Order under Section 21.2 of the Statutory Powers Procedures Act the Residential Tenancies Act, 2006

Citation: De Greens Family Holdings Corp v Barrett, 2025 ONLTB 1390
Date: 2025-01-08
File Number: LTB-L-078826-22

In the matter of:	MAIN (LOWER), 145 AINSLIE STREET CAMBRIDGE ONTARIO N1R3P4	
Between:	De Greens Family Holdings Corp	Landlord
	And	
	Matthew Barrett and Evan Browning	Tenants

De Greens Family Holdings Corp (the 'Landlord') applied for an order to terminate the tenancy and evict Matthew Barrett and Evan Browning (the 'Tenants') because the Tenants did not pay rent.

As described further below, the application came before me as a request to review an order made by the LTB resolving the application and evolved to include an assertion by Mr. Barrett that subsection 74(4) and (11) of the *Residential Tenancies Act, 2006* (the 'RTA') were not constitutionally operative.

I heard the matter by videoconference on November 4 and December 19, 2024. The Landlord and the Tenants attended the hearings. Shaun Harvey represented Mr. Barrett, although Mr. Barrett represented himself in connection with his request that the LTB review an order. Barrett Beaudoin represented Mr. Browning. Dan Schofield represented the Landlord.

Determinations:

I. Background

1. The application was initially resolved by an order issued on August 23, 2023 and amended on September 20, 2023 (the 'First Hearing Order'). **[DOC-1799206 and DOC-1943436]** In the First Hearing Order the Member (the 'First Hearing Member') dismissed the application in reliance on subsection 83(3) of the RTA and a finding that removal by the Landlord of a full-sized stove and refrigerator from the unit constituted a serious breach.
2. The Landlord requested a review of the First Hearing Order. **[DOC-2001884]** That request was granted and the Review Member directed the application to a new hearing. **[DOC-2323528]**
3. The application came before the LTB again on February 27, 2024.

4. On February 27, 2024, the application was adjourned by the Member assigned to rehear the application (the 'Second Hearing Member') and an interim order was issued that, among other things, required Mr. Barrett to pay $775.00 per month to the Landlord. **[DOC-2872376]**

5. The application came before the Second Hearing Member again on April 10, 2024.

6. In an interim order issued on April 25, 2024 (the '25 Apr 24 Interim Order') the Second Hearing Member: (a) determined the tenancy was joint; and (b) directed the Tenants to pay the rent of $1,550.00 as and when due until the application was resolved. **[DOC-3199007]** Mr Barrett acknowledged that the Tenants did not make all of the payments required by the 25 Apr 24 Interim Order.

7. The application came before the Second Hearing Member for a further hearing on June 21, 2024.

8. In an interim order issued on July 18, 2024 the Second Hearing Member established a schedule for: (a) the Tenants to deliver further submissions under section 83 regarding the supply of heat to the unit; and (b) the parties to make written closing submissions. **[DOC-3761950]**

9. The application was heard again on June 21, 2024 and, after considering written submissions, the Second Hearing Member resolved the application in an order issued on September 25, 2024 (the 'Second Hearing Order'). **[DOC-4169515]**

10. The Second Hearing Order: (a) terminated the tenancy; and (b) required the Tenants to vacate the unit by October 15, 2024.

11. On October 10, 2024—after the tenancy had been terminated, but before the eviction became enforceable—Mr. Barrett became bankrupt. **[DOC-4353099]**

12. The Tenants did not pay the arrears to void the Second Hearing Order by October 15, 2024 as contemplated by subsection 74(4) of the RTA.

13. On October 15, 2024—after he became bankrupt and the day the eviction became enforceable—Mr. Barrett requested that the LTB review the Second Hearing Order because:

    (a) the Second Hearing Order referred in two places in the preamble to LTB-L-034745-23;

    (b) the Review Member should have amended the First Hearing Order instead of directing that the application to a new hearing;

    (c) the Second Hearing Member incorrectly dismissed the Tenants' claims under section 82 of the RTA;

    (d) the Second Hearing Member erred in finding issues raised by the Tenants under subsection 83(3) of the RTA 'lacked merit'; and

    (e) the Second Hearing Member failed to properly apply section 83(3) of the RTA based on a factual finding by the First Hearing Member.

14. Mr. Barrett further asserted that his bankruptcy required that the enforcement of the Second Hearing Order be stayed or prevented the enforcement of the portion of the Second Hearing Order that directed the Court Enforcement Officer (Sheriff) to provide vacant possession of the unit to the Landlord.

15. In an interim order issued on October 16, 2024 (the '16 Oct 24 Interim Order') the LTB:

    (a) directed a hearing to determine whether the refusal of the Second Hearing Member to hear the section 82 issues raised by the Tenants was reasonable; (b) the Second Hearing Member had jurisdiction to consider the application as a result of the application of section 69.3 of the of the *Bankruptcy and Insolvency Act* (the 'BIA')[1]; and (c) any other issues deemed appropriate; and

    (b) stayed the various LTB orders including the Second Hearing Order. **[DOC-4320930]**

16. In an endorsement dated October 17, 2024, the LTB directed that the review of the Second Hearing Order be determined on an expedited basis. **[DOC-4339691]**

17. The review was assigned to me. I decided to hear the review based on all of the issues raised in Mr. Barrett's request and not just the issues identified in the 16 Oct 24 Interim Order.

18. I first heard Mr. Barrett's request that the LTB review the Second Hearing Order on November 4, 2024.

19. At the opening of the hearing on November 4, 2024, Mr. Barrett argued: (a) the application, including his request that the LTB review the Second Hearing Order, was stayed as a result of section 69.3; and (b) the Court Enforcement Officer (Sheriff) could not evict the Tenants as a result of the application of section 84.2 of the BIA. The essence of Mr. Harvey's argument was that because Mr. Barrett became bankrupt before the Second Hearing Order became enforceable: (a) section 69.3 of the BIA stayed the 'continuation' of the application, including the review; and (b) the portion of the Review Order that required the Court Enforcement Officer (Sheriff) to provide the Landlord with vacant possession of the unit was not enforceable as a result of section 84.2 of the BIA.

20. On November 4, 2024, I was only required to determine whether the review was stayed and I was not satisfied that the effect of section 69.3 of the BIA was to stay the review. A review is not an action, execution or other proceedings by a creditor for the recovery of a claim provable in bankruptcy. **[See *Robson, Re*, 2006 CanLII 17743 (ON CA)]**

21. Mr. Harvey requested that the review be adjourned because he had received instructions to bring a motion for a finding that subsections 74(4) and (11) of the RTA are not operational because Mr. Barrett became bankrupt before the Second Hearing Order became enforceable—that there is an operational conflict between subsections 74(4) and (11) and the BIA.

[1] The 16 Oct 24 Interim Order contains a typographical error. It refers to section 69 rather than section 69.3 of the BIA. Section 69 of the BIA creates a stay that applies when a notice of intention to make a proposal is filed by a debtor.

22. I granted Mr. Harvey's request and, in an endorsement issued on November 7, 2024 (the '7 Nov 24 Endorsement'), I directed Mr. Harvey to serve and file a motion by no later than 20 November 2024. **[DOC-4462575]**

23. On November 4, 2024, the Landlord advised me that the Tenants had not paid rent for the month of October of 2024 or the full rent for November. In the 7 Nov 24 Endorsement, I ordered the Tenants to pay:

    (a) the daily rent from October 11, 2024 until October 32, 2024 and the remainder of the rent for November of 2024 by no later than 20 November 2024; and

    (b) pay the full lawful monthly rent as and when due beginning December 1, 2024. **[DOC-4462575]**

II. Payment of Rent

24. The Tenants did not pay daily rent from October 11, 2024 until October 31, 2024 and the remainder of the rent for November of 2024 as directed in the 7 Nov 24 Endorsement.

25. On November 26, 2024, Mr. Barrett filed a Request to Extend or Shorten Time asking for more time to comply with the 7 Nov 24 Endorsement. According to Mr. Barrett, his bankruptcy and the uncertainty concerning the tenancy was preventing him from obtaining the financial support he needed to comply. Mr. Barrett further asserted that he was not told by the trustee of his bankruptcy estate that he would be liable to pay daily rent from October 11, 2024 until October 31, 2024.

26. While I have some sympathy for Mr. Barrett's circumstances, the BIA is clear that a bankrupt tenant is required to pay rent after the date the tenant becomes bankrupt. **[BIA, s. 84.2(4) and *Mahmood* v *Riutta*, 2024 ONLTB 62844 (CanLII)]** The LTB has no jurisdiction on this application to relieve Mr. Barrett of his obligation to pay rent. However, I heard the review and considered the constitutional questions posed by Mr. Barrett notwithstanding that the Tenants did not comply with the 7 Nov 24 Endorsement.

III. Post-Hearing E-mail from Mr Barrett

27. After the hearing concluded on December 19, 2024, Mr. Barrett sent an e-mail to my business e-mail addresses identifying WWI-related family history that he thought might be of interest to me based on what he described as a review of my 'Veterans Affairs Profile'. I did not respond to Mr. Barrett, and forwarded his e-mail to Messrs Harvey, Beaudoin and Schofield.

IV. Matters to be Determined

28. On December 19, 2024, I heard both Mr. Barrett's request that the LTB review the Second Hearing Order and argument as to why subsection 74(4) and (11) of the RTA were not operational as a result of Mr. Barrett having become bankrupt.

A. Constitutional Issue

i. Preliminary Issues

29. On November 27, 2024, Mr. Barrett delivered a Notice of Constitutional Question to the Attorney General of Ontario and the Attorney General of Ontario as required by the *Courts of Justice Act* and to the Superintendent of Bankruptcy as required by the 7 Nov 24 Endorsement. **[DOC-4622732]**

30. On December 19, 2024, I was advised: (a) the Attorney General of Canada and the Superintendent of Bankruptcy did not respond, and (b) the Attorney General of Ontario sent a letter indicating they would not be taking a position on the Constitutional issue raised by Mr. Barrett.

31. On December 19, 2024, the Landlords argued that I should not hear from Mr. Barrett on the constitutional issue because the Notice of Constitutional Question had not been delivered by November 20, 2024 as required by the 7 Nov 24 Endorsement. I heard from Mr. Harvey as to why the notice had been delivered late and was satisfied with his explanation.

32. Mr. Barrett did not file a formal motion asking the LTB to declare subsection 74(4) and (11) of the RTA not operational as a result of Mr. Barret having become bankrupt, but the Landlord did not object and the relief he was asking for was well-enough articulated in the Notice of Constitutional Question to allow me to ascertain the remedy being requested and the grounds.

ii. Jurisdiction of the LTB

33. The LTB has jurisdiction to determine if subsections 74(4) and (11) of the RTA are inoperative in light of the Tenant's bankruptcy.

34. Section 174 of the RTA gives the LTB authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this RTA. Nothing in the RTA prevents the LTB from determining the constitutional validity of the RTA. **[*Nova Scotia (Workers' Compensation Board)* v. *Martin*, 2003 SCC 54 (CanLII)]**

iii. Remedy

35. Subsection 52(1) of *The Constitution Act, 1867* says:

> ***52 (1)*** *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

36. If there is an operational conflict between otherwise valid provincial and federal legislation, the appropriate remedy is to declare the provincial legislation inoperative to the extent of the conflict. **[See *Husky Oil Operations Ltd.* v. *Canada*, 1995 CanLII 69 (SCC)]** In my view, that would mean the Tenants would be able to set aside the Second Hearing Order without being required to pay the arrears that existed when Mr. Barrett became bankrupt on October 10, 2024. However, as described further below, I am unable to find there is an operational conflict between the RTA and the BIA.

iv. Doctrine of Paramountcy

37. Mr. Barrett relied on the doctrine of paramountcy.

38. The guiding mantra of the paramountcy analysis is that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency. **[*Saskatchewan (Attorney General)* v. *Lemare Lake Logging Ltd.*, 2015 SCC 53 (CanLII), para 15]**

39. In *Alberta (Attorney General)* v. *Moloney* **[2015 SCC 51 (CanLII)]** the majority described the doctrine of paramountcy as follows:

> *[14] Each level of government — Parliament, on the one hand, and the provincial legislatures, on the other — has exclusive authority to enact legislation with respect to certain subject matters. Sections 91 and 92 of the Constitution Act,1867 assign each power to the level of government best suited to exercise it. Broad powers were given to the provincial legislatures with respect to local matters, in recognition of regional diversity, while powers relating to matters of national importance were given to Parliament, to ensure unity.*
>
> *[15] Legislative powers are exclusive, and one government is not subordinate to the other. However, the legislative matrix is not as clearly defined as ss. 91 and 92 might suggest. It is often impossible for one level of government to legislate effectively within its jurisdiction without affecting matters that are within the other level's jurisdiction. Furthermore, it is often impossible to make a statute fall squarely within a single head of power. This leads to overlap in the exercise of provincial and federal powers. The tendency has been to allow these overlaps to occur as long as each level of government properly pursues objectives that fall within its jurisdiction. This tendency reflects the theory of co-operative federalism.*
>
> *[16] That said, there comes a point where legislative overlap jeopardizes the balance between unity and diversity. In certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. To protect against such intrusions, the Court has developed various constitutional doctrines. For the purposes of this appeal, I need only refer to one: the doctrine of federal paramountcy. This doctrine "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse". When there is a genuine "inconsistency" between federal and provincial legislation, that is, when "the operational effects of provincial legislation are incompatible with federal legislation", the federal law prevails. The question thus becomes how to determine whether such a conflict exists.*
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> *…*
>
> *[29] In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law. In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists.* (citations omitted)

v. Alleged Constitutional Conflict

40. Mr. Barrett asserts a Constitutional conflict exists between the RTA and the BIA because he will be required by the RTA to pay arrears to reinstate the tenancy. Mar. Barrett relied on the Supreme Court of Canada/s decisions in *Alberta (Attorney General)* v. *Moloney* **[2015 SCC 51 (CanLII)]** and *407 ETR Concession Co.* v. *Canada (Superintendent of Bankruptcy)* **[2015 SCC 52 (CanLII)].** In those cases the Supreme Court found that provincial legislation that permitted or directed the government to withhold a privilege until a discharged claim was paid conflicted—was not compatible—with the fact the BIA provided that the claim was discharged and not recoverable by the creditor. The question I was required to determine is whether this ratio extends to circumstances where a debtor is permitted by provincial legislation—the RTA in this case—to reinstate an agreement—the tenancy in this case—on payment of amounts that are provable in bankruptcy and will be discharged.

41. The essential facts underlying the Constitutional issue raised by Mr. Barrett are: (a) the Tenants failed to pay rent; (b) the Landlord delivered a notice of termination under section 59 of the RTA terminating the tenancy because the Tenants did not pay rent; (c) the Landlord brought an application under section 69 asking the LTB to make an order terminating the tenancy and evicting the Tenants because the Tenants did not pay rent; (d) on September 25, 2024 the LTB made the Second Hearing Order terminating the tenancy and establishing an eviction date of October 15, 2024; (e) on October 10, 2024, Mr Barrett became bankrupt; and (f) subsection 74(4) of the RTA would have required that Mr. Barrett pay rent owed as at October 10, 2024 to void the Second Hearing Order and subsection 74(11) of the RTA will require that Mr. Barrett pay rent owed as at October 10, 2024 to set aside the Second Hearing Order .

42. Three sections of the BIA are raised by Mr. Barrett: section 69.3, section 84.2 and subsection 178(2).

43. Section 69.3 creates an automatic stay that is intended to prevent creditors from taking steps to establish or recover a debt owed by the bankrupt outside of the process established by the BIA. **[See, for example, *SWL-16920-SA (Re)*, 2008 CanLII 82446 (ON LTB)]** It says, in part:

    69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

44. Section 69.3 applies to proceedings for the recovery of a claim provable in the tenant's bankruptcy. The BIA defines a "claim provable" to be '[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt'. **[BIA, s 121(1)]** Generally, rent or other amounts owed by a bankrupt tenant when the bankruptcy started are 'provable' and any application that includes the recovery of such amounts is stayed.

45. As was noted by the Supreme Court of Canada in *R* v. *Fitzgibbon* **[1990 CanLII 102 (SCC)]**:

… [section 69.3] prohibits the granting of any 'remedy against' or 'recovery of' any claim against the debtor or his property without leave of the court in bankruptcy….The object of the section is to avoid a multiplicity of proceedings and to prevent any single unsecured creditor from obtaining a priority over any other unsecured creditors by bringing an action and executing a judgment against the debtor. This is accomplished by providing that no remedy or action may be taken against a bankrupt without leave of the court in bankruptcy, and then only upon such terms as that court may impose. (citations omitted)

46. Subsection 69.3 does not address the termination of agreements or tenancies. **[*Hutchingame Growth Capital Corporation* v. *Independent Electricity System Operator*, 2020 ONCA 430 (CanLII) leave to appeal denied, 2021 CanLII 2823 (SCC) and *Canadian Petcetera Limited Partnership* v. *2876 R Holdings Ltd.*, 2010 BCCA 469 (CanLII)]**

47. Once a tenant becomes bankrupt, the ability of a landlord or the LTB to terminate the tenancy based on the fact the tenant owes rent is restricted by section 84.2 of the BIA, which says, in part:

84.2 *(1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.*

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend, or claim an accelerated payment or forfeiture of the term under, the lease by reason only of the bankruptcy or insolvency or of the fact that the bankrupt has not paid rent in respect of any period before the time of the bankruptcy.

48. The effect of section 84.2 is to prevent the LTB from exercising its jurisdiction under section 69 of the RTA to terminate a tenancy where the basis for the application is the failure of a bankrupt tenant to pay rent owed at the time the tenant became bankrupt—an L1 application based on a notice of termination delivered under section 59 of the RTA.

49. Section 84.2 was first added to the BIA by Bill C-55. The clause-by-clause analysis produced for Bill C-55 described the purpose of the section:

The intention of the reform is to ensure that agreements in good standing be respected by all parties. Therefore, the individual bankrupt, who is attempting to obtain his or her "fresh start", will not be unreasonably evicted from their home, denied basic and essential services or denied other benefits to which they would otherwise be entitled.

…

Subsection (2) stipulates that a landlord may not evict a bankrupt only because of a bankruptcy or there is an amount for past rent outstanding prior to the bankruptcy. The provision applies only in respect of individuals - permitting a landlord to evict an individual only because of a bankruptcy or past obligations would cause a serious hardship on the individual. Balance in the relationship is restored, however, by requiring the bankrupt to pay rent on an on-going basis.

50. Similarly, in *The Annotated Bankruptcy and Insolvency Act*, the section is described as follows:

> *Section 84.2 is aimed at ensuring that agreements in good standing be respected by all parties. Therefore, the individual bankrupt who is attempting to obtain a "fresh start" will not be unreasonably evicted from the family home, denied basic and essential services, or denied other benefits to which the bankrupt would otherwise be entitled by reason only of the bankruptcy or insolvency….* **[HMPREC 4:440. See also *Capital Steel Inc* v *Chandos Construction Ltd*, 2019 ABCA 32 (CanLII) aff'd, 2020 SCC 25 (CanLII)]**

51. Section 84.2 operates to preserve the status quo. It does not revive or reinstate validly terminated tenancies. While the case did not involve a residential tenancy, in *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator* **[2020 ONCA 430 (CanLII) leave to appeal denied, 2021 CanLII 2823 (SCC)]** the Court of Appeal found that where a contract was validly terminated—in that case as a result of a bankruptcy—there is nothing left for the Bankruptcy Court to vest in a purchaser under the BIA. Similarly, once a tenancy is validly terminated, there is nothing left to preserve in a subsequent bankruptcy.

52. The application of sections 69.3 and 84.2 of the BIA is relatively straightforward, where there is a single tenant: (a) an application to recover rent or other amounts that were owed when the bankruptcy started is stayed; and (b) the LTB cannot terminate the tenancy and evict a bankrupt tenant based on rent owed when the bankruptcy started. However, the situation becomes somewhat more complicated when there is a joint tenancy and only one of the tenants is bankrupt.

53. In a joint tenancy, the tenants are not responsible for separate shares of the rent. They are jointly and severally liable to the landlord for the entire rent. This means that if the rent is not paid, the landlord may pursue any of the joint tenants for the full amount owed.

54. When it comes to applications to the LTB based on arrears of rent, a non-bankrupt joint tenant benefits, as a practical matter, from the application of section 84.2 of the BIA because it is not possible to terminate the tenancy of only the non-bankrupt joint tenant. If a landlord obtains an order under section 69 of the RTA terminating a joint tenancy, the tenancy ends for all of the tenants and they will all be evicted.

55. However, the BIA does not prevent a landlord from recovering rent or other amounts owed jointly by a bankrupt tenant and a non-bankrupt tenant from the non-bankrupt tenant. **[See BIA, s. 179]** The LTB can determine as against a non-bankrupt joint tenant an application in which the landlord has asked for only monetary compensation without violating section 69.3 of the BIA.

56. Subsection 178(2) of the BIA says that a bankruptcy discharge has the effect of releasing all claims provable against the discharged debtor such that creditors are not able to enforce the claim against the discharged debtor **[*Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), [2015] 3 SCR 327 (CanLII) and *407 ETR Concession Co.* v. *Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 (CanLII)]**, although the claim is not extinguished **[*Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605 (CanLII)]**.

57. In the residential tenancy context, sections 69.3 and 84.2, and subsection 178(2) of the BIA work together. Where a tenant who owes rent becomes bankrupt: (a) the landlord is prohibited from commencing or continuing any proceeding before the LTB to recover the arrears; (b) the landlord and the LTB are prohibited from terminating the tenancy based on any arrears owed as at the date the tenant became bankrupt; and (c) once the tenant is discharged, any arrears owed as at the date the tenant became bankrupt cannot be the basis for a notice of termination under section 59 of the RTA or an order of the LTB.

58. The Constitutional issues raised by Mr. Barrett relate to his ability to revive or reinstate the tenancy that was terminated by the Second Hearing Order on payment of the arrears owed to the Landlord[2].

59. Under the RTA, termination of a tenancy and eviction of the tenant are separate stages.

60. Where, for example, a landlord issues a notice of termination under section 59 of the RTA based on the failure of the tenant to pay rent—what happened in this case—there is not need for an eviction and the tenancy terminates on the date specified in the notice if the tenant voluntarily vacates. **[RTA, s. 37(2)]** If the tenant does not vacate, section 39 of the RTA prohibits the exercise of 'self-help', and the landlord must apply for an order under section 69 of the RTA: (a) terminating the tenancy; and (b) evicting the tenant. Where an application under section 69 is granted, the LTB makes an order that (a) terminates the tenancy; and (b) provides for the eviction of the tenant by: (i) authorizing the landlord to file the order with the Court Enforcement Officer (Sheriff); and (ii) directing the Court Enforcement Officer (Sheriff) to return possession of the unit to the landlord after a specific date.

61. The RTA entitles the landlord to daily compensation—occupation rent—from the date of the order—the date the tenancy is terminated—until the tenant vacates the unit. **[RTA, s. 86]** After a tenancy has been terminated, it cannot, subject to subsection 74(4) and (11) of the RTA, be reinstated without the consent of the landlord. **[See RTA, s. 45(b)]**

62. The RTA allows a tenant who has not paid rent to preserve or, if it has been terminated by an order made under section 69, to reinstate or revive a tenancy. This can happen at four stages of the process:

    (a) the tenant can void a notice of termination under section 59 of the RTA by paying the rent owed before the landlord files an application under section 69 of the RTA asking the LTB to make an order terminating the tenancy and evicting the tenant; **[RTA, s. 59(3)]**

    (b) an application under section 69 of the RTA is required to be discontinued if the tenant pays the arrears before the LTB makes an order evicting the tenant; **[RTA, s. 74(2)]**

    (c) an order made by the LTB under section 69 is void where the tenant pays the arrears and other amounts before the eviction date; **[RTA, ss. 74(4)]**

[2] There was no indication Mr. Browning wants to revive the tenancy, although the practical effect of Mr. Barrett paying the amounts required to revive the tenancy would revive the tenancy for both Tenants.

(d) the tenant can apply to the LTB for an order setting aside an eviction order where if after the eviction date on the order, but before the tenant is evicted, the tenant pays the arrears and other amounts, provided that this may only be done by a tenant one in a tenancy. **[RTA, s. 74(11)]**

63. The purpose of subsections 59(3) and 74(2) of the RTA is to allow the tenant to continue the tenancy.

64. The purpose of subsections 74(4) and (11), on the other hand, is to allow a tenant whose tenancy has been terminated to reinstate or revive the tenancy and continue to live in the unit paying the same rent. Were it not for subsections 74(4) and (11), a tenant whose tenancy was validly terminated would have to negotiate a new tenancy agreement with the landlord to avoid eviction and remain in the unit. Subsections 74(4) and (11) can have the effect of requiring a bankrupt tenant to pay a claim that is 'dischargeable' to reinstate the tenancy.[3]

65. Had Mr. Barrett become bankrupt prior to the Second Hearing Order being issued, there is no dispute that he would not have to pay the arrears to preserve the tenancy. Depending on the timing of the bankruptcy: (a) the termination of the tenancy would have been prevented by the operation of section 84.2 of the BIA, and /or (b) the application of the LTB would have been stayed by section 69.3 of the BIA.

66. However, Mr. Barrett did not become bankrupt until after the Second Hearing Order terminated the tenancy and directed the Court Enforcement Officer (Sheriff) to evict the Tenants by returning possession of the unit to the Landlord. That means that Mr. Barrett must rely on subsection 74(4) or (11) of the RTA to revive or reinstate the terminated tenancy so that he can continue to live in the unit.

67. Mr. Barrett asserts that there is an operational conflict between: (a) subsections 74(4) and (11) of the RTA; and (b) sections 69.3, 84.2 and 178(2) of the BIA and the result is that subsection 74(4) and (11) of the RTA are not operational to the extent that they require him to pay arrears that existed on October 10, 2024 to void or set aside the Second Hearing Order. It is Mr. Barrett's position that he is required to pay only rent and other amounts that became owed after October 10, 2024 to set aside the Second Hearing Order.

68. As a practical matter, only subsection 74(11) is now available to the Tenants because the eviction date had passed before the LTB stayed the Second Eviction Order. However, the Constitutional analysis is the same under both subsections because they both contemplate that arrears existing as at the date a tenant became bankrupt will have to be paid to revive a tenancy.

vi. The Constitutional Question

69. The Notice of Constitutional Question delivered by Mr. Barrett did not, in my view, clearly articulate the issue raised by Mr. Barrett. According to Mr. Harvey, the reason for the complicated decision tree in the Notice of Constitutional Question was that subsections 74(4) and (11) of the RTA are permissive and not prohibitive, which means it is not possible to simply ignore the application of the subsections based on there being an operational

[3] In the circumstance so this case, the amount that Mr. Barrett will be required to pay includes both pre- and post-bankruptcy amounts.

conflict with the BIA. The fact subsections 74(4) and (11) are permissive does mean that any remedy will have to be more than just a declaration the subsections do not apply. However, I do not think it necessitates a complex Constitutional question.

70. Based on the argument made by Mr. Harvey and Mr. Beaudoin on December 19, 2024, I would frame the questions as:

Is there an operational conflict between: (a) subsections 74(4) and (11) of the RTA; and (b) sections 69.3[4], 84.2 and 178(2) of the BIA insofar as subsection 74(4) and (11) of the RTA[5] require a tenant who has become bankrupt after an order is made under section 69 of the RTA terminating the tenancy and evicting the (bankrupt) tenant on the basis of arrears that existed on the date the tenant became bankrupt to pay those arrears to void or set aside the order to revive the tenancy?

71. Mr. Barrett has not yet been discharged. As a result, subsection 178(2) of the BIA does not—or does not yet—apply. However, the parties agreed that I should approach the Constitutional issues as if subsection 178(2) was applicable since Mr. Barrett is a first-time bankrupt and entitled to an automatic discharge. **[BIA, s. 168.1(1)(a)]**

vii. Legislation is Valid

72. The first step in the Constitutional analysis is to determine whether the federal and provincial legislation is validly enacted**. [See *Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), para 17]** In this case, there was no dispute that the BIA and the RTA are each independently valid pieces of legislation.

viii. No Conflict

73. A Constitutional conflict arises in one of two situations:

(a) the two pieces of legislation cannot operate together in the sense that it is impossible to comply with both, or

(b) although it is possible to comply with both pieces of legislation, the operation of the provincial law frustrates the purpose of the federal enactment. **[*Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), para 18]**

74. Mr. Barrett asserts there is a conflict between: (a) subsection 74(4) and (11) of the RTA; and (b) sections 69.3 and 84.2, and subsection 178(2) of the BIA. Mr Barrett had the burden of establishing either: (a) there was an operational conflict between the relevant sections RTA and the BIA; or (b) the relevant sections of the RTA operated to frustrate a purpose of the BIA. **[*Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), para 27]**

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[4] Mr. Barrett raises other sections of the BIA that create stays where other insolvency proceedings are commenced under the BIA. While the analysis would be the same were these provisions of the BIA applicable, they are not.
[5] Mr. Barrett raises section 85 of the RTA. That section says that an order evicting a person shall have the same effect, and shall be enforced in the same manner, as a writ of possession. It is not relevant for the purposes of the constitutional analysis.

75. In determining whether a conflict exists, I was required to take a 'restrained approach' and favour harmonious interpretations of the RTA and the BIA over interpretations that result in incompatibility. **[*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53 (CanLII)*, paras 20-23 and 27]**

a. Operational Conflict

76. An operational conflict exists where it is not possible to comply with both the federal and provincial legislation. In *Moloney* and *407 ETR*, for example, the majority found there was an operational conflict between provincial legislation that effectively required that a person pay a debt that had been discharged as a result of the application of section 178(2) of the BIA to retain driving-related privileges. This was based on a finding that the legislation in issue gave inconsistent answers to whether there was an enforceable obligation with the BIA saying the creditor could not enforce the discharged claim and the provincial law requiring payment of the same claim. **[*Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII)] , paras 60-69 and 407 ETR, para 25]**

77. Mr. Barrett argued that there is an operational conflict between subsections 74(4) and (11) of the RTA and section 69.3 of the BIA because section 69.3 prevents the recovery by the Landlord of arrears as of October 10, 2024 and subsection 74(4) and (11) contemplates the Landlord will be paid those arrears by Mr. Barrett to reinstate the tenancy[6]. I do not accept that argument and find there is no operational conflict.

78. Subsections 74(4) and (11) of the RTA have no impact on the operations of section 69.3 of the BIA.

79. Section 69.3 of the BIA prevents the Landlord from taking steps to recover the arrears owed by Mr. Barrett. Subsections 74(4) and (11) of the RTA, on the other hand, contemplate that Mr. Barrett may pay amounts to the Landlord to revive the tenancy that was terminated by the Second Hearing Order.

80. Mr. Barrett argued that there is an operational conflict between subsections 74(4) and (11) of the RTA and section 84.2 of the BIA because section 84.2 prevents the termination of his tenancy based on arrears existing as of October 10, 2024 and subsection 74(4) and (11) contemplates the Landlord will be paid those arrears by Mr. Barrett. I do not accept that argument and find there is no operational conflict.

81. Subsections 74(4) and (11) of the RTA have no impact on the operations of section 84.2 of the BIA. Subsections 74(4) and (11) of the RTA and section 84.2 of the BIA focus on different things, and the application of one does not preclude the application of the other. Subsections 74(4) and (11) constitutes, in my view, what has been described as 'non-repugnant supplemental' provincial legislation. **[WR Lederman, The Concurrent Operation of Federal and Provincial Laws in Canada, 1963 CanLIIDocs 39][7]**

[6] Nr. Barrett argued the 'true substance' of subsections 74(4) and (11) was to require him to pay the arrears.
[7] In *Robinson* v. *Countrywide Factors Ltd.*, 1977 CanLII 175 (SCC), the majority found that provincial legislation that permitted preferences to be challenged did not conflict with, but supplemented, the provisions of the *Bankruptcy Act* that permitted preferences to be attacked.

82. Subsections 74(4) and (11) deal with the reinstatement of terminated tenancies while subsection 84.2 preserves the *status quo* by preventing a landlord from relying on a claim for rent that will be discharged to terminate a subsisting tenancy.

83. Mr. Barrett argued that there is an operational conflict between subsections 74(4) and (11) of the RTA and subsection 178(2) of the BIA because subsection 178(2) prevents the Landlord from recovering from him arrears that existed as of October 10, 2024, and subsection, 74(4) and (11) requires Mr. Barrett to pay those arrears to revive the tenancy.[8] I do not accept that argument and find there is no conflict.

84. In arguing that there was an operational conflict involving subsections 74(4) and (11) of the RTA, Mr. Barrett relied on Supreme Court of Canada's decisions in *Molony* and *407 ETR* where the majority found there was an operational conflict between subsection 178(2) of the BIA and provincial legislation that allowed the province to withhold a privilege until the discharged debtor paid a claim that was not recoverable as a result of the application of subsection 178(2).

85. Mr. Barrett argued that the effect of subsection 74(4) and (11) was to require a bankrupt tenant to pay a claim that was subject to discharge and, in that respect, they operated in the same way as the legislative provisions that were found to be not operational in *Moloney* and *407 ETR*. I do not agree.

86. There is no dispute that to reinstate the tenancy Mr. Barrett will have to pay a claim that will be discharged—the amount Mr. Barrett is required to pay to set aside the Second Hearing Order includes arrears owed as at October 10, 2024. However, unlike in *Moloney* and *407 ETR*, the operation of subsections 74(4) and (11) of the RTA does not permit the government to terminate or withhold a privilege to force the payment of a discharged debt—they do not create a collection mechanism by allowing the government to put pressure on a debtor to pay a discharged claim.

87. Subsections 74(4) and (11) balance the rights and responsibilities of landlords and tenants by permitting a tenant to reinstate a terminated tenancy without the consent of the landlord. **[RTA, s. 1]** Had he become bankrupt at any time prior to the Second Hearing Order terminating the tenancy, Mr. Barrett would not have been required to pay the arrears to preserve the tenancy—section 84.2 of the BIA would have prevented the termination of tenancy based on the arrears. However, at the time Mr. Barrett became bankrupt there was no longer a tenancy—it had been terminated by the Second Hearing Order. Subsection 74(11) now permits Mr. Barrett to unilaterally reinstate or revive the tenancy so long the arrears are paid. Subsection 178(2) of the BIA does not prevent an arrangement between a debtor and a creditor to pay a discharged debt in the context of an arrangement where the debtor receives some benefit.[9] **[See *Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), para 81 and *Servus Credit Union* v *Sulyok*, 2018 ABQB 860 (CanLII)]**

[8] Mr. Barrett's position was that he should only be required to pay post-bankruptcy amounts to set aside the Second Hearing Order under subsection 74(11).

[9] Reaffirmation is normally associated with secured claims, but is not restricted to secured claims where a debtor reaffirms a debt to retain collateral. In *Moloney*, the majority did not restrict reaffirmation to secured claims.

88. Mr. Browning argued that under subsection 74(4) and (11) of the RTA there is no consideration provided by a landlord to support the payment of the (discharged) arrears because the same tenancy is reinstated and continues. I do not accept that argument.

89. Subsections 74(4) and (11) provide a (former) tenant with a benefit by allowing them to reinstate the tenancy and their statutory security of tenure—subsections 74(4) and (11) allow the tenant to continue to occupy the unit under the same terms and at the same rent subject to the ongoing protection of section 38 of the RTA—in return for paying the amounts specified. Were it not for subsections 74(4) and (11), Mr. Barrett would have to negotiate with the Landlord and the Landlord would be required to agree to reinstate the tenancy. In that scenario, the BIA would not prohibit the Landlord from requiring that Mr. Barrett pay the arrears in exchange for the Landlord agreeing to reinstate the tenancy. What subsections 74(4) and (11) of the RTA do is remove the requirement that the Landlord agree to reinstate the tenancy—they remove a landlord's right to decide who occupies their unit as a tenant and replace that with the right to receive the arrears that resulted in the termination of the tenancy.

90. Mr. Browning argued that the requirements of subsection 74(4) and (11) were 'enforced' by the LTB and were, as a result, a debt collection mechanism. I do not accept that argument.

91. The fact that the LTB is obliged by subsections 74(4) and (11) to grant a request by a bankrupt tenant to void or set aside an order on the payment of a discharged debt does not, in my view, result in the subsections becoming a debt collection mechanism. Subsections 74(4) and (11) do not require or permit the LTB to withhold a privilege until a discharged claim is paid but mandate the LTB to revive a terminated tenancy on payment of a discharged claim by a tenant. The effect of subsections 74(4) and (11) is to remove the right of a landlord to come to a tenancy in return for the right to receive payment of the arrears.

92. The Landlord argued that subsection 74(4) and (11) were 'optional'. In both *Moloney* and *407 ETR*, the majority rejected the argument there was no conflict between the provincial legislation and the BIA because the debtor could decide to not pay the discharged claim and forego the privilege. However, there is, in my view, a distinction between legislation that permits the government to withhold a privilege based on the fact a debtor has not paid a discharged claim and legislation that permits a debtor to force a private party to contract with them so long as they pay a discharged claim. The effect—the real substance—of subsections 74(4) and (11) is not to prevent Mr. Barrett from continuing a subsisting tenancy unless he pays a discharged debt, but to force the Landlord to accept the reinstatement of the terminated tenancy on the payment of specified amounts.

93. In determining whether there is an operational conflict between subsection 74(4) and (11) and subsection 178(2), it is also necessary to consider section 146 of the BIA, which say:

> ***72*** *(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.*

146 *Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.*

94. Section 146 of the BIA has been interpreted as permitting the operation of provincial landlord and tenant legislation where a tenant becomes bankrupt except to the extent where the legislation alters the ranking and priority of a landlord's claim to a distribution from the tenant's bankruptcy estate. **[See In *Re Gingras Automobile Ltee*, 1962 CanLII 79 (SCC), *Sawridge Manor Ltd.* v. *Western Canada Beverage Corp.*, 1995 CanLII 641 (BC CA) and *Linens 'N Things Canada Corp. (Re)*, 2009 CanLII 25311 (ON SC)]**

95. Subsections 74(4) and 74(11) do not alter the ranking or priority of a landlord's claim. The real substance of subsection 74(4) and (11) is to permit a tenant to reinstate a (validity terminated) tenancy without the consent of the landlord by paying the specified amount such that section 38 of the RTA will again operate to give the tenant security of tenure—the landlord is given the right to receive certain amounts and forced to accept the revival of the tenancy. Put another way, subsections 74(4) and (11) take away the Landlord's right to control who occupies their unit at what rent in return for the payment by Mr Barrett of the arrears.

96. Mr. Harvey argued that in the circumstances of this case, compliance with subsection 74(11) by Mr. Barrett would impact the distribution to creditors because Mr. Barrett has not yet been discharged and any money that might come into Mr. Barrett's hands at this point would vest in the trustee administer of Mr. Barrett's bankruptcy estate. I do not accept that argument.

97. Mr. Harvey relied on the definition of 'property' in section 67(1)(c) of the BIA, which says, in part:

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

…

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that…

98. In my view, the operation of subsection 74(11) will have no impact on the distribution of Mr. Barrett's property among creditors because Mr. Barrett will not be able to use any property that has vested or will vest in the trustee to pay the Landlord to revive the tenancy. While Mr. Barrett is required to disclose to any person from whom he borrows money his status as an undischarged bankrupt **[See BIA, s. 199]**, there is no prohibition on Mr. Barrett borrowing money to pay the Landlord or, subject to the BIA's surplus income regime, using his post-bankruptcy earnings to pay the Landlord.

99. Subsection 72(1) of the BIA has been interpreted as expressly protecting rights created by provincial legislation that are not in conflict with the BIA. **[*GMAC Commercial Credit Corporation - Canada* v. *T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII)]**

100. The right of a bankrupt tenant to have a validly terminated tenancy reinstated on payment of arrears and the right of a landlord to be paid arrears when a bankrupt tenant wishes to reinstate a terminated tenancy do not conflict with the BIA.

b. Frustration of Purpose

101. Having found that there is no operational conflict between subsection 74(4) and (11) of the RTA and the identified sections of the BIA, I have to consider whether subsection 74(4) and (11) frustrate a purpose of the BIA.

102. In the case of an individual, bankruptcy has two main purposes:

(a) the equitable distribution of the bankrupt's property among their creditors; and

(b) the financial rehabilitation of the bankrupt through discharge. **[See, for example, *Husky Oil Operations Ltd.* v. *Minister of National Revenue*, 1995 CanLII 69 (SCC) and *Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII)]**

Equitable Distribution

103. The equitable distribution of a bankrupt's property among their creditors is achieved through what is referred to as the 'single proceeding model' under which creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This is facilitated by: (a) the stay imposed by section 69.3 of the BIA; and (b) the distribution regime established by the BIA. **[*Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), paras 33-35]**

104. In both *Moloney* and *407 ETR*, the majority found provincial legislation that requires a debtor to pay a discharged claim does not frustrate the equitable distribution of the debtor's property among creditors. **[*Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), para 84-89 and 407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy), 2015 SCC 52 (CanLII), para 32]**

105. I have considered that Mr. Barrett has not yet been discharged, and in both *Moloney* and *407 ETR* the debtors had been discharged such that the focus was on subsection 178(2) of the BIA. However, as described above, I do not think requiring Mr. Barrett to pay the arrears to reinstate the tenancy has any impact on the distribution of Mr. Barrett's property among creditors as contemplated by the BIA[10].

[10] The only evidence uploaded by Mr. Barrett suggested that he would be required to borrow money to pay the arrears: see DOC-4581533.

Financial Rehabilitation

106. Mr. Barrett argued that subsections 74(4) and (11) of the RTA frustrate a policy objective of the BIA by permitting a landlord to recover a claim that was subject to discharge. I do not accept that argument.

107. Discharging claims against a bankrupt is not, in and of itself, a policy objective of the BIA. The discharge of claims is in furtherance of the objective of financially rehabilitating the bankrupt. The essence of Mr. Barrett's argument was that by requiring that he pay a discharged claim to reinstate the tenancy, subsections 74(4) and (11) frustrate his financial rehabilitation.

108. The financial rehabilitation of an individual bankrupt is achieved through:

    (a) the discharge of the honest but unfortunate debt from the burden of their pre-bankruptcy debts;

    (b) staying creditors from exercising remedies against the bankrupt and their property;

    (c) exempting certain of the bankrupt's property from being distributed among creditors; and

    (d) restricting the termination of pre-bankruptcy contracts, including tenancy agreements. **[See *Alberta (Attorney General)* v. *Moloney*, 2015 SCC 51 (CanLII), paras 36-39 and 77]**

109. It is not sufficient for Mr. Barrett to argue that requiring him to pay arrears that are 'dischargeable' in his bankruptcy will make his financial rehabilitation difficult.[11] In assessing whether subsections 74(4) and (11) of the RTA frustrate the financial rehabilitation of a debtor, I am required to consider how—the legislative means by which—Parliament contemplated the financial rehabilitation objective would be achieved.

110. The issue raised by Mr. Barrett was that subsections 74(4) and (11) require that he pay the arrears owed as at October 10, 2024—which he (correctly) asserted constitute a claim provable that will be discharged—to reinstate the tenancy. Considering how Parliament intended to achieve—perhaps more accurately 'facilitate'—the financial rehabilitation of bankrupt tenants, I am unable to find that requiring Mr. Barrett to pay the arrears frustrated the BIA objective of financial rehabilitation and it is, in my view, possible to interpret sections 69.3, 84.2 and subsection 178(2) of the BIA, and subsections 74(4) and (11) of the RTA harmoniously.[12]

111. Subsection 84.2 operates—and was intended—to preserve **existing** tenancies by preventing them from being terminated based on arrears owed when the tenant became bankrupt without the tenant being required to pay those arrears. In the bankruptcy context, subsections 74(4) and (11) of the RTA allow a tenant to reinstate a tenancy that was validly

[11] There was no evidence from Mr. Barrett on how being required to pay the arrears will impact his financial rehabilitation.
[12] Subsection 74(4) and (11) go further than the BIA by permitting a bankrupt tenant to reinstate a terminated tenancy. It is, as noted above, 'non-repugnant supplemental' provincial legislation.

terminated at the time the tenant became bankrupt on payment of the arrears. There was nothing before me to suggest Parliament intended to achieve the financial rehabilitation of individuals by reinstating validly terminated agreements or tenancies.

112. Section 69.3 of the BIA operates to prevent creditors from pursuing claims provable against a bankrupt. Subsections 74(4) and (11) operate to permit a bankrupt tenant to pay a claim provable in order to reinstate a tenancy.

113. Subsection 178(2) of the BIA operates to release claims provable against a bankrupt. However, as was noted by the majority in *Moloney*, a debtor is not prohibited from paying a discharged claim where the debtor receives consideration in return and, as noted above, in my view, subsections 74(4) and (11) contemplate a tenant will receive good consideration in return for paying arrears—the revival of a terminated tenancy with the consent of the landlord.

ix. Conclusion—No Operational Conflict

114. I am unable to find: (a) there is an operational conflict between the BIA and subsection 74(4) and (11) of RTA; or (b) subsections 74(4) or (11) of the RTA do not frustrate a purpose of the BIA. As a result, the Tenants are required to pay the amounts specified by the RTA to set aside the Second Hearing Order.

B. Review of the Second Hearing Order Dismissed

115. On December 19, 2024, I advised the parties that I was dismissing the review and would provide written reasons at the same time as I determined whether subsections 74(4) and (11) of the RTA are operational.

116. Mr. Barrett did not file a transcript or any evidence in support of his request that the LTB review the Second Hearing Order.

117. There are multiple stages to the LTB's review process. The first stage is a preliminary review of the request to review the order at which a Member decides if the order may contain a serious error—whether based on the information in the request there is a reasonable likelihood, based on the assertions made by the Landlord, that a Member hearing the review on the merits would determine the Hearing Order contains a serious error. If the answer is 'yes', the Member directs the request to a hearing.

118. If a request to review an order proceeds to a hearing, the Member hearing the review—me in this case—determines whether the party asking for the review—Mr. Barrett in this case—is able to establish on the balance of probabilities that the order in issue contains a serious error. If the party asking for the review establishes the order contains a serious error, the Member will set aside the order and either: (a) immediately re-hear the application on the merits immediately; or (b) direct the application to a re-hearing on the merits.

119. In this case, the Member who reviewed Mr. Barrett's request determined that the request had sufficient merit to proceed to a hearing. I am, however, unable to find that the Second Hearing Order contains a serious error and am dismissing the review. That means that the Second Hearing Order remains in force.

i. Effect of Bankruptcy

120. While raised by Mr. Barrett in his request that the LTB review the Second Hearing Order, the effect of Mr. Barrett having become bankrupt was argued on December 19, 2024 as part of the Constitutional argument.

121. Mr. Barrett became bankrupt after the Second Hearing Order was issued. That means the issues raised by Mr. Barrett concerning the application of sections 69.3 and 84.2 of the BIA could not be grounds to review the Second Hearing Order. Mr. Barrett instead argued the Second Hearing Order was not enforceable and/or was stayed and the eviction could not be enforced as a result of the bankruptcy.

122. The LTB has jurisdiction to determine the (legal) effect of a bankruptcy on an LTB order. The proper approach for Mr. Barrett to raise this issue would have been to bring a motion. That being said: (a) the issue was put before me by Mr. Barrett; and (b) the Landlord did not object to the issue being determined by me and was able to respond.

a. Section 69.3

123. Mr. Barrett argued that section 69.3 stayed the enforcement of the Second Hearing Order. I do not accept that argument.

124. As noted above, subsection 69.3 does not address the termination of agreements or tenancies. **[*Hutchingame Growth Capital Corporation* v. *Independent Electricity System Operator*, 2020 ONCA 430 (CanLII) leave to appeal denied, 2021 CanLII 2823 (SCC) and *Canadian Petcetera Limited Partnership* v. *2876 R Holdings Ltd.*, 2010 BCCA 469 (CanLII)]**

125. Mr. Harvey relied on *Forestwood Co-operative Homes Inc.* v. *Pritz* **[[2002] OJ No 550 (Div Ct)]** as supporting the proposition that section 69.3 stays the enforcement of an LTB order terminating a tenancy through the eviction of the tenant. I do not think *Forestwood* stands from that proposition.

126. In *Forestwood*, the Divisional Court found that a proceeding to obtain a judgment and writ of possession based on arrears was stayed by section 69.3 of the BIA because the proceeding involved a claim provable. The Divisional Court rejected the argument that the remedy—a writ of possession—could be 'severed' from the grounds for the remedy—arrears provable in the bankruptcy.

127. I raised with Mr. Harvey the Bankruptcy Court's decision in *Sylvie Marie Lafond (Re)* **[2023 ONSC 4065 (CanLII)]** in which it was found that section 69.3 did not prevent or stay the enforcement by a landlord of an order made under section 69 of the RTA prior to the tenant having become bankrupt.

128. Mr. Harvey argued that: (a) *Forestwood*, being a decision of the Divisional Court, had precedent over *Lafond*; and (b) in deciding *Lafond*, the Bankruptcy Court did not expressly consider *Forestwood*. I do not accept those arguments.

129. There is no conflict between *Forestwood* and *Lafond*. Each addressed a different stage of the process—different issues. *Forestwood* considered whether a proceeding seeking a remedy based on arrears—a claim provable—was stayed by operation of section 69.3 of the

BIA. *Lafond*, on the other hand, addressed whether section 69.3 of the BIA[13] stayed the enforcement of an eviction ordered by the LTB before the tenant becomes bankrupt.

130. There is no reason to doubt the correctness of *Lafond*. I note that *Lafond* was recently applied in a case where the facts were very similar to the facts of this case. **[*Estate of Justin Evan Stevenson*, 2024 ONSC 7051 (CanLII)][14]**

131. Where a residential tenant becomes bankrupt, section 69.3 of the BIA does not apply to stay the termination of the tenancy**. [*Hutchingame Growth Capital Corporation* v. *Independent Electricity System Operator*, 2020 ONCA 430 (CanLII) leave to appeal dismissed 2021 CanLII 2823 (SCC) and *Peel Housing Corporation* v. *Siewnarine*, 2008 CanLII 31815 (ON SCDC)]** That is addressed by section 84.2 of the BIA, which prevents the LTB from terminating the tenancy based only on arrears of rent owed on the date the tenant became bankrupt.

132. Mr. Harvey attempted to distinguish *Lafond* on the basis that in *Lafond*, the tenant had become bankrupt after the eviction had become enforceable, but Mr. Barrett had become bankrupt the day the eviction had become enforceable. I do not think that fact distinguishes this case from Lafond.

133. In *Lafond*, the Bankruptcy Court found that the eviction portion of an order made under section 69 of the RTA was not stayed. It matters not, in my view, whether the bankruptcy took place before or after the eviction portion of the order became enforceable.

134. Mr. Harvey argued that in *Lafond* the Bankruptcy Court had not considered: (a) that a tenant has a statutory right under the RTA to void or set aside an eviction order; or (b) the effect of a tenant's bankruptcy on the requirement of the RTA that the tenant pay pre-bankruptcy arrears to void or set aside an eviction order. I acknowledge those issues do not appear to have been argued before the Bankruptcy Court in *Lafond*. However, those issues are, in my view, related to whether subsection 74(4) and (11) of the RTA are 'operative' as opposed to whether section 69.3 of the BIA stayed the enforcement of an eviction order. The fact, for example, the RTA permits a tenant to void or set aside an eviction order does not change or inform the interpretation of section 69.3 of the BIA and its application to applications to the LTB.

b. Section 84.2

135. Mr. Barrett argued that section 84.2 resulted in the Second Hearing Orde not being enforceable by the Court Enforcement Officer (Sheriff). I do not accept that argument.

136. As noted above, section 84.2 of the BIA prohibits a landlord or the LTB from terminating a tenancy based on arrears owed as of the date a tenant became bankrupt. It does not prevent the Court Enforcement Officer (Sheriff) from enforcing a post-termination eviction by putting the landlord in possession of the unit. In this case, the tenancy had already been terminated

[13] Assuming Ms Lafond became bankrupt, the reference to section 69 of the BIA is clearly a typographical error. Section 69 of the BIA applies where a person files a notice of intention to make a proposal and not where a person becomes bankrupt.

[14] I note that in *Paterson* v. *City of Oshawa*, 2023 ONSC 2287 (CanLII), which was not raised before me, the Registrar granted leave to the landlord to enforce an eviction, which might imply the eviction was stayed. However, the parties proceeded before the Registrar on the basis of the eviction was stayed and the Registrar was not asked to consider the issue.

when Mr. Barrett became bankrupt on October 10, 2024 and section 84.2 of the BIA has no application.

ii. Typographical Errors in Order

137. The Second Hearing Order refers in two places in the preamble to LTB-L-034745-23, but the correct file number is referred to in the style of cause.

138. Mr. Barrett argued that the fact the Second Hearing Order referred to LTB-L-034745-23 'indicates a fundamental misunderstanding that potentially invalidates the entire process and renders the order void on its face.' I do not agree.

139. The fact the Second Hearing Order refers to an incorrect file number is unfortunate, but does not invalidate the process or result in the Second Hearing Order being void. The references to LTB-L-034745-23 are typographical errors that can, if necessary, be addressed by an amendment to the Second Hearing Order, which the Landlord can request if that is necessary.

iii. Application Director to New Hearing

140. Mr. Barrett argued that it was a serious error for the LTB to direct that the application be (re)heard on its merits and the Hearing Order should have been amended to address the issue raised by the Landlord. I do not accept this argument.

141. The fact the Review Member directed that the application be heard again did not, in my view, result in a serious error. While it might have been possible for the Review Member to amend the Hearing Order to address the narrow issue raised by the Landlord, the Review Member also found that it was a serious error for the First Hearing Member to have not addressed in the First Hearing Order the Tenants' section 82 issues. That error could not have been addressed by an amendment to the First Hearing Order.

iv. Refusal to Hear Section 82 Issues

142. Mr. Barrett asserted that the Second Hearing Order contains a serious error because: (a) his section 82 issues were 'unfairly dismissed'; and (b) the Second Hearing Order did not refer to the issues that he had previously raised under section 82. Mr. Barrett further asserted that the failure of the Second Hearing Member to hear his section 82 issues raised issues of procedural fairness. I do not accept this argument.

143. The Second Hearing Member found that the Tenants had failed to comply with the 25 Apr 24 Interim Order, which said:

> *If a party does not comply with the terms stated in paragraphs two and three, the Member may refuse to accept or consider that party's evidence and submissions.* **[DOC-3199007]**

144. After hearing from Mr. Barrett on the issue and considering post-hearing submissions made by Mr. Barrett addressing the issue **[DOC-3944802]**, the Second Hearing Member wrote:

13. As of the hearing on April 10, 2024, the parties were made aware by the Board that paragraph 2 of this interim order would be strictly enforced. In these circumstances, the consequence for the breach would be to not hear any submissions made by the Tenants under section 82 of the Act.

14. Despite this warning, the Tenants failed to pay a substantial portion of the rent for May 2024, and thus breached the interim order.

15. If I were to allow the Tenants to make any further submissions in accordance with section 82(1) of the Act, this condition, in which is a common condition laid out by all Adjudicators at the LTB, would be meaningless. Both parties should be able to rely on the terms of all orders, and it would be unfair to the Landlord to not enforce a clause meant to prevent any further prejudice to the Landlord.

16. In this case, the Tenants were aware of the consequences of failing to adhere to the terms of the interim order. I am not satisfied that the Tenants could not have paid the rent to preserve their right to present their submissions.

17. For these reasons, the Tenants shall not be permitted to present any evidence pursuant to section 82(1) of the Act. It should be noted that this decision does not prevent the Tenants from making their own application to the Board, however the limitations period stated in section 29(2) of the Act will apply.

145. I can find no serious error in the decision by the Member to not hear the Tenants' submissions on their section 82 issues based on the failure of the Tenants to comply with the 25 Apr 24 Interim Order.

146. On December 19, 2024: (a) Mr. Barrett conceded that he had not complied with the 25 Apr 24 Interim Order; and (b) acknowledged that he was aware of what the 25 Apr 24 Interim Order said the consequences might be should he not comply with the 25 Apr 24 Interim order.

147. I have considered that subsection 82(1) says that on an L1 application the LTB shall permit the tenant to raise issues that could have been made on a stand-alone tenant application. However, subsection 23(1) of the *Statutory Powers Procedures Act* says the LTB may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. The Second Hearing Member found that to allow the Tenants to make submissions on their section 82 issues without having complied with the 25 Apr 24 Interim Order would have resulted in an abuse of the LTB's processes.

148. While the Landlord was not able to point to any Divisional Court cases that addressed the specific issue—the refusal of the LTB to hear a tenant under section 82 based on the fact the tenant did not comply with an interim order to pay rent—the Landlord did refer me to a Divisional Court case that stands for the proposition the LTB: (a) has jurisdiction to make interim orders; and (b) can refuse to hear a tenant's section 82 issues where the tenant has not complied with an interim order. **[See *Houle* v. *Watson*, 2014 CanLII 66860 (ON SCDC)]**

149. Mr. Barrett asserted that it was unfair for the Member to not hear his section 82 issues because he was now barred from bringing a tenant application raising those issues. [These

arguments were considered by the Member.] I also note that Mr. Barrett did file a tenant application and that application was scheduled to be heard on December 23, 2024.

150. Mr. Barrett argued that the Review Member found it was an error for the First Hearing Member to have not determined the Tenants' section 82 issues in the Hearing Order and seemed to imply that this finding meant the Second Hearing Member was obliged to hear his section 82 issues notwithstanding that he did not comply with the 25 Apr 24 Interim Order. I do not agree.

151. A finding that the Review Member erred in not considering issues raised under section 82 does not mean the Second Hearing Member was prevented from determining he would not hear submissions from the Tenants on their section 82 issues based on their failure to comply with the 25 Apr 24 Interim Order.

152. In the course of arguing the Second Hearing Order contained a serious error because the Second Hearing Member failed to hear the Tenants on their section 82 issues, Mr. Barrett argued that the section 82 issues had already been 'granted' by the First Hearing Order. Mr. Barrett argued that where an L1 application is dismissed based on subsection 83(3): (a) the landlord is no longer able to bring an application based on the arrears upon which the L1 application was based; and (b) any section 82 issues raised by the tenant are 'granted'. I do not accept that argument.

153. Aside from the fact that the First Hearing Order was set aside, a determination that an L1 application must be dismissed under subsection 83(3) does not, in my view, mean: (a) that the landlord's claim for arrears is *res judicata* or subject to issue estoppel; or (b) any section 82 issues raised by the tenant are automatically 'granted'. As was noted by the Review Member, the First Hearing Member should have addressed the section 82 issues raised by the Tenants notwithstanding the application was being dismissed based on subsection 83(3).

v. Application of Subsection 83(3)—Heating System

154. Mr. Barrett asserted the Second Hearing Member incorrectly determined issues with the heating system in the unit raised by the Tenants under subsection 83(3) of the RTA. I do not accept that assertion.

155. The Second Hearing Member considered the arguments made by the Tenants concerning the heating system but did not accept the assertion made by the Tenants because they did not submit evidence. The Second Hearing Order says:

42. At the hearing on June 21, 2024, I was informed that the Tenants would be making submissions regarding the state of the heating system. Although this would normally be an issue addressed under section 82 of the Act, heating is a major component of any tenancy agreement and would have been considered under section 83(3)(a) of the Act. However, the Tenants' submissions did not give any detailed insight into the functionality of the furnace, other than stating that it has not worked at periods of time throughout last winter.

43. Due to a lack of evidence, I am not satisfied that there is a reason to deny the eviction pursuant to section 83(3) of the Act as it pertains to heating.

156. I reviewed the written submissions filed by the Tenants **[DOC-3872501 and DOC-3944802]** and, as noted by the Second Hearing Order, it contains no information on an issues with he heating system.

vi. Application of Subsection 83(3)—Lack of Consequences

157. Mr. Barrett asserted the Second Hearing Member erred in applying subsection 83(3) of the RTA because there was a finding by the First Hearing Member that the removal by the Landlord of the stove and refrigerator from the unit constituted a serious breach such that the application had to be dismissed and the Second Hearing Order did not dismiss the application based on that finding.

158. The Second Hearing Member turned their mind to the previous finding concerning the removal of the fridge and the stove from the unit. The Second Hearing Order says:

> *39. The Tenants have made submissions regarding the period of time where the Landlord had removed both the refrigerator and the stove from the rental unit. At the original hearings on December 19, 2022, and May 1, 2023, this evidence resulted in the Board deciding that section 83(3)(a) applied, as the Board member determined that the Landlord was in serious breach of their responsibilities and material covenant of the tenancy agreement.*
>
> *40. However, since that order was issued, and before it was overturned on review, the Landlord has supplied the Tenants with a refrigerator and stove.*
>
> *41. If one looks at the wording of section 83(3)(a), it states that a landlord must be in serious breach of either their responsibilities to maintain the rental unit or complex, or material covenants of the agreement. I am satisfied that the Landlord has successfully addressed this issue and is not currently in breach of section 83(3)(a) of the Act.*

159. The Second Hearing Member's approach to the issue was, in my view, correct and he was not required by subsection 83(3) to dismiss the application.

160. For subsection 83(3) to be 'triggered' the issue must be serious and ongoing. **[See *Jensen* v. *Johnson*, 2022 ONSC 4303 (CanLII)]**[15] The issue raised by the Tenants that was the basis for the application of subsection 83(3) of the RTA by the First Hearing Member had been addressed by the Landlord and was not 'ongoing'.

vii. Conclusion—Review is Dismissed

161. The review is dismissed. Mr. Barrett has not established that there is a serious error.

[15] Mr Barrett specifically addressed this in written submissions: see DOC-3944802.

V. Lifting of the Stay

162. There are no Divisional Court or Court of Appeal decisions dealing with many of the issues raised by Mr Barrett. On December 19, 2024, Mr. Barrett indicated that he would be appealing the dismissal of his request that the LTB review the Second Hearing Order to the Divisional Court. I expect that Mr. Barrett may also appeal my decision that there is no operational conflict between the BIA and the RTA.

163. An appeal to the Divisional Court will stay this order and a successful appeal of either the review or the Constitutional issue will have a material impact on the parties. Mr. Harvey will not be able to act for Mr. Barrett on the appeal. To allow Mr Barrett some time to locate a lawyer to act for him on an appeal or himself file an appeal, I am not lifting the stay imposed by the 16 Oct 24 Interim Order until February 15, 2025.

It is ordered that:

1. The review is denied. The Second Hearing Order remains in force.
2. The 16 Oct 24 Interim Order and the stay of the Second Hearing Order is cancelled effective February 10, 2025.
3. Subject to subsection 74(11) of the RTA, the eviction of the Tenants as contemplated by the Second Hearing Order can proceed notwithstanding that Mr. Barrett is bankrupt.
4. The bankruptcy of Mr. Barrett has no impact on the application of subsection 74(11), which remains operational notwithstanding the bankruptcy, or the amount required to be paid by the Tenants to set aside the Second Hearing Order.

January 8, 2025
Date Issued

E. Patrick Shea
Vice Chair, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.