which the eviction of the upper tenant was sought has nothing to do with the upper tenant's conduct. If successful, the upper landlord may then become the "lower" tenant's or occupant's landlord by virtue of an assignment and would need to file a new application with the Board in order to evict the lower tenant. This process would be inefficient and cumbersome, and could lead to inconsistent findings of fact and inconsistent rulings by the Board.

32. The same problem arises whether the "upper" tenancy is considered as falling within or outside of the RTA. We are not prepared to accept the position of HPA that it is not and can never become the landlord of IM. As discussed above, IM is clearly party to a residential tenancy agreement for the rental unit owned by HPA, and pursuant to the RTA such an agreement can only be terminated in accordance with the Act.

IM is not a Subtenant:

33. A number of the parties argued, in the alternative to an upper and lower tenancy position that HCH entered into a subtenancy with IM when they signed the occupancy agreement or that it assigned its tenancy agreement with HPA to IM. The rules and conditions respecting subtenancies and assignments set out in sections 95-97 of the RTA are somewhat complex and will not be recited here. By virtue of section 2(2) of the RTA, there cannot be a lawful subtenancy based upon the presented facts. That is because section 2(2) provides that in order for there to be a subtenancy, the tenant must give the subtenant the right to occupy the rental unit for a term ending on a specified date before the end of the tenant's term or period. In this case, IM's right to occupy the rental unit does not end before the end of term or period of the rental agreement between HPA and HCH. With respect to an assignment, neither HPA nor HCH purported to have agreed to permanently assign the rental unit to IM. Accepting these arguments would torture the language of the subtenancy provisions, or require finding that HPA consented to an assignment of its agreement with HCH by default. Neither of these approaches are necessary or consistent with the facts.

34. HCH argued that, if the Board determines that the upper tenancy is not a residential tenancy covered by the RTA, the decision could have profound effects on its ability, and that of other supportive housing providers, to secure housing from the pool of private housing. HPA too submitted that if it is found to be IM's landlord, this would discourage private landlords from renting to supportive housing providers. It notes that, in contrast to normal tenancy arrangements where it is able to screen and accept a tenant, in this circumstance it did not. Again, while we appreciate that our finding is not in accordance with what HPA and HCH understood their relationship to be, we

are not prepared to accept their position of an upper and lower tenancy, with the upper tenancy governed by the RTA. The "risks" identified by the parties do not sway our decision.

35. First, we have no evidence before us that the provision of supportive housing in Ontario will fall or collapse if we fail to determine there are two tenancies in respect of the residential unit. It is not disputed that the arrangement between HPA and HCH, while common, is not the only type of arrangement between supportive housing providers and private landlords. We expect that HPA and HCH, and parties like them, will address their mutual interests through negotiated agreements, or amendments to existing agreements in light of our decision.

36. Second, we are not prepared to accept what is in essence a fiction (that supportive housing providers are residential tenants and their agreements with private landlords are residential tenancy agreements) because it is convenient for the parties, particularly where to do so would undermine or limit the rights of individuals whom the RTA is specifically designed to protect. In this regard, we accept aspects of the position advanced by ARCH: that individuals like IM who have severe disabilities and may need supports to live independently, should not be disadvantaged or treated unequally with regards to rental housing. IM is no different than any other residential tenant in Ontario, except that, because of his disability he may require support in finding and maintaining housing. The assistance and supports are provided by organizations like HCH which are facilitators, not residential tenants themselves.

37. Similarly, we are not prepared to find that there are upper and lower tenancy agreements, which have the effect of limiting the rights of individuals such as IM, because of the possibility that some private landlords may be unwilling to rent to individuals who have mental illness. While this concern may be, unfortunately, well founded, it would be equally wrong for the Board to make a determination that would provide lesser rights to persons with disabilities.

38. Finally, it is not for the Board to remedy any social policy concerns regarding the ability of supportive housing providers to secure housing for their clients. It is for the Legislature to adopt specific provisions relating to supportive housing providers, if it considers it necessary or advisable. The Board's responsibility is to interpret and apply the RTA in a way that best accords with its purpose, and protects the rights and responsibilities of residential landlords and residential tenants.

SUMMARY:

39. For the reasons set out above, we find there is a single residential tenancy in respect of the rental unit occupied by IM. IM is the sole Tenant, and HPA and HCH are Co-Landlords. The agreement between HPA and HCH is therefore not a residential tenancy agreement governed by the RTA. We make no determination as to how that agreement should be characterized or enforced, as that question is not within our jurisdiction. This is not to say that their agreement, and the relationship between the HPA and HCH is not a matter the Board may be required to consider in the context of an application under the RTA respecting this tenancy, but only, having decided it is not a residential tenancy agreement governed by the RTA, we are not required to provide additional comment.

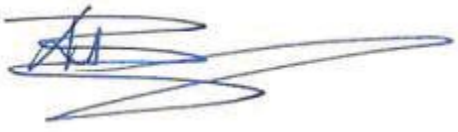
It is ordered that:

1. For the reasons set out above, the original decision in TSL-50630-14 is varied; application TSL-50630-14 is dismissed.

2. We make no determination as to whether it is possible for a residential landlord to also be a residential tenant in respect of the same unit, nor do we make any finding as to the nature of the agreement between HPA and HCH, except that it is not a residential tenancy agreement falling within the scope of the RTA. We find that there is a single residential tenancy between IM as the Tenant and HPA and HCH as Landlords. These determinations also resolve the A1 Applications (TST-57285-14 and TST-57947-14) filed by IM.

March 13, 2015
Date Issued

Michael Gottheil
Executive Chair, Landlord and Tenant Board



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