

**DIVISIONAL COURT  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**RYAN** [REDACTED]

Appellant

and

**Mario Marazzi**

Respondent in Appeal

**FACTUM**

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## **PART I: THE NATURE OF THE APPEAL**

1. The Appellant is Ryan [REDACTED] (“Mr. [REDACTED]”), the Tenant at [REDACTED] [REDACTED] (“Unit”).
2. This is a statutory appeal under section 210 of the *Residential Tenancies Act, 2006* (“RTA”)<sup>1</sup> of:
  - a. The Order of Member Robb of the Landlord and Tenant Board (“LTB”) in LTB-L-015157-22 dated July 20, 2022, terminating the Mr. [REDACTED]’s for the Landlord, the Respondent Mario Marazzi’s (“Mr. Marazzi”), own use of the Unit pursuant to section 48 of the RTA;<sup>2</sup> and
  - b. The Review Order of Member Lange of the LTB in LTB-L-015157-22-RV dated November 16, 2022, affirming the termination of Mr. [REDACTED]’s tenancy.

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<sup>1</sup> *Residential Tenancies Act, 2006, SO 2006, c 17* at s 210 [RTA].

<sup>2</sup> RTA at s 48.

## **PART II: OVERVIEW OF THE CASE**

3. Statutory appeals are determined on a standard of correctness, and limited deference is due to the LTB in this case.
4. In making his Application to the LTB, Mr. Marazzi submitted an affidavit or declaration that did not comply with the mandatory requirements of section 72(1)(a) of the *RTA*.<sup>3</sup>
5. Mr. Marazzi's affidavit or declaration was not "substantially compliant" with the *RTA*, because it did not meet the mandatory content requirements under the *RTA*.<sup>4</sup>
6. Pursuant to section 71.1(2) of the *RTA* the LTB made an error of law in accepting the Application with the defective affidavit or declaration for filing.<sup>5</sup>
7. Pursuant to s 72(1)(a) of the *RTA*, the Member had no lawful authority to Order the termination of Mr. [REDACTED]'s tenancy, due to the defective affidavit or declaration.<sup>6</sup>
8. Further, the LTB failed to give Mr. [REDACTED] adequate Notice of the hearing; did not allow him the opportunity to offer evidence that was mandatory for the Member to consider pursuant to section 83 of the *RTA*<sup>7</sup>; and given the inadequate notice, did not allow adequate time for Mr. [REDACTED]'s counsel to prepare for the hearing.
9. On this basis the LTB decisions in LTB-L-015157-22 and LTB-L-015157-22-RV should be rescinded.

## **PART III: SUMMARY OF FACTS**

10. Mr. [REDACTED] has lived in the Unit since roughly 2005.<sup>8</sup>
11. On or about November 1, 2021, Mr. Marazzi served Mr. [REDACTED] with an N12 Notice seeking termination of Mr. [REDACTED]'s Tenancy for the Landlord's own use, pursuant to section 48 of the *RTA*.<sup>9</sup>
12. What happened next was highly irregular. Although Mr. Marazzi's L2 Application was stamped by the Board as being received on October 29, 2021<sup>10</sup>, it was not actually filed in any of the LTB's administrative systems until approximately March 15, 2022 – well after

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<sup>3</sup> *RTA* at s 72(1)(a).

<sup>4</sup> *George V Apartments Ltd v Cobb, 2002 CarswellOnt 5553*, at paras 14-15 [*George V Apts*].

<sup>5</sup> *RTA*, at s 71.1(2).

<sup>6</sup> *RTA* at s 72(1)(a).

<sup>7</sup> *RTA* at s 83.

<sup>8</sup> *Affidavit of Ryan [REDACTED] sworn October 21, 2021* at para 1 [*[REDACTED] Affidavit*].

<sup>9</sup> [REDACTED] *Affidavit* at para 8.

<sup>10</sup> [REDACTED] *Affidavit* at Exhibit "E".

the 30-day statutory time limitation following Notice of Termination imposed by section 69(2) of the *RTA*.<sup>11</sup> In fact, Mr. [REDACTED] contacted the LTB as recently as February 9, 2022, and was advised at that time that no application had been filed in relation to his unit.<sup>12</sup>

13. As a result, Mr. [REDACTED] was rightly confused when on March 17, 2022, he received a copy of an L2 Application filed with LTB by Mr. Marazzi. Because he had been advised that the limitations date for an Application on the November 1, 2021, N12 Notice had long since expired and that he had received no subsequent Notices of Termination, he did not know what case he had to meet to defend the Application.<sup>13</sup>
14. The LTB placed further and unusual administrative barriers Mr. [REDACTED]'s way in answering the Application. Due to administrative and technical issues at the LTB, Mr. [REDACTED] was unable to access the Tribunals Ontario Portal – the formal repository for all materials relating to the matter – until May 25, 2022.<sup>14</sup>
15. In the meantime, however, on May 17, 2022, the LTB issued a Notice of Hearing for June 7, 2022, a mere 21 days away, and Mr. [REDACTED] still did not know the case he was required to answer.
16. Once Mr. [REDACTED] was granted access to the Tribunals Ontario Portal on May 25, 2022, he contacted counsel promptly – the next day – to advise of the nature of the case.<sup>15</sup>
17. Mr. [REDACTED] has voluminous evidence going to Mr. Marazzi's serious breaches of the Landlord's responsibilities under the *RTA*<sup>16</sup>, that the LTB is required to assess under section 83(2) and which may give rise to relief from eviction under section 83(3) of the *RTA*.<sup>17</sup> Because of the sheer quantity of this evidence, Mr. [REDACTED] was advised by counsel that it would take more time than the few days remaining to organize and assess this material in preparation for the scheduled hearing. At that time, Mr. [REDACTED] instructed counsel to seek an adjournment in order to allow for adequate preparation.<sup>18</sup>
18. On or about June 1, 2022, counsel for Mr. [REDACTED] made a written request to the LTB to reschedule the hearing.<sup>19</sup> The LTB was not able to respond to that request prior to the hearing.<sup>20</sup> Counsel for Mr. [REDACTED] then made oral submissions at the June 7, 2022, hearing

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<sup>11</sup> *RTA*, at 69(2).

<sup>12</sup> [REDACTED] *Affidavit* at para 9.

<sup>13</sup> *Ibid* at 10–12.

<sup>14</sup> *Ibid* at para 19.

<sup>15</sup> *Ibid* at para 20.

<sup>16</sup> *Ibid*.

<sup>17</sup> *RTA*, at ss 83(2) 83(3).

<sup>18</sup> [REDACTED] *Affidavit* at paras 21-22.

<sup>19</sup> *Ibid* at para 21.

<sup>20</sup> *Ibid*.

seeking an adjournment so that Mr. [REDACTED] may adequately prepare his case. This motion was dismissed by Member Robb.<sup>21</sup>

19. A further oral motion by Mr. [REDACTED]'s counsel to dismiss the Application because a) the Affidavit or Declaration ("Affidavit") submitted with the Application did not meet the requirements of section 72(1)(a) of the *RTA* and pursuant to section 71.1 of the *RTA* should not have been accepted for filing by the LTB; and b) because the Member lacked jurisdiction to make the Orders sought in the Application pursuant to section 72(1)(a) of the *RTA* because of the defective Affidavit was dismissed by Member Robb on the basis of a) section 72(1.1)<sup>22</sup> of the *RTA* even though that provision does not apply to the Application in any way; and on the basis of *Sertic v Mergarten*, even though that case was decided well before either section 72(1)(a) or section 71.1 of the *RTA* came into effect.<sup>23</sup>
20. On or about August 4, 2022, Mr. [REDACTED] requested a review by the LTB of Member Robb's decision, issued July 20, 2022.<sup>24</sup> Due to even more administrative SNAFUs at the LTB, the Order arising from the LTB's preliminary review by Member Lange was not issued until November 16, 2022. In that Order, Member Lange affirmed the Order of Member Robb, for erroneous reasons that will be detailed *infra*.

#### **PART IV: ISSUES AND THE LAW**

##### **The Court has jurisdiction to hear this Appeal and grant the Orders sought**

21. Section 210(1) of the *RTA* gives this Court the authority to hear an Appeal of a decision of the *LTB*:

*Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.*<sup>25</sup>

22. The endorsement of Justice O'Brien in a preliminary hearing of this matter found that the Appeal does disclose Appealable questions of law.
23. Sections 210(4) and 210(5) of the *RTA* gives this Court the authority to rescind decision of the *LTB* and to award costs as sought:

*(4) If an appeal is brought under this section, the Divisional Court shall hear and determine the appeal and may, (a) affirm, rescind, amend or replace the*

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<sup>21</sup> *Transcript of Hearing in LTB- L-015157-22 before Emily Robb on June 7, 2022 at 3–12.*  
[Hearing Transcript]

<sup>22</sup> *RTA* at s 72(1.1).

<sup>23</sup> *Hearing Transcript* at pp 3-12.

<sup>24</sup> [REDACTED] *Affidavit* at para 33.

<sup>25</sup> *RTA* at s 210.

*decision or order; or (b) remit the matter to the Board with the opinion of the Divisional Court.*

*(5) The Divisional Court may also make any other order in relation to the matter that it considers proper and may make any order with respect to costs that it considers proper.*

24. Because the LTB lacked the jurisdiction to hear the Application and make the requested Orders in the first place, remitting the matter back to the LTB is not an appropriate remedy.

### **The Standard of Review is Correctness**

25. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, the Supreme Court was clear that statutory appeals should be decided on a standard of correctness and that decision-makers subject to statutory appeal deserve limited deference (unless the statute dictates the contrary):

*It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.*<sup>26</sup>

### **The Landlord's affidavit or declaration was inadequate**

26. Section 72(1)(a) of the *RTA* requires a Landlord wishing to evict a Tenant for their own use to file an affidavit or declaration that meets the following criteria:
- a. The affidavit is sworn by the person who personally requires the rental unit;
  - b. The affiant must certify that they in good faith require the rental unit for their own use; and
  - c. The affiant must certify that they intend to occupy the unit for a period of one year.<sup>27</sup>
27. Mr. Marazzi's affidavit or declaration was subject to the stipulations of section 72(1)(a) of the *RTA* because the N12 Notice was given well after the provision came into force on May 30, 2017.

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<sup>26</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*CanLII*), at para 37 [*Vavilov*] (emphasis added).

<sup>27</sup> *RTA* at s 72(1)(a).

28. Mr. Marazzi's affidavit or declaration did not stipulate that intention to occupy the unit for a period of at least one year.
29. Mr. Marazzi's affidavit did not, then, comply with the minimum requirements set out in the RTA.

**The Landlord and Tenant Board only has the powers granted to it by the Legislature**

30. It's been long established at the highest levels of Canadian jurisprudence that courts and especially administrative tribunals are "creatures of statute" and may only exercise their discretion and jurisdiction within the four corners of their enabling statute(s).
31. In *Mills v The Queen*, for instance, the Supreme Court of Canada wrote (quoting approvingly from the Ontario Court of Appeal in *R v Mogentaler et al*<sup>28</sup>):

*a court is competent if it has jurisdiction, conferred by statute, over the person and the subject matter in question and, in addition, has authority to make the order sought.*<sup>29</sup>

32. The Supreme Court of Canada further affirmed this basic principle in *R v 974649 Ontario Inc.* when they wrote:

*Whether a court or tribunal enjoys the "power to grant the remedy sought" is, first and foremost, a matter of discerning the intention of Parliament or the Legislature. The governing question in every case is whether the legislator endowed the court or tribunal with the power to [...] grant the remedy sought [...]*

*Where, as here, the tribunal in question is a creature of statute, this power must derive from its enabling legislation. It is a fundamental principle that statutory bodies may perform only those tasks assigned to them by Parliament or one of the provincial legislatures, and in performing those tasks they have at their disposal only those powers granted to them expressly or impliedly: Doyle v. The Queen, 1976 CanLII 11 (SCC), [1977] 1 S.C.R. 597, at p. 602; R. W. Macaulay and J. L. H. Sprague, Practice and Procedure Before Administrative Tribunals (loose-leaf), vol. 3, at pp. 23-17 et seq. The enactment of the Charter did not alter this fundamental tenet: it remains the role of Parliament and the legislatures, and not the judiciary, to assign jurisdiction to the various courts and tribunals comprising our legal system.*<sup>30</sup>

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<sup>28</sup> *Regina v Morgentaler, Smoling and Scott, 1984 CanLII 55 (ON CA), [Morgentaler].*

<sup>29</sup> *Mills v The Queen, 1986 CanLII 17 (SCC), at para 265 [Mills].*

<sup>30</sup> *R v 974649 Ontario Inc, 2001 SCC 81, at paras 25-26 [974649 Ontario].*



33. The Landlord and Tenant Board was created by the *Residential Tenancies Act*, specifically at section 168.<sup>31</sup> The LTB is further subject to the *Statutory Powers and Procedures Act* (“SPPA”)<sup>32</sup> and the *Human Rights Code*<sup>33</sup> (“OHRC”) as stipulated in the *RTA*<sup>34</sup>.

**The Landlord’s Affidavit was not “substantially compliant” with the RTA**

34. Section 212 of the *RTA* does grant the LTB certain discretion regarding the “contents of forms, notices or documents” if they are “substantially compliant” with the *RTA*.<sup>35</sup>
35. This Court, however, has found that documents that do not meet the mandatory requirements as set out in the *RTA* – as distinguished from information that is requested on forms or documents that is not mandatory under the *RTA* – are not “substantially compliant” and therefore do not give rise to the decision-maker’s lawful exercise of discretion.
36. For instance, in *George V. Apartments Ltd v. Cobb*, the Divisional Court heard a case where a Tenant had provided a termination notice orally but where the *RTA* required notice in writing. In that case, the tribunal precursor to the LTB ruled that the oral notice was “substantially compliant” with the Act.<sup>36</sup>
37. The Divisional Court, however, found to the contrary of the tribunal. They ruled:
- Section 39(1) of the Act recites that a tenancy may be terminated only in accordance with the Act[....] There is nothing in the legislation to suggest that a [document] which fails to comply with the provisions of the Act is other than void.*<sup>37</sup>
38. Further, this decision is consistent with the Ontario Court of Appeal’s finding in *Price v Turnbull’s Grove Inc.* that documents that do not meet the mandatory requirements of the *RTA* are unlawful.<sup>38</sup>
39. This decision is also consistent with the basic principle of administrative law outlined *supra* that administrative decision-makers may only exercise their discretion within the four corners of the statute(s) that empower them.
40. In this case, the *RTA* requires that an affidavit meeting all three criteria outlined in paragraph 14, above, must be filed at the same time as the Application is filed:

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<sup>31</sup> *RTA* at 268.

<sup>32</sup> *Statutory Powers Procedure Act, R.S.O. 1990, c. S.22.*

<sup>33</sup> *Human Rights Code, RSO 1990, c H.19.*

<sup>34</sup> *RTA* ss 3(4), 184(1).

<sup>35</sup> *Ibid* at s 212.

<sup>36</sup> *George V. Apts* at paras 14-16.

<sup>37</sup> *Ibid* at para 15.

<sup>38</sup> *Price v Turnbull’s Grove Inc*, 2007 ONCA 408, at para 37 [*Price*].

*A landlord who, on or after the day subsection 11 (1) of Schedule 4 to the Protecting Tenants and Strengthening Community Housing Act, 2020 comes into force, files an application under section 69 based on a notice of termination given under section 48 or 49 shall file the affidavit required under subsection 72 (1) at the same time as the application is filed.*<sup>39</sup>

41. In this case, the affidavit or declaration met neither the statutory requirement regarding the content of the affidavit nor for filing a compliant affidavit at the time of the filing the Application and for that reason, the affidavit or declaration is not “substantially compliant” with the RTA.

**The Application should never have been accepted for filing and should not have been heard**

42. Section 71.1 of the RTA, in its material portions reads as follows:

*71.1 (1) A landlord who, on or after the day subsection 11 (1) of Schedule 4 to the Protecting Tenants and Strengthening Community Housing Act, 2020 comes into force, files an application under section 69 based on a notice of termination given under section 48 or 49 shall file the affidavit required under subsection 72 (1) at the same time as the application is filed.*

*(2) The Board shall refuse to accept the application for filing if the landlord has not complied with subsection (1)*<sup>40</sup>

43. Mr. Marazzi filed his application on October 29, 2021.<sup>41</sup> Subsection 11(1) of Schedule 4 to the Protecting Tenants and Strengthening Community Housing Act, 2020 came into effect on September 1, 2021. Sections 71.1(1) and (2) of the RTA clearly apply to Mr. Marazzi’s Application and affidavit or declaration.
44. In sub-section 71.1(2) of the RTA, above, the Legislature clearly denied jurisdiction to the Board to accept or, implicitly, hear an Application where the affidavit or declaration omits information required under the Act. And, as, outlined *supra*, Mr. Marazzi’s affidavit or declaration did omit information required under the RTA.
45. With the Legislature clearly denying the LTB jurisdiction to accept the Application for filing, and with the LTB being bound by the statutory requirements of the RTA in the exercise of their discretion under section 212 of the RTA, as submitted *supra*, the LTB, then, clearly erred in law by acting outside of their jurisdiction by even bringing the matter forward to a hearing.
46. Further, though, Member Robb, in LTB-L-015157-22, failed to consider the effect of either section 71.1(1) or section 71.1(2) of the RTA on their exercise of jurisdiction or discretion

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<sup>39</sup> RTA at s 71.1(1).

<sup>40</sup> *Ibid* at ss 71.1(1), 71.1(2) (emphasis added).

<sup>41</sup> [REDACTED] Affidavit at Exhibit “E”.

as regards the affidavit or declaration. This failure is a clear error of law, pursuant to *Yatar v TD Insurance Meloche Monex*, which reads:

*On a statutory appeal limited to questions of law alone, the court considers whether the decision-maker correctly identified and interpreted the governing law or legal standard relevant to the facts found by the decision-maker.*<sup>42</sup>

47. In this case, Member Robb failed to correctly identify and interpret the governing law regarding their use of discretion, even though counsel for the Appellant made submissions on the applicability of sections 71.1(1) and (2) of the *RTA* during the hearing.<sup>43</sup>
48. Further, Member Robb considered the wrong law in making their preliminary decision to allow the hearing to go forward. Member Robb relied on section 72(1.1) of the *RTA*, which applies to Applications made prior to May 30, 2017.<sup>44</sup> Mr. Marazzzi's Application was made on October 29, 2021 – significantly after that date.<sup>45</sup>
49. Member Robb also relied on the wrong law in relying on *Sertic and Mergarten* in their reasons because *Sertic* is no longer good law.<sup>46</sup>
50. The Appeal in *Sertic* was heard on January 11, 2017.<sup>47</sup> It was based on an Application to the LTB made at some date prior, of course, to that Appeal.
51. None of the statutory provisions at issue in today's Appeal – sections 71.1 and 72(1) of the *RTA* – were yet in force on the date of the *Sertic* Appeal or on the date that the Landlord's application and affidavit were filed. Those sections – in their grammatical and ordinary meaning, read in harmony with the rest of the Act and in keeping with the purpose and intent of the legislature – effectively removes the discretion to allow *viva voce* amendment of the affidavit that *Sertic* endorsed. The statute now clearly requires that a complete affidavit must be filed at the same time as the Application.
52. Further, *Sertic* was decided on a standard of reasonableness, not correctness.<sup>48</sup> Although that was the correct standard at the time of the decision, the decision was made well before the Supreme Court of Canada ruled in *Vavilov* making it clear that the proper standard for statutory Appeals such as those under the *RTA* are to be decided on a standard of correctness.<sup>49</sup> As such, *Sertic* is not useful to us in determining the correct approach to be taken by the LTB.

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<sup>42</sup> *Yatar v TD Insurance Meloche Monnex*, 2021 ONSC 2507, at para 28 [*Yatar*]; upheld on appeal in *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446, [*Yatar Appeal*].

<sup>43</sup> *Hearing Transcript* pp 7-9.

<sup>44</sup> *Ibid* at pp 9-10.

<sup>45</sup> [REDACTED] Affidavit at Exhibit "E".

<sup>46</sup> LTB-L-015157-22, at paras 7-8 [*Hearing Order*].

<sup>47</sup> *Sertic v Mergarten*, 2017 ONSC 263 (CanLII) [*Sertic*].

<sup>48</sup> *Ibid* at para 8.

<sup>49</sup> *Vavilov* para 37.

53. Finally, Member Lange, in LTB-L-015157-22-RV, also failed to correctly interpret section 71.1(1) of the *RTA*. In their Order, they interpret this provision as merely requiring that an affidavit or declaration be filed along with the Application.<sup>50</sup>
54. The contemporary approach to statutory interpretation requires that the relevant provision be read in its grammatical and ordinary sense in harmony with the overall scheme and in keeping with the purpose and intent of the legislature.<sup>51</sup>
55. The plain and ordinary meaning of the words in section 71.1(1) and 71.1(2) of the *RTA* read in harmony with each other is that an affidavit complying with all of section 72(1) must be filed at the same time as the Landlord's application, otherwise the LTB must not accept it for filing.
56. Further, the plain and ordinary meaning of the words in section 72(1) require that this affidavit or declaration:
  - a. Be made by the person requiring the unit;
  - b. Stipulate an intention to occupy the premises; and
  - c. Stipulate that the intention to occupy the premises is one that continues for a period of at least one year.<sup>52</sup>
57. This plain and ordinary meaning is in harmony with the overall scheme of the *RTA*, and is in keeping with the legislative purpose of the *RTA* (especially its provisions placing obligations on Landlords), which is to 1) return substantive equity to the Landlord / Tenant Relationship (which is by default skewed in favour of Landlords); and 2) safeguard the security of tenure for Tenants.<sup>53</sup>

### **The Member was wrong to grant the Termination Order**

58. As submitted at length, *supra*, Mr. Marazzi's affidavit did not meet the requirements laid out in section 72(1)(a) of the *RTA*. Section 72(1) also stipulates that "the Board shall not make an order terminating a tenancy and evicting the tenant in an application" where the Affidavit does not meet the requirements laid out in, in this case, section 72(1)(a) – again, that the affiant stipulate an intention to occupy the premises for a period of a year.<sup>54</sup> Further, when section 72(1) of the *RTA* is read in harmony with section 71.1(1) of the Act as *Rizzo v Rizzo*

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<sup>50</sup> *LTB-L-015157-22-RV*, at para 9 [*Review Order*].

<sup>51</sup> *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo v Rizzo Shoes*].

<sup>52</sup> *RTA* at 72(1).

<sup>53</sup> *White v Upper Thames River Conservation Authority*, 2022 ONCA 146, at paras 10, 20-26 [*White*].

<sup>54</sup> *RTA* at ss 72(1), 72(1)(a).

*Shoes* requires, it is clear that this affidavit, in its entirety, must be filed “at the same time as the application is filed”.<sup>55</sup>

59. Our submissions regarding the current applicability of *Sertic*, *supra*, also apply to this analysis.
60. Member Robb, then, wrongly exceeded their lawful authority under the *RTA* in ordering the termination of Mr. [REDACTED] tenancy and in ordering his eviction.
61. Member Lange erred in interpreting section 72(1) of the *RTA* – that section 72(1)(a) of the *RTA* only requires that an affidavit be filed, whereas it’s clear from the grammatical and ordinary meaning of the section, read in harmony with the scheme of the *RTA* and with the purpose and intent of the Legislature, that the affidavit must contain specific stipulations that were lacking in Mr. Marazzi’s declaration.
62. Both the original Order terminating the tenancy and evicting Mr. [REDACTED] and the Review Order upholding that decision then, are fundamentally incorrect and should be rescinded.

### **The LTB Proceeding was procedurally unfair**

63. It is well trod law within common law jurisdictions that procedural unfairness takes place when a decision-maker breaches Principles of Natural Justice. Such Principles are well known to include:
  - a. the right to know the case to be met;
  - b. the right to be heard; and
  - c. the right to counsel.
64. It is settled law in the Province of Ontario that questions of procedural fairness are questions of law and proper subjects for Appeal pursuant to section 210 of the *RTA*.<sup>56</sup>
65. The administrative delays by the LTB in processing the L2 Application; the administrative delays in providing Mr. [REDACTED] with full access to the full set of case materials until the very 11<sup>th</sup> hour; and Member Robb’s refusal to allow additional time for Mr. [REDACTED] and his counsel to prepare their case all worked in concert to:
  - a. Substantially deprive Mr. [REDACTED] of his right to know the case against him by obscuring the nature of the Notice on which the Application was based;<sup>57</sup>

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<sup>55</sup> *RTA* at 71.1(1).

<sup>56</sup> *Dean v McDonald*, 2022 ONSC 6183 (*CanLII*), at para 5; ; *Magnacca v Zoppo*, 2022 ONSC 5640 (*CanLII*), at para 8; and; *Schram v Thompson*, 2022 ONSC 4669 (*CanLII*), at para 17.

<sup>57</sup> *Ball v Metro Capital Management Inc*, Toronto Docket No 48/02 (Div Ct), at paras 10-15 [*Ball v Metro Capital*].

- b. Deprive Mr. [REDACTED] of his right to be heard, in regard to bringing forward evidence that could have given rise to mandatory relief from eviction pursuant to section 83(3) of the *RTA*<sup>58</sup> and which the Board is statutorily required to consider under section 83(2) of the *RTA*.<sup>59</sup>
- c. Deprive Mr. [REDACTED] of the effective assistance of counsel – notwithstanding the presence of counsel, without adequate opportunity to prepare, the effectiveness of counsel on the substance of the Application was virtually nullified.

**Dismissing the Landlord's Application is the correct remedy**

- 66. Since the Orders of the LTB are clearly incorrect, they must not be permitted to stand.
- 67. Since the Landlord's Application should never have been heard by the LTB, and since no LTB adjudicator has the authority to grant the Orders sought by the Landlord, it would be pointless to refer the Application back to the LTB for further adjudication.
- 68. The proper decision for this Court, then, is to fully rescind the Orders in LTB-L-015157-22 and LTB-L-015157-22-RV.

**PART V: NATURE OF THE ORDER SOUGHT**

- 69. An Order rescinding the termination of Mr. [REDACTED]'s tenancy as Ordered in the Tribunal below;
- 70. An Order rescinding the Orders permitting eviction of Mr. [REDACTED] at the LTB;
- 71. Costs of this Appeal on a full indemnity basis, including any applicable HST;
- 72. Post-judgment interest in accordance with the *Courts of Justice Act*, RSO 1990, c C43;  
AND
- 73. Any other such order as counsel may request and this honourable Court deems just.

All of which is respectfully submitted  
this March 15, 2023

*Kenneth Wakely*

Kenneth J. Wakely

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<sup>58</sup> *RTA* at s 83(3).

<sup>59</sup> *Ibid* at s 83(2).

## **SCHEDULE A: AUTHORITIES**

*Ball v Metro Capital Management Inc*, Toronto Docket No 48/02 (Div Ct).

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII).  
<https://canlii.ca/t/j46kb>

*Dean v McDonald*, 2022 ONSC 6183 (CanLII).  
<https://canlii.ca/t/jsrr8>

*George V Apartments Ltd v Cobb*, 2002 CarswellOnt 5553.

*Magnacca v Zoppo*, 2022 ONSC 5640 (CanLII).  
<https://canlii.ca/t/js98j>

*Mills v The Queen*, 1986 CanLII 17 (SCC).  
<https://canlii.ca/t/1cxmx>

*Price v Turnbull's Grove Inc*, 2007 ONCA 408.  
<https://canlii.ca/t/1rpw5>

*Regina v Morgentaler, Smoling and Scott*, 1984 CanLII 55 (ON CA).  
<https://canlii.ca/t/1p6zl>

*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27.  
<https://canlii.ca/t/1fqwt>

*Schram v Thompson*, 2022 ONSC 4669 (CanLII).  
<https://canlii.ca/t/jrgjf>

*Sertic v Mergarten*, 2017 ONSC 263 (CanLII).  
<https://canlii.ca/t/gwv8p>

*White v Upper Thames River Conservation Authority*, 2022 ONCA 146.  
<https://canlii.ca/t/jmggb>

*Yatar v TD Insurance Meloche Monnex*, 2021 ONSC 2507.  
<https://canlii.ca/t/jfh5w>

*Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446.  
<https://canlii.ca/t/jpmvh>

## **SCHEDULE B: STATUTES AND REGULATIONS**

### **Residential Tenancies Act, 2006, SO 2006 c 17**

**3(4)** If a provision of this Act conflicts with a provision of another Act, other than the *Human Rights Code*, the provision of this Act applies. 2006, c. 17, s. 3 (4).

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**48 (1)** A landlord may, by notice, terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation for a period of at least one year by,

- (a) the landlord;
  - (b) the landlord's spouse;
  - (c) a child or parent of the landlord or the landlord's spouse; or
  - (d) a person who provides or will provide care services to the landlord, the landlord's spouse, or a child or parent of the landlord or the landlord's spouse, if the person receiving the care services resides or will reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located. 2006, c. 17, s. 48 (1); 2017, c. 13, s. 7 (1); 2021, c. 4, Sched. 11, s. 31 (1).
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**69 (1)** A landlord may apply to the Board for an order terminating a tenancy and evicting the tenant if the landlord has given notice to terminate the tenancy under this Act or the *Tenant Protection Act, 1997*. 2006, c. 17, s. 69 (1).

*Same*

(2) An application under subsection (1) may not be made later than 30 days after the termination date specified in the notice. 2006, c. 17, s. 69 (2).

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**71.1 (1)** A landlord who, on or after the day subsection 11 (1) of Schedule 4 to the *Protecting Tenants and Strengthening Community Housing Act, 2020* comes into force, files an application under section 69 based on a notice of termination given under section 48 or 49 shall file the affidavit required under subsection 72 (1) at the same time as the application is filed. 2020, c. 16, Sched. 4, s. 11 (1).

#### **Non-compliance with subs. (1)**

(2) The Board shall refuse to accept the application for filing if the landlord has not complied with subsection (1). 2020, c. 16, Sched. 4, s. 11 (1).



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**72** (1) The Board shall not make an order terminating a tenancy and evicting the tenant in an application under section 69 based on,

- (a) a notice of termination given under section 48 on or after the day section 13 of the *Rental Fairness Act, 2017* comes into force, unless the landlord has filed with the Board an affidavit sworn by the person who personally requires the rental unit certifying that the person in good faith requires the rental unit for his or her own personal use for a period of at least one year;

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**72(1.1)** The Board shall not make an order terminating a tenancy and evicting the tenant in an application under section 69 based on a notice of termination given under section 48 before the day section 13 of the *Rental Fairness Act, 2017* comes into force, unless the landlord has filed with the Board an affidavit sworn by the person who personally requires the rental unit certifying that the person in good faith requires the rental unit for his or her own personal use. 2017, c. 13, s. 13. (emphasis added)

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**83** (1) Upon an application for an order evicting a tenant, the Board may, despite any other provision of this Act or the tenancy agreement,

- (a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or
- (b) order that the enforcement of the eviction order be postponed for a period of time. 2006, c. 17, s. 83 (1).

*Mandatory review*

(2) If a hearing is held, the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection (1). 2006, c. 17, s. 83 (2).

*Circumstances where refusal required*

(3) Without restricting the generality of subsection (1), the Board shall refuse to grant the application where satisfied that,

- (a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement;

- (b) the reason for the application being brought is that the tenant has complained to a governmental authority of the landlord's violation of a law dealing with health, safety, housing or maintenance standards;
  - (c) the reason for the application being brought is that the tenant has attempted to secure or enforce his or her legal rights;
  - (d) the reason for the application being brought is that the tenant is a member of a tenants' association or is attempting to organize such an association; or
  - (e) the reason for the application being brought is that the rental unit is occupied by children and the occupation by the children does not constitute overcrowding. 2006, c. 17, s. 83 (3).
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**168** (1) The Ontario Rental Housing Tribunal is continued under the name Landlord and Tenant Board in English and Commission de la location immobilière in French. 2006, c. 17, s. 168 (1).

#### *Board's jurisdiction*

(2) The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act. 2006, c. 17, s. 168 (2).

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**184** (1) The *Statutory Powers Procedure Act* applies with respect to all proceedings before the Board. 2006, c. 17, s. 184 (1).

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#### **Appeal rights**

210 (1) Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.

[...]

(4) If an appeal is brought under this section, the Divisional Court shall hear and determine the appeal and may,

- (a) affirm, rescind, amend or replace the decision or order; or
- (b) remit the matter to the Board with the opinion of the Divisional Court. 2006, c. 17, s. 210 (4).

#### **Same**

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(5) The Divisional Court may also make any other order in relation to the matter that it considers proper and may make any order with respect to costs that it considers proper. 2006, c. 17, s. 210 (5).

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**212** Substantial compliance with this Act respecting the contents of forms, notices or documents is sufficient. 2006, c. 17, s. 212.

**MARAZZI**

Appellant / Moving Party

-and-

Respondent on Appeal / Responding Party

***ONTARIO***  
**DIVISIONAL COURT**  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM**

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