Ontario's New Rent Rules

Get ready for a flood of AGIs

July 1, 2017

As I write this Ontario's new rent rules spelled out in Bill 124, the "Rental Fairness Act" (2017) have just achieved royal assent, becoming law.

Bill 124 is fixing a rather huge and growing loophole in the Residential Tenancies Act ("RTA", S. O, C.17, 2006) that allowed any building constructed after 1991 to be exempt from the province's rent controls. This may have made sense in 1997 when it was introduced as part of the old Tenant Protection Act ("TPA", S. O, C.24, 1997) but as time has moved on an ever increasing number of newly constructed rental units were becoming exempt and rents began to soar. Some tenants were being hit with 50 and 100% rent increases. Eliminating this glaring bit of short sightedness from the law made perfect sense.

Once the RTA is suitably updated, any rent increases for occupied units issued on or after April 20, 2017 will have to conform to the province's rent increase guideline. This guideline is a floating amount set annually by the Ministry of Housing in accordance with inflation. It can vary from 0.0% to 2.5%. For 2017 it is set at 1.5%

But, no matter how it has been depicted, this is not a hard limit on rent increases. Vacant units are still uncontrolled allowing the landlord to charge whatever he thinks the market will bear. For occupied units, landlords who feel they can justify a larger rent increase may apply to the Landlord and Tenant Board ("LTB") for an Above Guideline Increase ("AGI") within the rules set out in section 126 of the RTA. So the real difference here is not that a landlord cannot spike your rent, the difference is that large increases must be justified in an LTB tribunal where tenants have the right to challenge the application.

If an AGI is approved, it will allow landlords to increase rents by the provincial guideline plus (up to) an additional 3.0% per year for 3 years. The resulting 9.0% increase can last for up to 25 years. Additionally, nothing prevents a landlord from having more than one AGI active at the same time which can drive rents up by a considerable amount.

While this is a significant improvement, it is not without it's drawbacks. Given that the new rules will roughly double the number of rent controlled units, it is reasonable to expect a large increase in the number of AGI applications. Landlords who are not used to rent controls will now be hunting for any and every way they can find to increase rents, including the filing of multiple applications. The LTB needs to brace itself for a flood of new applications and tenants need to gear up to defend themselves against this onslaught in tribunals.

Yes, I just told you to get ready to be sued repeatedly by your landlord.

About Above Guideline Increases

This is one time that you really do need to understand both the law and your rights. An AGI hearing is the most intense and complex action that can be taken under the RTA.

Section 126 of the RTA says:

> ***126*** *(1) A landlord may apply to the Board for an order permitting the rent charged to be increased by more than the guideline for any or all of the rental units in a residential complex in any or all of the following cases:*
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> > *1. An extraordinary increase in the cost for municipal taxes and charges for the residential complex or any building in which the rental units are located.*

2. Eligible capital expenditures incurred respecting the residential complex or one or more of the rental units in it.

3. Operating costs related to security services provided in respect of the residential complex or any building in which the rental units are located by persons not employed by the landlord. 2006, c. 17, s. 126 (1).

Interpretation
***126** (2) In this section, "extraordinary increase" means extraordinary increase as defined by or determined in accordance with the regulations. 2006, c. 17, s. 126 (2).*

When application made
***126** (3) An application under this section shall be made at least 90 days before the effective date of the first intended rent increase referred to in the application. 2006, c. 17, s. 126 (3).*

So, if the landlord's property taxes go up significantly, they do renovations or improvements or they hire a security company they can apply to increase your rent above the provincial guideline.

Capital Expenditures from renovations or improvements are the most complex to deal with and usually involve the largest amounts of money.

There are rules for what applies:

***126** (7) Subject to subsections (8) and (9), a capital expenditure is an eligible capital expenditure for the purposes of this section if,*
(a) it is necessary to protect or restore the physical integrity of the residential complex or part of it;
(b) it is necessary to comply with subsection 20 (1) or clauses 161 (a) to (e);
(c) it is necessary to maintain the provision of a plumbing, heating, mechanical, electrical, ventilation or air conditioning system;
(d) it provides access for persons with disabilities;
(e) it promotes energy or water conservation; or
(f) it maintains or improves the security of the residential complex or part of it. 2006, c. 17, s. 126 (7).

Similarly there are rules for what does not apply:

***126** (8) A capital expenditure to replace a system or thing is not an eligible capital expenditure for the purposes of this section if the system or thing that was replaced did not require major repair or replacement, unless the replacement of the system or thing promotes,*
(a) access for persons with disabilities;
(b) energy or water conservation; or
(c) security of the residential complex or part of it. 2006, c. 17, s. 126 (8).

***126** (9) A capital expenditure is not an eligible capital expenditure with respect to a rental unit for the purposes of this section if a new tenant entered into a new tenancy agreement in respect of the rental unit and the new tenancy agreement took effect after the capital expenditure was completed. 2006, c. 17, s. 126 (9).*

The definition of an eligible capital expenditure is further refined in Ontario Regulation 516-06 ("OReg", 2006) Section 18, which says:

***18.** (1) In the Act and in this Part,*
"capital expenditure" means an expenditure for an extraordinary or significant renovation, repair, replacement or new addition, the expected benefit of which extends for at least five years

including,
(a) an expenditure with respect to a leased asset if the lease qualifies as determined under subsection (2), and
(b) an expenditure that the landlord is required to pay on work undertaken by a municipality, local board or public utility, other than work undertaken because of the landlord's failure to do it,

but does not include,
(c) routine or ordinary work undertaken on a regular basis or undertaken to maintain a capital asset in its operating state, such as cleaning and janitorial services, elevator servicing, general building maintenance, grounds-keeping and appliance repairs, or
(d) work that is substantially cosmetic in nature or is designed to enhance the level of prestige or luxury offered by a unit or residential complex; ("dépense en immobilisations")

(**Please note:** While most of the above will remain true, it is being modified by the new regulations. Consult the actual RTA online for the most current versions if you find yourself defending against an AGI.)

Most capital expenditures are big jobs like balcony replacement, roof, furnace, parking lot, etc. that affect the entire complex. But they can also apply to individual units. Your landlord could, for example, renovate your bathroom and then file for a rent increase above guideline on your unit. He could not, however, file for routine maintenance items such as paint, a plumbing problem or a broken door knob.

About LTB Tribunals

Ontario's Landlord and Tenant Board holds tribunals under the auspices of the Social Justice Tribunals of Ontario ("SJTO"). The general conduct of SJTO tribunals is spelled out in the Statutory Powers and Procedures Act ("SPPA", S.O, C s22, 1990), which is based on the principles of Natural Justice.

There are three parties to any tribunal. The person who applies for a tribunal is known as the "Applicant" the people named in the application are known as the "Respondents". The tribunal member assigned to render judgment is known as an "Adjudicator".

The core principle of natural justice is that in any hearing both the applicant and respondent must have a reasonable opportunity to present both evidence and testimony, including the right to question one and other's witnesses. The adjudicator is charged with making a decision based on the evidence presented.

In a hearing the applicant always goes first. They will present their evidence, call witnesses, etc. to make their case before the Adjudicator. It is up to them to convince the adjudicator their application has merit. Also in this phase of the hearing the respondent has the opportunity to question the applicant's witnesses to clarify issues or evince more information.

Next it is the respondent's turn. Like the applicant they can present evidence, call witnesses, etc. However; the respondent's goal is different. He will be trying to discredit the applicant's claims. Like the first phase, the applicant will have the chance to question the respondent's witnesses.

After all evidence and testimony is submitted. Both parties will have the chance to make comments and arguments in summary. The applicant goes first, will summarize his case and offer reasons why his application should succeed. The respondent will then summarize their arguments and offer reasons why the applicant's case should not succeed.

Finally, the adjudicator will close the hearing and begin his analysis of the evidence and arguments presented. When his deliberations are finished, he will produce an Order, in which he will post his decision and his reasons. The order is then sent to all parties to the hearing.

Burden of Proof

In all SJTO sponsored hearings, including those of the LTB, the burden of proof is always on the applicant. It is the applicant's job to prove their claims are justified. Thus, the only reasonable starting point in any hearing has to be that the applicant's claims are not justified until he proves they are. To start from any other assumption would bias the hearing in favour of the applicant.

The standard of proof in these hearings is called "Balance of Probabilities" meaning that at the end of the day the adjudicator will decide who they believe, based on the evidence and testimony before them.

If the applicant cannot prove his case to a reasonable degree of certainty or his evidence and testimony do not stand up in the face of the respondent's case-in-counter, the finding should favour the respondent(s).

The Right of Review

Natural justice is based almost entirely upon fairness and cannot function in a biased or limited environment. For this reason tribunals offer the right to have a hearing order reviewed with the possibility of having all or part of the application re-heard.

This is spelled out in the RTA section 209(2) which says:

> ***209****(2) Without limiting the generality of section 21.2 of the Statutory Powers Procedure Act, the Board's power to review a decision or order under that section may be exercised if a party to a proceeding was not reasonably able to participate in the proceeding. 2006, c. 17, s. 209 (2).*

and the SPPA part 21.2 which says:

> ***21.2*** *(1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order. 1997, c. 23, s. 13 (20).*
> *Time for review*
> *(2)The review shall take place within a reasonable time after the decision or order is made.*
> *Conflict*
> *(3)In the event of a conflict between this section and any other Act, the other Act prevails. 1994, c. 27, s. 56 (36).*

If there is good reason to believe an LTB hearing or order is unfair, Review Requests can be filed, by any party to the hearing, using the LTB's form within 30 days of the date on the order.

Only one review is allowed per order. At the board's discretion multiple requests will be combined into a single hearing or secondary requests can be declined.

Be aware that you don't get to file for a review simply because you lost. For a review request to succeed it must demonstrate a serious error in the hearing or the order. Serious errors are things like misapplication of law, lack of jurisdiction, procedural errors and bias or impropriety on behalf of the adjudicator.

As in all SJTO hearings, the burden of proof is on the applicant (the requestor) who must make arguments that will stand up in the face of opposition from the respondent. The same "balance of probability" standard of proof is applied as in other cases. If the applicant succeeds, a review is granted and the case file will be re-opened so that all or part of it can be re-heard. If it is not granted the order under review stands as issued.

Since this process asks an adjudicator to second guess a trusted co-worker it is neither a simple matter nor one to be taken lightly. Arguments made will require demonstrations that a hearing went horridly wrong in some way that can only be corrected by re-hearing all or part of the case. In particular, questions of bias by an adjudicator can be very hard to demonstrate to a reasonable degree of certainty.

Flaws in the System

While part 126 of the RTA may appear, at first, to be both fair and reasonable there are profound problems for tenants who must deal with AGIs:

1. **The evidence problem**
   The RTA contains no obligation for a landlord to notify a tenant when a large Capital Expenditure project is planned, unless the landlord needs access to tenant's private spaces to complete it. Even then the required notice period is only 24 hours.

   The most frequent result of this is that the workmen simply show up and start tearing things apart in preparation for whatever job they are doing. This, in turn, significantly alters the workspace and tends to destroy evidence of prior condition. For example: To replace a fire escape, the old one must be removed first. This effectively destroys any evidence of it's condition before it was removed.

   Since the tenant's first involvement in most AGIs comes with the service of the application which often comes a year or more after the work is completed it is frequently not possible for tenants to offer credible evidence about the necessity of the work. This strongly biases the application in favour of the landlord who had every opportunity to acquire engineering reports, building inspections and other documentation to support his claim before the work began.

   It is very likely that you will find yourself in an AGI hearing with literally no evidence to support a case-in-counter and your only opportunity for justice will come from challenging the landlord's evidence and testimony.

2. **The overpayment problem**
   Each AGI application includes a date when the landlord intends to begin applying the new rent. This is to be at least 90 days after the application is filed. (RTA, s.126.3). As a rule the landlord will begin billing rent at the increased rate on the tenant's next annual rent increase (their "anniversary date").

   This can result in considerable overpayments if the AGI is rejected or if the final amount is less than the landlord is applying for. Getting these sums of money back can be painfully difficult for tenants, since the RTA contains no provisions for enforcement.

   Be aware that you <u>do not</u> have to pay this increased amount until there is a tribunal order saying that you must. (RTA s.126.5 and 126.6) Often this order can come a year or more after your landlord begins billing at the increased rate. The smart strategy is to pay the provincial guideline amount only, setting aside the landlord's AGI amounts until the file is settled. Although it may appear counter-intuitive, in reality it is most often far easier to pay arrears than collect on an overpayment.

3. **Situational awareness**
   In any LTB hearing, you need to exercise a careful sort of situational awareness. You live in the complex in question, you will have watched the work being done, you will know something of the building's history. The landlord's representative will also know something about the complex, based on the documents and evidence compiled by the landlord.

   But, except by coincidence the Adjudicator will know absolutely nothing about the situation or the complex that is not in the evidence from the hearing. In many cases they won't even know what the building looks like. This, unfortunately makes them the easiest person in the room to lie to.

   While I will advise anyone going into one of these hearings that it is far better to lose on the truth than to win on a lie, it is likely the landlord will not share the same enlightened moral compass.

Preparing For The Hearing

The rule here is very simple: Prepare ... Prepare some more... Prepare again...

Before this even begins, you should go to at least one LTB hearing as an observer and watch how the hearing works. Seeing it in action is more informative than all the pamphlets you will ever gather.

An AGI hearing is not about whether the landlord spent money. It is also not about whether he had the right to alter the complex. It is about one thing only: the landlord's right to force you to pay for the items claimed through increases in your rent. Be very aware that while the Adjudicator and Landlord might be talking in the abstract about large sums of money, it is your money they are talking about.

The first thing to do is to obtain a full length copy of the application. What you got in the mail is just the forms, there will be a much larger disclosure that is supposed to be made available to you in your complex's office or through your landlord's offices. (RTA s.126.4, Oreg s.23) It is a dismissible offense to not make this available to tenants because it will prevent you from participating fairly in the hearing.

Study the full disclosure page by page, looking for anything and everything, that may be wrong, deceptive or false. In particular make sure there are no hidden items, accounting errors or items that fall outside the 18 month limit. (Oreg, s.26.2) The goal is to be able to challenge your landlord's testimony and make submissions regarding flaws in the application.

Where sections of the application do not include evidentiary documents such as Engineering Reports, Inspector's Orders or other forms of documentary evidence, you should make an effort to obtain these documents well in advance of the hearing. If the landlord is not forthcoming, file a request in writing with your landlord's representative and send copies to the LTB office overseeing the application. If the landlord does not comply, that will play well for you in the hearing as you can claim that you were not given a full disclosure of the application.

If it is at all possible compile a group of before and after pictures and/or inspector's reports of the worksite in question. It may be that the work done was not structurally necessary and presenting this at the hearing might be your only defense. (RTA s.126.7 and 126.8)

Prepare a building history, with photos, to present as part of your testimony. Acquaint your Adjudicator with the building and it's condition over time. Especially try to find pictures taken right before the Capital Expenditure work commenced. Always include a current photo of the building so the Adjudicator does not have to imagine what it might be like.

For each item and sub-item in the application, prepare a counter-argument as to why you should not have to pay for it. For example: If the landlord painted the hallway but did no other repairs, you can claim it is cosmetic in nature and not a valid Capital Expenditure (Oreg, s.18.1d)

Carefully select a single representative to lead your case. Most often lawyers and paralegals will do only what you instruct them to do and will never do more than they are paid to do. In my experience this will often fall short of the required motivation for success. Very often an informed tenant, someone with an interest in the outcome, who knows the RTA and is familiar with LTB rules will do a far better job than any third party representative. There is much to be said for "motivated self interest" in these situations.

Above all else, do not go into this emotionally. Complaining about the difficulty rent increases cause will not help your case one little bit. Appeals to the Adjudicator's humanity will also fall on deaf ears. Go in there with evidence and arguments that are supported by law, regulation and policy. Leave the rest at home.

What To Expect

In Oliver Twist, Charles Dickens wrote "The law is an ass", bringing to focus the mindless application of the letter of the law, in the face of common sense. While natural justice seeks to overcome this problem by providing for a balanced and hopefully objective solution, you cannot rely upon it in every case and you certainly should not expect it from every adjudicator.

In fact, whenever you have to deal with the SJTO or LTB you should be keenly aware that you are playing in a wholly unfair game. Be happy if all goes as planned but be fully prepared in case it doesn't.

My own story illustrates this principle perfectly...

> In 2007 the building I live in was sold to TransGlobe Property Management.
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> In early 2008, TransGlobe commissioned an engineer's report, detailing what was wrong with the building and soon after we found ourselves living in the middle of a construction zone that encompassed not only the outside of the building but also all common areas as well. They redid the hallways, replaced the carpets, redid the lobby, put in new toilets, added flow restrictors to our taps and then filed an AGI for it all.
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> In the summer of 2010 they redid our balconies by cutting back the edges of the cement slabs (floors) of the balconies and recasting them to fix some deterioration cited by the engineering report. They did repairs on the balcony railings and gave them a coat of paint. Also in compliance with the report they did considerable work on the sheer wall at the front of the building replacing the wall retainers and some of the bricks along the floor lines.
>
> There would have been an AGI for this as well, except that CBC's Marketplace did an episode on TransGlobe that caused their shares to tank. They had no idea they were about to be killed by a news expose so they did everything the engineering report suggested, leaving our balconies in probably the best condition I'd ever seen in my (then) 27 years in the building.
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> But TransGlobe did fail, there was no AGI and the building's owners sold the buildings to themselves, forming Starlight Investments in the process.
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> In the summer of 2012 Starlight gained control of our building and immediately the renovations started again. They redid the hallways, redid the lobby, replaced our toilets, installed new flow restrictors on our taps, they redid the balconies, replaced the balcony railings and they painted the entire building in that characteristic 2 tone brown of Starlight Buildings. It was virtually the same series of renovations done when TransGlobe took over --In fact it is a "playbook" they follow whenever taking over a building-- and this time there was an AGI ... for some $800,000 dollars.
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> For the first AGI hearing, in September of 2014, the other tenants in the building didn't want me to represent them and went to a free legal clinic and retained a paralegal. This hearing was a flaming disaster with the adjudicator shutting down tenant questions, lecturing them about why they would have to pay rent increases and even arguing the landlord's case for them. The landlord's only witness lied repeatedly about the condition of the building and relied entirely upon the 2008 engineering report that was rendered moot by the 2010 renovations. Both the tenants and their free lawyer argued against it but that didn't stop the adjudicator from giving the landlord every penny he was asking for. Clearly the entire thing had been decided long before anyone ever entered the hearing chambers.
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> At that point I no longer cared that the other tenants in the building didn't want me. I was morally compelled to step in and try to right this horrific wrong I filed a review request and represented the tenants at the review hearing in February of 2015. I was successful in convincing the adjudicator of "Reasonable Apprehension of Bias" and was granted a de novo (new) hearing of the application.
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> In September of 2015, we had our new hearing. The landlord relied upon the same witness and the same document as their primary evidence. However, this time I presented a case showing that in 2012 the building itself was not in bad condition, argued against the engineering report and provided personal testimony about the condition of the old balconies right before they ripped them off the sides of our building. This hearing was orderly, both the landlord and I had every

opportunity to present our cases without interference from the adjudicator and except for an error in procedure on my part, it was an entirely balanced and dignified hearing. In January of 2016 the order came back with about $700,000 of the landlord's claims disallowed ... as it should have been from the beginning.

This however, did not stop our landlord from filing a review request alleging the adjudicator made serious errors in disallowing their claims. This review floated around in the LTB's offices for more than a year before I knew anything of it.

The adjudicator for this review initially called for written submissions but was unsatisfied with the outcome and eventually moved to an in-person hearing that was held in June of 2017, a full 19 months after the de novo hearing.

The purpose of a review is to determine whether the original adjudicator's conduct and decisions were within the bounds of reason. I went into this hearing with a nicely prepared argument to show they were. The requestor (landlord) was tasked to show that they were not. But almost none of that happened. The adjudicator's behaviour was so outrageous that she ended up spending most of our time lecturing and micro-managing the testimony effectively blocking any independent submissions, all while listening to the landlord re-litigating the application instead of addressing his claims of problems with the de novo order. It finally got so bad that mid-point in the hearing I declared "Reasonable Apprehension of Bias" as it had become clear the adjudicator was intent upon finding some way, any way, to re-open the file and allow a re-hearing of the items related to our balconies. My motion was refused and the hearing proceeded under duress. In the end, the adjudicator did find a minor error and leapt to the letter of law so that $700,000 now hangs on her assessment of the de novo adjudicator's use of the word "and" in the last paragraph of his order.

There will be at least one more hearing in this case as I simply cannot let this stand.

Our case is now 4 years old. The tenants have endured litigation and rent overpayments the entire time. Nearly 100 tenants have moved out of the building with money owed to them. Some of the long term tenants are overpaid by $1200 or more. We've all been put through almost a decade of near-constant renovations with all the noise and filth that entails. With at least 3 more AGIs in the wings, this mess is far from over.

The lesson is that you must go into these hearings with a representative prepared to present a credible case-in-counter, in a logical, dignified and adult manner. But you must also be prepared to deal with biased adjudicators, lying witnesses, dishonest lawyers, stale evidence, legal and procedural errors and just about anything else they can throw at you. Be prepared to deal with this long-term and never hesitate to stand up for yourselves, even to the point of challenging the adjudicator if necessary.

As they say in the movies: "It's on" ... you are being sued by your landlord.

A New Strategy For Tenants

Since the new rules set rent controls on all occupied units but still leave vacant units open to market value rents, the general strategy for tenants has changed.

Particularly for those in newly rent controlled units, the smart money now rests on finding a place you like and straying put. Let the rent controls protect you and keep your rent increases to reasonable amounts. In a couple of years your rent will fall below market value and you will end up with a comparatively inexpensive place to live while those who move frequently pay more.

Moving out when things go sideways is no longer a good solution. But to do this you must now be prepared to defend yourself and your home.

The Need to Organize

The new changes in rent rules, placing every rental unit in Ontario under rent controls, changes the game in big ways. Landlords who are used to issuing huge rent increases and playing "renteviction" games with their tenants will now be looking for new ways to jack up their rents. AGIs are their best way and you can be certain they will use them whenever possible.

In all my years advocating first for Human Rights and now for Tenant Rights, I've never seen a better argument for organization and cooperation than this one. With nearly a million rental units in the province, there will be tens of millions of dollars at stake and those who do not organize will be trampled in the deluge of litigation and "dirty landlord tricks" that are, no doubt, being organized as I write this.

Tenants need to inform themselves. Learn your rights and get acquainted with the law. Be ready to defend yourselves and your homes.

Each building should have it's own tenant association set up so you stand together when the litigations begin and help one and other through it.

Each tenant association needs to build bridges with other tenant associations. They should be prepared to share information and assist one and other against undue litigation and pressure from landlords.

The tired old expression about "the voice of the many will be heard first" is exactly true.

Finally

As I told the adjudicator in our first review hearing:

> "Where AGIs are concerned,
> if you are going to do something without my permission,
> quite possibly without my knowledge,
> destroy all the evidence of what you've done
> and then come after me to pay for it,
> you are going to need a really, really good reason."

Fight the good fight.

Sincerely

LD Blake

(ldblake@cogeco.ca)