

CITATION: Attorney General for Ontario v Persons Unknown, 2020 ONSC
4676

COURT FILE NO.: CV-20-638480

DATE: 20200802

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

ATTORNEY GENERAL FOR ONTARIO, Applicant

– and –

PERSONS UNKNOWN, Respondents

BEFORE: F.L. Myers J.

COUNSEL: *Benjamin Ries*, for Advocacy Centre for Tenants Ontario

Domenico Polla, for the Attorney General for Ontario

Moira Daly, for Indra Gordon

Joseph Myers, for Hasina Nanji

John W. Dickie, for Federation of Rental Housing Providers of Ontario

Kristin A. Ley, for Greater Toronto Apartment Association

Ike Awgu, for Lanlordlawyers.ca

D. Rich, for Small Ownership Landlords of Ontario

HEARD: July 31, 2020

ENDORSEMENT

The Motion

[1] Advocacy Centre for Tenants Ontario (“ACTO”), Hasina Nanji, and Indra Gordon move for an order setting aside the order of Chief Justice Geoffrey B. Morawetz dated July 6, 2020 varying his order dated March 19, 2020. The March 19, 2020 order effectively placed a moratorium on residential evictions in Ontario. As a result of the order made on July 6, 2020, the moratorium ended July 31, 2020. ACTO seeks to reinstate the moratorium by setting aside the July 6, 2020 order.

[2] It will take several weeks (or more) for all the people who wish to join this proceeding and their counsel to prepare the evidence and legal submissions needed to join the proceeding and argue the motion. However, as residential evictions in Ontario may re-commence as early as next Tuesday, August 4, 2020, ACTO and two residential tenants moved for an urgent stay of the Chief Justice’s July 6, 2020 order until the motion to set aside that order can be heard.

[3] For the reasons that follow, the motion is dismissed. I have no doubt that ACTO and all those facing eviction have genuine and important concerns about what may lie in store for them in light of the pandemic. Their concerns, as raised before me, are not properly directed at the Chief Justice’s order re-opening court enforcement services. Rather, there may be individual concerns for individual eviction proceedings and there may be systemic concerns that are properly addressed with the government. I cannot find any issue raised by the proposed moving parties that ought properly lead to a stay of the Chief Justice’s order.

The Facts

[4] I do not intend to give a full recitation of all of the facts in evidence. I am not deciding the motion on its merits. Moreover, time does not permit a full review of all of the parties’ evidence as this decision is needed this weekend before evictions might re-start on Tuesday.

The Moratorium on Court Enforcement of Eviction Orders

[5] On March 15, 2020, the Chief Justice issued the *Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings* announcing the suspension of regular court proceedings effective March 17, 2020. He took this extraordinary step,

[t]o protect the health and safety of all court users and to help contain the spread of the 2019 novel coronavirus (COVID-19)...

[6] The people who enforce evictions ordered by the Landlord and Tenant Board and by the court work under the direction of the court. This proceeding was brought on March 19, 2020 to clarify whether the court's Enforcement Officers were to continue conducting evictions despite the suspension of court proceedings under the *Notice to the Profession*.

[7] In asking the court to halt evictions while the court's operations were suspended, the Director of Operational Support Branch for the Court Services Division of the Ministry of the Attorney General testified:

I believe that an appropriate mitigation strategy for the health and safety of CSD's enforcement officers, and to avoid adding further risk of community transmission in the province, is to stay the enforcement of evictions and writs of possession effective immediately and until regular court operations are directed by the Chief Justice to resume

[8] By order dated March 19, 2020, the Chief Justice allowed the Attorney General to bring this proceeding without notice to parties to residential eviction orders. He then ordered:

THIS COURT ORDERS that, during the suspension of regular court operations by the Chief Justice, the eviction of residents from their homes, pursuant to eviction orders issued by the Landlord and Tenant Board or writs of possession, are suspended unless the court orders otherwise upon leave being granted to a party by the court pursuant to the court's procedures for urgent motions.

[9] This order has been commonly referred to as creating a moratorium on evictions. It actually inserts a leave requirement into the eviction process. Leave of the court has been granted to carry out eviction orders in a few cases even during the pandemic.

[10] Under the moratorium order, the end of the moratorium depends on the identification of a date when regular court proceedings are no longer suspended.

[11] The order needs to be seen through the lens of the jurisdiction of the court. Throughout the pandemic, the Chief Justice has made numerous orders concerning the operations of the court utilizing his inherent jurisdiction to control the court's processes. There is no indication that the Chief Justice was purporting to regulate the province's response to the pandemic or to decide any issues between landlords and tenants or as between mortgagors and mortgagees. Rather, in his brief reasons accompanying the moratorium order, the Chief Justice found that he was satisfied, for the reasons provided by Court Services Division,

...that it is an appropriate mitigation strategy for the health and safety of Court Services Division Enforcement Officers, and to avoid adding further risk of community transmission of COVID-19 in the Province of Ontario, to suspend the enforcement of eviction orders and writs of possession, unless the court orders otherwise.

ACTO and the Personal Moving Parties

[12] ACTO is a legal clinic governed by the *Legal Aid Services Act, 1998* to advance the rights and systemic concerns of low-income tenants and other vulnerable "precariously housed and homeless Ontarians." It has a long history of advocating for the interests of the homeless, for eviction prevention, and affordable housing. In June, it wrote to the Attorney General and staff expressing concern that the moratorium may be lifted prematurely and requesting input into the matter. Despite a follow-up letter and two additional voicemails, no one for the Attorney General's office replied.

The July 6, 2020 Order Varies the End Date of the Moratorium

[13] On July 6, 2020, the Attorney General moved before the Chief Justice in writing to amend the moratorium order. By that time, the court had expanding its services and the Chief Justice had announced the resumption of some in-court proceedings. In a new affidavit, the Director of Operational Support Branch for the Court Services Division expressed concern about the ambiguity of the date for the resumption of eviction services as follows:

By its terms the Moratorium will end up on the resumption of regular court operations. However, this end date may cause public confusion because the phased resumption of in-court hearings in the Superior Court of Justice does not provide a single date for the resumption of regular court operations and therefore does not provide a clear end date for the Moratorium. Given this uncertainty, the Attorney General is seeking to vary the order to provide a clearer and more ascertainable end-date for the Moratorium.

[14] Instead of tying the end of the moratorium to the resumption of court operations, the Attorney General proposed that the end of the moratorium should be related to the end of the Declaration of Emergency under the *Emergency Management and Civil Protection Act*:

20. The eviction orders and writs of possession that were delivered to the Enforcement Office prior to the March 19, 2020, Moratorium, and remain unenforced, had been issued by the Landlord and Tenant Board or by the Court without consideration of health and safety risks of enforcement arising from the COVID-19 pandemic. The Moratorium has addressed these risks

21. The Court and the Landlord and Tenant Board are now aware of these risks and may take them into account in exercising their discretion as to the timing of enforcement in individual cases. I believe that this discretion, together with the improved public health circumstances that would form the basis for ending the

State of Emergency and the discretion of Enforcement Officers to protect themselves and others from health and safety risks, adequately address the concerns that originally justified the Moratorium.

22. Given that the Moratorium was issued in response to the declaration of a State of Emergency, it would be appropriate for the court to align the end date of the Moratorium with the end of the emergency. *Aligning the end of the Moratorium with the government's lifting of the State of Emergency would ensure that non-urgent residential evictions would resume only when it is safe to do so.* [Emphasis added.]

[15] The Attorney General went on to propose that to give tenants time to make alternative arrangements, the moratorium should be lifted at the end of the calendar month in which the government's Declaration of Emergency is withdrawn.

[16] The affidavit also noted that rather than repealing the moratorium, the Attorney General was proposing to amend it and to leave the order in place so that the leave requirement could be resorted to if circumstances warranted in future.

[17] The Chief Justice granted the order sought on July 6, 2020. He again authorized the motion to be brought without notice and he varied the operative wording of the March 19, 2020 moratorium order to read:

THIS COURT ORDERS that the eviction of residents from their homes, pursuant to eviction orders issued by the Landlord and Tenant Board or writs of possession, are suspended until the end of the calendar month in which the state of emergency declared pursuant to section 7.0.1(1) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, is terminated, unless the court orders otherwise upon leave being granted to a party by the court pursuant to the court's procedures for urgent motions.

ACTO's Concerns

[18] ACTO believes that it is premature to lift the moratorium on evictions and that the Chief Justice was not told of the continuing risks to individuals facing eviction and to others in the community. Although this motion was brought on very little notice, ACTO adduced substantial evidence of the continued threat posed by COVID-19 to people in Ontario, especially low-income tenants facing eviction, and even more so to vulnerable, homeless people, and people in government shelters.

[19] On July 7, 2020, the day after appearing before the Chief Justice and adducing evidence that tying the lifting of the moratorium to the end of the Declaration of Emergency “would ensure that non-urgent residential evictions would resume only when it is safe to do so” the government introduced Bill 195 that gave the government powers to continue to make orders in relation to the pandemic after the formal Declaration of Emergency ended. The government explained that the new statute was required because of the continuing danger posed by COVID-19. The government said it needed ongoing powers like those under the Declaration of Emergency to safely “re-open Ontario.”

[20] ACTO argues that the end of the Declaration of Emergency did not ensure that it was safe to evict people as the Chief Justice was told. Rather, ACTO argues, the COVID-19 emergency continues. The withdrawal of the Declaration of Emergency is a term of the new statute. ACTO argues that but for the passage of the new law, the Declaration of Emergency would have been continued.

[21] None of this was before the Chief Justice when the Attorney General moved without notice on July 6, 2020 despite ACTO having tried to become involved and not having received a response from the Attorney General's office. I note Mr. Ries' submission and confirmation that ACTO does not allege that counsel for the Attorney General in this proceeding, Mr. Polla and Ms. Blake, knew of ACTO's requests for consideration.

[22] To support its argument that there remains heightened danger to vulnerable tenants who may be evicted at this time, ACTO adduced the evidence of Dr. Andrew Bond.¹ He makes reference to several studies discussing the enhanced risks of COVID-19 transmission among the homeless and those in shelters among other things.

[23] ACTO is looking for tenants facing evictions and loss of their homes whom it says have a direct interest in the issues before the court and ought to be heard. ACTO proposes to be recognized as class representative going forward. In addition, for this motion, it put forward the evidence of Hasina Nanji and Indra Gordon.

[24] Ms. Nanji is a tenant who works as a cashier. She is 53 years old and suffers from chronic medical issues. After a dispute with her landlord that resulted in claims by both sides before the Landlord and Tenant Board, Ms. Nanji and her landlord reached a settlement. They consented to an order dated March 18, 2020 under which Ms. Nanji agreed to leave the rented premises on June 1, 2020.

[25] Ms. Nanji testifies that she has no place to go. She has no friends or family who have extra space where she can live. She believes that if she is evicted, she will likely become homeless or have to enter the shelter system. She also says that had she been notified of the Attorney General's request to lift the moratorium, she would have wished to participate and make her position known to the Chief Justice.

[26] Indra Gordon is a tenant whose sole source of income is from Ontario Works. She also qualifies for a housing subsidy from the City of Toronto. Ms. Gordon has experienced homelessness before and does not want to undergo that trauma again. In January, 2020, the Landlord and Tenant

¹ I make no findings on the admissibility of any of the evidence filed for this interim motion. There is much hearsay and advocacy throughout all sides' material.

Board ordered Ms. Gordon evicted without notice to her based on a prior written agreement to terminate the tenancy. At a subsequent hearing of a motion by Ms. Gordon to set aside the without notice eviction order, Ms. Gordon settled with her landlord and agreed to vacate the rental unit by May 31, 2020.

[27] Ms. Gordon too has no place to go. She expects to be forced to live on the streets because she understands the shelter system to be full at the moment. She too would have wished to make her position known to the Chief Justice had she been provided with notice of the hearing before him.

The Applicable Legal Test

[28] All parties who appeared before the court agreed that the test for an interim stay is the same as the well-known, three-part test for granting interlocutory injunctions adopted by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117.

[29] In *The Select Group of Canada Inc. v. Healy*, [2019 ONSC 2860 \(CanLII\)](#), Cavanagh J. recently set out the applicable tests as follows:

In order to obtain an interlocutory injunction [or stay], the moving party must establish that (a) there is a serious issue to be tried (or, in some cases, the plaintiff has a strong *prima facie* case); (b) the moving party will suffer irreparable harm if the injunction [or stay] is not granted; and (c) the balance of convenience favours the granting of the injunction [or stay]...

Analysis

[30] This motion turns on the first part of the three-part test – whether ACTO and other tenants can establish that there is a serious issue to be considered on their proposed motion. I can briefly dispose of the other two tests.

[31] I have no doubt that a tenant who is evicted and exposed to an increased risk of COVID-19 on the streets or in shelters suffers harm that cannot be readily compensated in money. That is the definition of “irreparable harm” for the purpose of this type of motion.

[32] The balance of convenience test compares the harm to the moving parties if a stay is denied against the harm to the responding parties if a stay is granted. None of the landlord associations or tenant groups are parties as yet. But I am asked to balance the risk of COVID-19 to the subset of evicted, vulnerable tenants and mortgagors who may end up homeless or in shelters against the economic risk to landlords and mortgagees of a further delay of evictions for all tenants and mortgagors for a few weeks or months.

[33] That equation defines the difficulty with the issues argued before me by both the purported landlord and tenant representatives. I do not believe that this is an issue for the court nor an issue that was properly before the Chief Justice. Questions of how the Province should battle the pandemic and the necessary policy choices among competing views - all good, decent, and honestly-held - are for the government. The Chief Justice never embarked on a legal determination of whether Ontario should stop residential evictions because the danger to some vulnerable tenants outweighed the risks to landlords. As Mr. Ries rightly points out, that would mix the court in the government's business and cross the lines separating the respective branches of government delineated by the Supreme Court of Canada in *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43 (CanLII).

[34] The Chief Justice's task was much more limited. As discussed above, the Chief Justice was called upon to exercise the inherent jurisdiction of the court to control its own process. He was not exercising the government's emergency powers. He was ordering the court's officers to stand down while the court's operations were suspended, "for the health and safety of Court Services Division Enforcement Officers" and to avoid the Court's operations increasing the risk of community spread of COVID-19. The Chief Justice had no wider jurisdiction to regulate the societal response to the pandemic. He was exercising a Superior Court judge's jurisdiction to control the court's processes and nothing more.

[35] Mr. Ries argues that the Chief Justice did not just give an administrative direction for the court's officers to stay home. Rather, the Attorney General brought a legal proceeding under the *Rules of Civil Procedure*, RRO 1990, Reg. 194 against named but unknown respondents. He says ACTO acts for some of the unknown respondents, plus Ms. Nanji and Ms. Gordon, and they have rights in the proceeding.

[36] Mr. Ries identifies the following issues that he says are serious issues that need to be resolved concerning the July 6, 2020 order:

- a. Who is a proper representative of the respondents under Rule 10 of the *Rules of Civil Procedure*;
- b. Should the Chief Justice have dispensed with the need to serve notice of the motion under Rule 16.04;
- c. Did the Attorney General make full disclosure to the Chief Justice as required by Rule 39.01(6);
- d. Or, in the alternative, did the Chief Justice improperly delegate his judicial authority to the executive branch by tying the lifting of the moratorium to the end of the Declaration of Emergency.

[37] I specifically inquired whether ACTO was asserting that there was a serious issue to be tried as to the appropriate legal test to be applied by the Chief Justice in assessing whether to vary the moratorium and he advised that he was not.

[38] ACTO and the tenants whom it wishes to represent want to argue that the pandemic is still too dangerous to expose vulnerable tenants to eviction given the enhanced risk of catching the virus for the homeless and those who may find themselves forced into under-resourced shelters. That is the upshot of the evidence of Mr. Hale and Dr. Bond. Ms. Nanji and Ms. Gordon have every right to be concerned about the risk of homelessness and to tell an appropriate authority why they fear being evicted from their homes during the pandemic. But their issues do not concern the health and safety of the Enforcement Officers of the Superior Court of Justice or the substance of the inherent jurisdiction of a judge of this court to control the court's officers' services during the pandemic.

[39] I am very sympathetic to Ms. Nanji and Ms. Gordon. Their evidence that they would have wished to appear before the Chief Justice is compelling. Hundreds or thousands of other similarly situated people could all have had the same wish - to tell their story to try to get someone in authority to let them stay where they are despite the eviction orders of the Landlord and Tenant Board. But their cases were not before the Chief Justice. Nothing they said about their individual circumstances bears on the question of how the court is to re-open and which of its officers should report to work.

[40] The three procedural issues listed as (a) to (c) above are not issues for tenants facing eviction. As to the balance of powers referenced in proposed issue (d), the Chief Justice conditioned an order on an external act. That is a routine decision. Nothing about that decision implicates the balance of powers. Rather, it is the tenants' and landlords' positions before me that seek to invite the court into the political arena that risk crossing that line.

[41] Both sides' proposed evidence and arguments about the propriety of the July 6, 2020 order turn on public policy choices as between the interests of tenants and landlords based on unknowable prognostications about the course of the pandemic. Different classes of tenants and mortgagors on one side, and landlords and mortgagees on the other, may have very different interests at stake. That is not what was before the Chief Justice and is not properly a legal issue for the court in my view.

[42] I am cognizant of the case law that sets out clearly that the test of whether a proposed question is a "serious issue to be tried" does not set a high bar. While ACTO has tried to grasp process issues to get its foot in the door, the tenants whom it purports to represent (and the landlords on the other side as well) advance no substantive issue of relevance.

[43] An order of the court was required to effect the moratorium because subsisting orders and writs required Enforcement Officers to act as a matter of law. The use of a proceeding and a court order does not change the nature of the argument the tenants' and landlords' proposed

representatives wish to make. They want to argue about whether evictions should be allowed in Ontario at this time. The Chief Justice was considering when to bring Enforcement Officers back to work as part of the phased re-opening of the court.

[44] Whether tenants seeking to avoid eviction orders due to the pandemic can go back to the Landlord and Tenant Board (as was argued by the landlord representatives) or whether they can bring motions to the court under the varied moratorium (as was argued by the Attorney General) is not before the court. Tenants' individual situations are for their own cases.

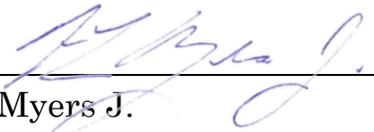
[45] I have no doubt that ACTO performs valuable services on behalf of tenants and other vulnerable constituents. The issues that it has raised are issues on which they have already and will rightly continue to lobby the government.

[46] Accordingly, I dismiss the motion for a stay. If the matter is to proceed despite this order, one or more case conferences are required to set a process to determine what notice may be required, who will be parties, and whether one or more representation orders ought to be made under Rule 10. Then a schedule for the exchange of material and cross-examinations is required. In light of the numerous parties who attended this hearing and ACTO's indication that everyone facing an eviction order in Ontario has a right to be heard in this proceeding, I am dubious that a hearing in a few weeks is very likely.

[47] If the matter is to continue, counsel for the Attorney General will act as a point person to schedule a first case conference before a judge (other than me) through the Motion Coordinator. Counsel for ACTO is directed to continue to upload to a folder on Sync.com all parties' materials in the same way that it did for this motion. The organization of the materials by Mr. Ries was very helpful and much appreciated.

[48] No one sought costs and none are ordered.

[49] Messrs. Polla, Ries, and Dickie have agreed to circulate this endorsement to those who express a desire to receive it before it is published on CanLII.



F.L. Myers J.

Date: August 2, 2020