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BARRISTERS AND SOLICITORS

Submission Regarding Section 136 of the

Residential Tenancies Act, 2006

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1. Summary

This submission requests that the Honourable Kathleen Wynne, Minister of Municipal Affairs and Housing, amend the deeming provisions of the Residential Tenancies Act, 2006 related to rent increases (particularly section 136).

The Ontario Court of Appeal decision of *Price* v. *Turnbull's Grove Inc.*, 2007 ONCA 408 (*Price*) has eliminated any limitation period related to "void" Notices of Rent Increase (NORIs). This allows tenants to claim that they have paid unlawful rent increases for an indefinite period. It also creates significant evidentiary problems as landlords may not have the documentary evidence necessary to prove lawful rent, effectively putting landlords in an impossible position if the lawful rent is challenged in an eviction proceeding.

Reinstatement or creation of an express limitation period will conserve tribunal and legal resources of the parties related to disputes about NORIs and provide certainty to landlords and tenants. It will also avoid the significant evidentiary problems that arise for very old claims.

2. Recommendation

We recommend that the Residential Tenancies Act be amended to clarify that the effect of the s.136 is to deem a charged rent to be legal, even if the notice of rent increase (NORI) was void at the time it was provided to the tenant, if the notice, the rent increase or any other related aspect of the NORI remains unchallenged by the tenant after one year.

3. Introduction

This submission requests that the Honourable Kathleen Wynne, Minister of Municipal Affairs and Housing, amend the deeming provisions of the Residential Tenancies Act related to rent increases (e.g., section 136) to address outcomes that have arisen in the past four years. The Ontario Court of Appeal decision of *Price* v. *Turnbull's Grove Inc.*, 2007 ONCA 408 (*Price*) and subsequent tribunal and court decisions have created a situation that severely prejudices some landlords in their efforts to ensure that their commercial and economic interests and other rights are respected by eliminating any limitation period related to NORIs.

4. Early History (1975-1996)

Successive Ontario governments, the courts and housing tribunals have struggled for more than 35 years with the issue of how to balance a number of competing statutory provisions, property rights and policy objectives related to adequate notice of rent increases. This section briefly sets out some of the history of law reforms related to rent increase notices in Ontario.

5. Re Devitt and Sarochyn (1976)[1]

In 1975, the Ontario government enacted the *Residential Premises Rent Review Act, 1975* (the RPRRA). Included in the RPRRA were provisions intended to clearly define the amount and the circumstances in which rents could be increased by a landlord. Consistent with this objective, the legislation provided that a tenant shall be given at least 90 days notice, in the prescribed form, of a landlord's intention to increase the rent.

In *Re Devitt and Sarochyn*, the Divisional Court held that the purpose of the 90-day period of the RPRRA[2] was to allow a tenant sufficient time to accept the increase, or to serve the required 60-day notice to terminate the tenancy. The court went on to rule in that case that since the landlord had failed to provide notice in accordance with statutory requirements, the rent increases were void. This decision was upheld by the Ontario Court of Appeal (OCA).

Even though significant reforms were undertaken to Ontario's landlord-tenant laws in the late 1970s and in 1985[3], the provisions on notice of rent increases remained largely unchanged. In subsequent rulings issued in the 1980s the Ontario courts held consistently that, without notice in accordance with statutory requirements, rent increases are void.[4]

The public policy goal of the statutory provisions and the court interpretations appear to have been intended to ensure that landlords closely adhere to provisions on NORIs to ensure that tenants were treated fairly.

6. Residential Rent Regulation Act, 1986

With the passage of the Residential Rent Regulation Act, 1986 (RRRA) rent controls were formally introduced in Ontario.[5] In addition, the RRRA established a registry showing what the legal rents in each building were on July 1, 1985, and what the legal rent would be at a certain date if the landlord had complied with the rent guidelines. By the fall of 1986 all tenants in the province were required to receive letters explaining what the "legal rents" in their units should be. Since the new guidelines would be published in August of each year, in theory landlords and tenants would know well in advance what their future rent increases would be.[6]

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[1] 12 O.R. (2d) 652 at 655 (Div. Ct.); aff'd. (1977)

[2] S.O. 1975.

[3] Residential Tenancies Act, 1979 (in force December 1, 1979 - July 31, 1985); Residential Tenancies Amendment Act, 1985 (August 1, 1985 - December 31, 1986); and the Residential Rent Regulation Act (in force January 1 – August 2002).

[4] See Re Symons and Alexander (1986), 55 O.R. (2d) 395 at 397-98 (Sup. Ct.); Re Kasprzycki and Abel (1986), 55 O.R. (2d) 143 (Dist. Ct.); Re Di Petta and Mardarowicz, (1989), 69 O.R. (2d) 143 (Dist. Ct.).

[5] The RRRA applied to residential rental buildings regardless of the date of first occupancy. Enacted on December 4, 1986, it established a 4% guideline retroactive to August 1, 1985, on all rental buildings.

[6] The new procedures for determining financial and capital costs for landlords also brought a new certainty to rent review that didn't exist before the RRRA was enacted.

In the event that landlords imposed rent increases that exceeded the new guidelines, a tenant could seek compensation from the applicable tribunal. In those cases where notices had not complied with the requirements for NORIs, they also could be found to be void.

7. Rent Control Act, S.O. 1992

The *Rent Control Act, S.O. 1992 (RCA),* c. 11, which came into effect on August 10, 1992, introduced a wide range of reforms to promote increased construction of rental units but also improve certain tenant rights. Section 7(5) of the RCA re-affirmed that an increase in rent by a landlord was "void" where the landlord had not given the tenant a notice of the proposed rent increase in the form prescribed (in this case, by the RCA).

One noteworthy change is that s. 30(12) clarified that a maximum six-year review period would apply in filing claims where it was alleged by a tenant that a series of NORIs were invalid and illegal rent had been charged for a lengthy period.

8. Re Massicotte Bros. Holdings Ltd. and Beales (1996)[7]

In *Re Massicotte Bros. Holdings Ltd. and Beales*, the landlord provided a notice of rent increase 47 days in advance of the effective date. When the tenant refused to pay the increase, the landlord applied to the Ontario Court (General Division) to terminate the tenancy. The trial judge found that there had been substantial compliance with the notice of rent increase and allowed the notice to become valid once the required 90-day notice period had been met. In allowing the tenant's appeal, the Divisional Court did not find that the notice became valid at another date but stated:

> The clear implication of s. 5(1) of the RRRA is that a notice of increase in rent in the case of a periodic tenancy must state that the increase will be effective not earlier than the end of a period occurring at least 90 days after the giving of the notice. The notice given by the landlord in this case in which there was a monthly tenancy provided that the increase would be effective about 47 days after the date of the notice. The notice did not comply with s. 5(1). Under s. 5(2) the increase is void.

9. Wolkow v. Dunnell (1998)

The approach set out in *Re Massicotte Bros. Holdings Ltd. and Beales* was followed by the OCA in *Wolkow v. Dunnell*[8].

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[7] Released January 26, 1996, Unreported; cited in (1998) Wolkow v. Dunnell, (1998) CanLII 4124, 40 O.R. (3d) 783 (Ont. C.A.)

[8] (1998) CanLII 4124, 40 O.R. (3d) 783 (Ont. C.A.)

The original application in *Wolkow* concerned rent increases imposed during the period June 1, 1988, to May 31, 1995 but this was narrowed to six years as required by the RCA, plus the period after the application was filed.[9]

The Rent Officer found all NORIs issued during the six-year period to be illegal because the landlord had failed to provide the 90-day notice period required by the applicable legislation. Consequently the tenant had paid $4,632 more in rent than the landlord was entitled to receive. The landlord was ordered to repay that amount to the tenant, together with interest. The Divisional Court determined that the NORIs substantially complied with the requirements and overturned the Rent Officer's decision.

The issue on appeal was whether the NORIs given complied with the RRRA which was applicable until August 9, 1992 and the RCA which applied thereafter.[10]

The Court of Appeal held that the notice of rent increase in *Wolkow* was void as stipulated by subsection 7(5) of the RCA. The Court of Appeal noted that the notice was not in the prescribed form, did not express the increase in both dollars and percentage and did not give 90 days notice of the increase. The Court of Appeal, in reversing the decision of the Divisional Court, expressed the view that "if the Divisional Court's reasoning were adopted, there would be greatly reduced incentive to landlords to comply with these important notice requirements, as a landlord could give less than 90 days' notice and ignore the prescribed form with the knowledge that if a tenant objected, at worst, only a short period of the increase would be disallowed."

In reviewing some of the case law set out above, Austin J.A. stated at para. 15, "the courts have held consistently that, without notice in accordance with statutory requirements, rent increases are void, in the sense that they are without legal effect and not merely postponed." The Rent Officer's original finding was restored by the OCA.

10. Tenant Protection Act, 1997

The *Tenant Protection Act, 1997* included a curative provision, section 141 (now section 136 of the RTA, 2006) that, in our submission, was expressly intended to provide a one-year limitation period on claims related to lawful rent and NORIs.

The TPA provisions were worded as follows:

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[9] In Wolkow, the Rent Officer found that this period exceeded the review period permitted by the Rent Control Act, S.O. 1992, c. 11, s. 30(12), namely, six years before the date of filing of the tenant's application. As a result, the review was restricted to the period March 1, 1989, to February 27, 1995, plus the period after the application was filed.
http://www.canlii.org/en/on/onca/doc/1998/1998canlii4124/1998canlii4124.html

[10] Section 7(5) of the Rent Control Act provided that an increase in rent by a landlord was "void" where the landlord had not given the tenant a notice of the proposed rent increase in the form prescribed by that statute. A similar voiding provision contained in s. 5(2) of the RRRA.

> Rent deemed lawful
>
> 141. (1) Rent charged one or more years earlier shall be deemed to be lawful rent unless an application has been made within one year after the date that amount was first charged and the lawfulness of the rent charged is in issue in the application.
>
> Increase deemed lawful
>
> (2) An increase in rent shall be deemed to be lawful unless an application has been made within one year after the date the increase was first charged and the lawfulness of the rent increase is in issue in the application.

On a plain reading the intended effect of the TPA s. 141 provision was to deem a charged rent to be legal, even if the NORI technically was void because it failed to comply with notice requirements, if it was unchallenged by the tenant after one year. It is our further submission that this was designed to conserve tribunal and legal resources related to disputes about NORIs and provide certainty to landlords and tenants, consistent with the policy goals of the Progressive Conservative government which enacted the TPA.

A similar one year time limitation period applies under s. 135 of the RTA[11] when a tenant or former tenant applies to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money collected or retained in contravention of the RTA or the TPA.

Landlords believed that rent increases taken without giving proper notice under subsection 127(4) of the TPA were void. The TPA then required that landlords resubmit the proper notice and wait the requisite 90-day period before they could begin collecting the increased rent. This interpretation is supported by statements that were made to the Standing Committee that conducted hearings on the proposed legislation and in a law reform proposal made by a tenant's rights organization in 2003.[12]

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[11] Section 135 of the RTA reads as follows:
Money collected illegally
135. (1) A tenant or former tenant of a rental unit may apply to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money the person collected or retained in contravention of this Act or the Tenant Protection Act, 1997.

Time limitation
(4) No order shall be made under this section with respect to an application filed more than one year after the person collected or retained money in contravention of this Act or the Tenant Protection Act, 1997.

[12] Robert Levitt, What Ontario Tenants Want in Housing Policy: A New Landlord and Tenant Act, September 15, 2003; http://www.ontariotenants.ca/law/policy.phtml

In sum, under s. 141 of the TPA NORIs could be found void if they were brought to the attention of the tribunal and found to be defective within one year. Otherwise they would be deemed to be valid after one year. The intention was to further circumscribe the limitation period from six years to one year.

11. Price v. Turnbull's Grove Inc.

In *Price v. Turnbull's Grove Inc. (2007)*[13] the landlord imposed a rent increase on a tenant in an Ontario land lease park without providing written notice of the proposed rent increase.[14] The tenant paid $179 per month for the lease commencing in 2001, and, in compliance with the verbal notice, paid the increased rent of $250 per month in 2002 continuing through 2003. In August of 2003, the tenant refused to pay the increased rent, claiming it was illegal.

Subsequently, the landlord filed an application with the (then) Ontario Rental Housing Tribunal (ORHT) seeking to terminate the tenancy and to evict the tenant for non-payment of rent. The application was granted by the ORHT. The tenant appealed to the Divisional Court and lost. The tenant then appealed to the Ontario Court of Appeal, where the appeal was allowed. The landlord was not represented by counsel at the OCA and it seems unlikely that any effort was made to distinguish previous decisions or provide the legislative history related to s. 141 of the TPA.[15]

The issue on appeal was whether section 141 of the TPA, the deeming provision described above, applied where a rent increase was imposed without giving notice of the increase as required by the Act and without the proper notice period of 90 days. A notice is "void" where the requirements of the Act are not met, but the court was asked to consider whether the rent was deemed valid after one year if the notice remained uncontested.

Cronk J.A. writing for a unanimous panel of the Court of Appeal, concentrated her analysis on the provisions of s. 127 of the TPA, in particular the interaction between ss. 127(1) and (4) and s. 141:

> TPA s.127(1)

Levitt states: "Section 141, Tenant Protection Act, makes any illegal rent that landlords have gotten away with charging for at least one year, the legal rent. Any law that includes such a section that says what was illegal, is made legal if it goes unnoticed and unacted upon for one year, only encourages landlords and their agents to charge illegal rents in the hopes of getting away with it. No such section should exist in any new landlord and tenant act."

[13] 85 O.R. (3d) 641 (Ont. C.A.)
[14] *Price* was filed under the Tenant Protection Act, the law which then was in force.
[15] ROBERT G. DOUMANI AND TOM HALINSKI, UNHAPPY RESULTS FOR LANDLORDS ON THE LEGAL FRONT IN 2007, BUILDING BLOCKS, VOL. 6 NO. 3 DECEMBER 2007 GREATER TORONTO APARTMENT ASSOCIATION NEWS; http://www.gtaaonline.com/_building_blocks/bb_12_07.pdf; see also Canadian Apartment Magazine, November 2007 Issue

> A landlord shall not increase the rent charged to a tenant for a rental unit without first giving the tenant at least 90 days written notice of the landlord's intention to do so.
>
> TPA s. 127(3)
>
> The notice shall be in a form approved by the Tribunal and shall set out the landlord's intention to increase the rent and the amount of the new rent.
>
> TPA s. 127(4)
>
> An increase in rent is void if the landlord has not given the notice required by this section, and before the landlord can take the increase the landlord must give a new notice.

The current provisions of the RTA[16] are substantially similar to those in the TPA, and which were examined in *Price*. These are reproduced in Appendix 2. For the sake of simplicity, the discussion below relies on the sections of the TPA, as referenced in the Price decision.

On its face the original (verbal) 'notice' provided to the tenant violated s. 127(1) of the TPA, thus rendering the notice void under the 'voiding' provisions of s. 127(4). The Court of Appeal considered there to be an apparent conflict between the use of the distinct and strong term 'void' in s. 127(4) and the curative or amnesty function of s. 141(1) of the TPA.

Cronk J. A. followed the logic set out in key decisions such as *Wolkow* that had previously interpreted the word "void" with respect to NORIs:

> [36] In my view, by the use of the word "void" in s. 127(4) of the Act, the legislature expressed its intention, in plain language, that a rent increase imposed without "at least" ninety days advance written notice to the affected tenant is of no legal force or effect. This accords with a fundamental purpose of the Act, namely, to control the circumstances in which a landlord may effect a rent increase.
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> [37] Thus, a rent increase rendered void under s. 127(4) of the Act for non-compliance by the landlord with the mandatory notice requirement of s. 127(1) is not merely unlawful – it is a nullity. It is as if the increase never occurred.

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[16] Residential Tenancies Act, 2006, S.O. 2006, c. 17.

Accordingly, in the case of a NORI made void because of a failure to comply with s. 127(1), Cronk J. A. ruled there is nothing to be 'saved' by the curative provisions of s. 141. In other words, despite the fact that the tenant had paid the unlawful rent for more than 12 months, the one year "deeming rule" did not come into effect.

In her analysis, Cronk J. A. relied extensively on basic principles of statutory interpretation, especially two of the key principles that a statute should be interpreted consistent with its purpose (which the court interprets as tenant protection) and that any ambiguity in the wording of benefits-conferring legislation should flow to the benefits-claimant (i.e. the tenant). The Court seemed concerned with the significant consequences for the tenant (i.e. possible eviction) and appears to weigh these heavily in its analysis:

> [40] The critical statutory purpose of the s. 127(1) notice requirement would be significantly undermined if ss. 141(1) or (2) of the Act were construed so as to imbue otherwise void rent increases with legal validity notwithstanding non-compliance with s. 127(1).

The implication of the Court's statutory analysis is that, when triggered, s. 127(4) serves to nullify the amnesty or curative provisions s. 141(1). The Court also commented that section 141 of the TPA is not rendered useless, because there are other types of rent increases that are unlawful, but not void (i.e., increasing rent by more than the provincial guideline amount).[17] These "voidable" or "illegal" increases can be rescued by section 141. The Court also left the door open to an argument of laches or estoppel as a defence that could be invoked by landlords.[18]

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[17] Since it also is a vital principle of statutory interpretation that no legislative provision should be rendered meaningless Cronk J. A. addressed the meaning for TPA 141(1) in the following passages:

[41] Fourth, on the view of the purpose and effect of ss. 127(1) and 127(4) that I hold, as described above, ss. 141(1) and (2) of the Act are not rendered meaningless. Part VI of the Act sets out various rules regarding rent, including, as I have stated, the requirement that the quantum of a rent charge or of a rent increase not exceed prescribed limits. Rent amounts that exceed those limits are unlawful. In my opinion, it is to these types of excessive or "tainted" rents that ss. 141(1) and (2) are intended to apply. In other words, ss. 141(1) and (2) deem a rent charge or a rent increase to be lawful in certain circumstances where they would otherwise be unlawful. But an "unlawful" rent charge or rent increase is not the same as a "void" rent charge or rent increase. Section 141 is directed to the former, while s. 127(4) is concerned with the latter.

[42] Fifth, while Part VI of the Act prohibits various conduct in respect of rent and rent increases, only conduct concerning a rent increase that offends s. 127(1) renders the increase void under Part VI. This signifies the importance of the s. 127(1) notice requirement to the rent control scheme established by the Act. For example, rent charged in contravention of s. 121(1) of the Act - rent in an amount that is greater than the lawful rent permitted under Part VI of the Act - is not deemed to be void under Part VI of the Act. This type of 'tainted' rent charge, therefore, could be subject to the remedial effect of s. 141(1) of the Act in a proper case. Similarly, where proper notice of a proposed rent increase is given in conformity with s. 127(1) of the Act, but the amount of the proposed increase exceeds the permitted increase prescribed by the guideline under the Act - in contravention of s. 129(1) of the Act - s.141(2) may be engaged.

[18] Price, paragraph 45.

Whether or not the Court of Appeal's decision is correct in law, its effect is to completely eliminate *any* limitation period. Previously, under the *Rent Control Act, 1992*, there was at least a six year limitation period in place. Now there is none, which runs contrary to all recent legislative reform in this area, and possibly contrary to the intention of the legislature when it brought in the deeming provision.

It also throws into question whether a one-year limitation period remains for tenant applications for "money collected illegally" under section 135(4). The decision in *Price* would suggest it does not.

12. The Consequences for Some Landlords

Iler Campbell became involved in two lengthy and costly litigation cases related to void NORIs when it was retained by the Sisters of St. Joseph (the **Sisters**). Copies of all the decisions are enclosed for the Minister's information and review at Appendix 1.

The Sisters of St. Joseph purchased a rental property and took over its management in late 2007 with the intention of demolishing the existing buildings to build a new convent.

As the LTB is required to be correct on issues of law[19], tribunal members must follow the courts where they have provided interpretations of the provisions in question.

12.1 The Audain Case

> One of the tenants living in the rental property, Mr. David Audain, had been embroiled in a dispute with his landlord for many years, and had ceased paying rent. The apartment was originally occupied by Mr. Audain's mother and was taken over by him after her death in 1993.
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> In 2007, the prior landlord, Ina Grafton Gage Home of Toronto (IGG), applied for an LTB order to terminate the tenancy and evict Audain, noting that the rent arrears up to November 30, 2007 were more than $8,000 and the tenant had ceased paying rent.[20]
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> At the LTB hearing in late 2007, the tenant led evidence that the rent arrears claimed on the Landlord's application to the LTB were not correct because the rent claimed was not the lawful rent for the unit and the landlord had illegally raised

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[19] Dollimore v. Azuria, [2002] O.J. No. 4408 (Div.Ct.); Samuel Property Management v. Nicholson, 2002 CanLII 45065 (ON C.A.), (2002) 61 O.R. (3d) 470, 217 D.L.R. (4th) 292 (C.A.).
[20] Landlord Tenant Board, Re Ina Grafton Gage Home of Toronto and David Audain, File No. TSL-05087, November 23, 2007, Savoie Vice-Chair.

the rent for the unit since 1993. Specifically, the tenant provided eight "notices" of rent increases, in the form of letters, covering a 10-year period between 1993 and 2002.

The evidence indicated that between 1993 and 2001 the landlord gave the tenant a letter explaining that the rent would be increased as of a certain date. In most cases, IGG gave less than 90 days notice and did not use the prescribed forms. In subsequent years (between 2004 and 2007) the correct form was used but IGG did not comply with the 90-day notice period. In total, at least 12 notices were received by the tenant between July 1993 and July 2006.[21]

In his decision released in November 2007, LTB Vice Chair Savoie found all the NORIs filed to be void, flowing from the *Price* decision. The issue of laches or estoppel does not appear to have been addressed by the parties or Vice Chair Savoie. In addition, Vice Chair Savoie could not determine the lawful rent for the unit because no party had presented any evidence on this point. IGG did not appeal the decision.

In point of fact, none of the parties to the litigation had any evidence regarding what might constitute the lawful rent, and this bore out as litigation proceeded with Mr. Audain and the Sisters. This ultimately placed the Sisters in a nearly impossible situation as they tried to gain possession of the unit and ultimately, the building, for the purposes of their redevelopment.

In April 2008, the Sisters pursued an eviction of Mr. Audain after they took over the leases in December 2007. Mr. Audain had paid no rent to the Sisters. They were unable to present evidence at the LTB regarding the lawful rent. The Sisters had even less evidence to present than Mr. Audain as the prior landlord, IGG, had not kept good records.

As a result, the Sisters sought to prove the lawful rent based on the amount Mr. Audain stated it to be in a tenant application he brought.

Though Mr. Audain resiled from his own evidence regarding the lawful rent at the LTB hearing, the LTB accepted his tenant application as evidence of the lawful rent. On appeal to the Divisional Court, this finding was overturned as being

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[21] Ibid; Vice chair Savoie notes that seven NORIs were filed for the years between 1993 and 2001, and five more notices were filed for the years between 2002 and 2006.

tantamount to an error of law. The Divisional Court concluded that the tenant's evidence was not actually evidence of the lawful rent at all, and quashed the eviction decision of the LTB.

The landlord ultimately secured a writ of possession to evict Mr. Audain on the basis of a consent order between him and the Sisters. Mr. Audain also sought to appeal this consent order at the Divisional Court, but it was upheld by the Divisional Court. However, enforcement of the landlord's rights resulted in a further hearing being required at the LTB, by order of the Divisional Court. While the Sisters were successful at the LTB, this only resulted in further appeals and motions by Mr. Audain. The litigation was protracted for several more months.

Ultimately, the consequence of the Court of Appeal's decision in *Price*, and Vice Chair Savoie's 2007 decision, was a lengthy legal battle. It took the Sisters more than two years and nine months to evict Mr. Audain, requiring 14 appearances before the LTB and the courts. For the last three years of his residency, Mr. Audain paid only $650 in rent, only because a court order required him to.

12.2 The Thomson Case

Like Mr. Audain, Mr. Thomas Thomson lived at the rental property purchased by the Sisters and stopped paying rent in December 2007. Even though Mr. Thomson at no time proved any of the NORIs he was provided were void, Mr. Thomson sought to rely on LTB ruling made by Vice Chair Savoie in November 2007 in the Audain case.[22]

The Sisters abandoned any efforts to evict Mr. Thomson on arrears after his successful appeal to the Divisional Court on a procedural ground, and ultimately evicted him on the basis of demolition. Mr. Thomson moved out in January 2011. However, it took the Sisters more than two years and seven months to evict him from their initial attempt to do so on the basis of rent arrears, and required 16 appearances before the LTB and the courts, including an appearance at the Court of Appeal, flowing out of the demolition eviction.

As of August 2011, the Sisters are still in litigation with Mr. Thomson over "unlawful rent". Mr. Thomson initiated a claim for his alleged overpayment in rents, all of it occurring

[22] Thomson v Sisters of St Joseph 2010 ONSC 2337

under IGG's tenure as landlord. He started this claim just prior to the landlord launching an application to evict him on the basis of demolition. He has since started another claim in small claims seeking more compensation for his eviction.

13. Implications

a. No Limitation Period

A landlord's errors in relation to NORIs should not have such serious consequences for an indefinite period of time. Since the LTB and the lower courts cannot change the application of the law and reverse the impact of the *Price* decision, it is essential that the Ontario government amend the relevant provisions to bring finality to potential claims past a certain time limit.

Minimally, a six-year limitation period should be re-instated for NORIs found to be invalid. However, we submit that in keeping with the legislation generally, a one-year limitation period should apply.

b. Waste of tribunal and court resources

In the past fifteen years successive Ontario governments have sought to streamline and conserve tribunal and court processes. It is our submission that the current interpretation of the provisions in s. 136 of the RTA undermines these efforts.

c. Implications for real estate practitioners

This case also has implications for real estate practitioners and prospective purchasers of residential tenancy buildings. Prior to *Price*, normally only rents charged in the year immediately preceding the closing date were checked for legality (based on the deeming provisions of the Residential Tenancies Act (e.g., section 136)). However, in view of the *Price* decision, all past rent increase notices need to be reviewed a likely impossible task for timeframes as long as the ones that arose in these cases. Purchasers cannot reasonably know in light of the *Price* decision what risks they are taking on.

14. Conclusion

The RTA's purpose, as stated in s. 1 of the Act, is to "provide protection for residential tenants from … unlawful evictions … 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."

Landlords, agents, counsel and LTB Members had believed for years that under the TPA and now the RTA, the deeming provision in s. 136 provided a statutory amnesty for errors made by landlords in raising rents and filing NORIs so as to protect landlords who may have increased the rent by more than the provincial

guideline amount improperly if more than one year passes without the rent being challenged. The Court of Appeal has now determined that this is not the case, and that s.136 only operates in a more narrow fashion.

To date the LTB and court decisions since *Price* have stated clearly that where a notice to increase the rent did not give 90 days notice, the notice is void – a nullity – as though it never existed. As documented above, this means that landlord can be severely prejudiced by time, potentially finding itself unable to ever prove the lawful rent simply because the documents no longer exist. While on one level it is important to protect the rights of the tenants who were overcharged rent, on another, this is a claim, like any other, should have an appropriate limitation period associated with it.

Appendix 1

A. Audain Litigation

1. Ina Grafton Gage Home of Toronto and David Audain, File No.: TSL-05087, Order Issued November 23, 2007, Reasons for Order issued December 7, 2007

2. The Sisters of St. Joseph for the Diocese of Toronto in Upper Canada and David Audain, File No. : TSL-12280, Order issued by Olga Luftig February 9, 2009, Amended January 8, 2010

3. *Audain v. Sisters of St. Joseph*, 2010 ONSC 719, (Div. Ct.)

4. *Audain v. Sisters of St. Joseph*, 2010 ONSC 1077, (Div. Ct.)

5. The Sisters of St. Joseph for the Diocese of Toronto in Upper Canada and David Audain, File No. : TSL-12280, Order issued July 9, 2010, Amended August 3, 2010

6. *Audain v. Sisters of St. Joseph*, 2010 ONSC 6415, (Div. Ct.)

7. *Audain v. The Sisters of St. Joseph for the Diocese of Toronto in Upper Canada*, File No.: 394/10, December 10, 2010, (Div. Ct.) (unreported)

8. The Sisters of St. Joseph for the Diocese of Toronto in Upper Canada and David Audain, File Nos.: TSL-13613-AM, TST-01003-AM, Order issued July 10, 2009, Amended January 7, 2010

B. Thomson Litigation

1. *Thomson v. Sisters of St Joseph*, 2010 ONSC 2337, (Div. Ct.)

2. *Thomson v. Sisters of St. Joseph*, Court File No.: 578/10 (O.S.C. Div. Ct.) (unreported)

3. *Thomson v. Sisters of St. Joseph*, File No.: M39550/M39557, (O.C.A.)

Appendix 2

Provisions of the Residential Tenancies Act, 2006 (RTA)

The provisions of the Residential Tenancies Act, 2006 (RTA)[23] are substantially similar to those provided in the Tenant Protection Act, 1997 (TPA), which was examined in Price. The relevant provisions of the RTA are:

Notice of rent increase required

116. (1) A landlord shall not increase the rent charged to a tenant for a rental unit without first giving the tenant at least 90 days written notice of the landlord's intention to do so.

Increase void without notice

(4) An increase in rent is void if the landlord has not given the notice required by this section, and the landlord must give a new notice before the landlord can take the increase.

Money collected illegally

135. (1) A tenant or former tenant of a rental unit may apply to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money the person collected or retained in contravention of this Act or the Tenant Protection Act, 1997.

Time limitation

(4) No order shall be made under this section with respect to an application filed more than one year after the person collected or retained money in contravention of this Act or the Tenant Protection Act, 1997.

Rent deemed lawful

136. (1) Rent charged one or more years earlier shall be deemed to be lawful rent unless an application has been made within one year after the date that amount was first charged and the lawfulness of the rent charged is in issue in the application.

Increase deemed lawful

(2) An increase in rent shall be deemed to be lawful unless an application has been made within one year after the date the increase was first charged and the lawfulness of the rent increase is in issue in the application.

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[23] Residential Tenancies Act, 2006, S.O. 2006, c. 17.