

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ATTORNEY GENERAL FOR ONTARIO

Applicant

-and-

PERSONS UNKNOWN

Respondents

-and-

ADVOCACY CENTRE FOR TENANTS ONTARIO

Moving Party

MOTION UNDER Rules 10.01(1), 37.14(1)(a), and 39.01(6) of the *Rules of Civil Procedure*

NOTICE OF MOTION

The Advocacy Centre for Tenants Ontario will make a Motion to the Chief Justice on July 29, 2020 at 10:00 a.m., or as soon after that time as the Motion can be heard at the courthouse, 393 University Avenue, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: This motion is to be heard orally.

THIS MOTION IS FOR:

1. If the requests for relief remaining in this motion cannot be determined by July 31, 2020, an order, on an urgent basis, staying the July 6, 2020 variance and continuing the original order of March 19, 2020 until the remaining issues in this motion can be determined.
2. An order appointing the Advocacy Centre for Tenants Ontario as a person representing unknown tenants who are either already Respondents to this proceeding or have an interest in this proceeding.

3. An order setting aside the July 6, 2020 order of the Chief Justice in this matter and restoring the original, unamended order of the Chief Justice issued March 19, 2020.
4. An order directing that the Applicant's July 6, 2020 motion or any future motion to vary the March 19 order proceed only on adequate notice to the proper Respondents and interested persons such that they may have meaningful opportunity to be heard on the merits.
5. An order that no costs shall be payable by any party to this motion.
6. Such further relief as this Honourable Court may deem appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. The July 6, 2020 variance of the order of the Chief Justice ("varied order"), combined with subsequent decisions by the executive and legislative branches of government, will cause the resumption of normal enforcement of all residential eviction orders and writs of possession in Ontario beginning August 4, 2020.
2. This motion pleads that the varied order should not have been sought on an *ex parte* basis, was obtained based on incomplete or inadequate evidence, and in a manner that blurred the institutional boundaries between independent branches of government.
3. Until this motion is heard by the Court, equity favours a stay of the varied order and the restoration of the March 19, 2020 order of the Chief Justice ("original order") to prevent irreparable harm and to preserve the moratorium against enforcement of non-urgent evictions which was sought, *inter alia*, to protect the health and safety of enforcement officers, tenants and homeowners, and to help contain and prevent the spread of novel coronavirus 2019 ("COVID-19").
4. It would be just and convenient for the Court to issue a stay or otherwise exercise its inherent jurisdiction to continue the moratorium against enforcement of non-urgent

evictions. The Moving Parties raise serious issues respecting the duty of an Applicant to make full and fair disclosure of all material facts on an *ex parte* motion; the propriety of proceeding *ex parte* in the circumstances of the Applicant's July 6, 2020 motion; and the powers of the executive relative to the judiciary. The balance of convenience favours keeping the original order in place pending a determination of the Moving Parties' motion.

5. The Respondents include, or will include, tenants who may be ordered evicted by the LTB on dates and in circumstances such that their health and safety will be threatened by the potential spread of COVID-19.
6. One Respondent, PT, is a 77-year-old low-income woman subject to unenforced LTB eviction orders, but whose landlord had not sought leave to enforce those orders. She was identifiable to the Applicant prior to July 6, 2020, but received no notice of the Applicant's motion. She faced likely eviction into homelessness and increased risk of death from COVID-19 next month as a result of the varied order.
7. PT had therefore joined ACTO on this motion as an individual moving party, but within 24 hours of the moving parties contacting landlord's counsel and Applicant's counsel to canvas motion scheduling, landlord's counsel communicated his client's reasonable decision not to enforce either of the outstanding eviction orders against PT, thus resolving much of her interest in the Application.
8. No doubt other Respondents exist who may be in circumstances similar to PT, but unless and until they are provided with an opportunity to be heard on the Applicant's motion, their rights to procedural fairness continue to be denied in a manner that was and is not justified by the circumstances surrounding the Applicant's motion.
9. May of those Respondents or persons with future, contingent or unascertained interests in this proceeding cannot be readily ascertained, found or served. Among the Persons

Unknown who are Respondents to the Application, there exists a class of persons – tenants who are subject to LTB eviction orders and who have not been evicted because of the Chief Justice’s original order – who are directly affected by this proceeding because the variance order ends the protection against eviction in non-urgent matters while COVID-19 remains a threat to health. It is necessary and desirable that their interests be considered by the Court.

10. The Advocacy Centre for Tenants Ontario (“ACTO”) has a statutory mandate to advance the legal welfare of tenants in Ontario, has served as an intervenor before this Court, the Court of Appeal for Ontario, and the Supreme Court of Canada representing the interests of Ontario tenants generally; is directly referenced in the record of this Application; and is able to supply the Court with evidence and submissions in the interests of a significant number of Respondents, on the Applicant’s motion and any like motion.
11. ACTO wrote emails to the Applicant’s staff on March 17, 2020 and April 9, 2020 – approximately three months prior to the Applicant’s motion – expressing a direct interest in what would eventually become the subject matter of the Application, original order, and Applicant’s motion. The Applicant’s staff acknowledge receipt of those emails on April 9, 2020.
12. ACTO wrote a letter to the Applicant on June 8, 2020 – nearly one month prior to the Applicant’s motion – requesting “a process by which relevant stakeholders and medical officials can provide meaningful input into the decision about when the province would be permitting evictions to resume.” ACTO received neither acknowledgement of its correspondence nor any reply from the Applicant.
13. ACTO did not receive notice (formal or otherwise) of the Applicant’s motion. Nor, it appears, did any other Respondent.

14. It is necessary and desirable that the Court determine the Applicant's motion and any like motion after hearing the evidence and submissions of more than just one interested party.
15. The Applicant did not take any reasonable steps to bring the Applicant's motion to the attention of the "unknown persons" named as Respondents (such that those persons could have had any opportunity to make themselves known and heard on the motion) and the circumstances of the motion did not justify this infringement of the Respondents' rights to procedural fairness.
16. The Applicant did not make full and fair disclosure of all material facts to the Applicant's motion. Specifically, the record of the Applicant's motion:
 1. did not disclose ACTO's letter from nearly a month prior requesting an opportunity to make submissions on the question of when and how eviction enforcement should resume, nor the existence of the concerns and arguments advanced and referenced by ACTO's letter and evidenced in repeated previous emails;
 2. deposed that "improved public health circumstances... would form the basis for ending the State of Emergency" but did not disclose the Applicant's intention to introduce Bill 195, the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* on July 7, 2020 (the day immediately following the Applicant's motion and the varied order) which, as enacted, permits the government of Ontario to end the formal "State of Emergency" (and as a result of the variance of the Chief Justice's order, restart enforcement of all evictions) while continuing to exercise a variety of emergency powers because, in the words of the Applicant, "the danger posed by COVID-19 will continue for months to come";

3. deposed instead that “[a]ligning the end of the Moratorium with the government's lifting of the State of Emergency would ensure that non-urgent residential evictions resume only when it is safe to do so” as though the variance was intended to delay, not hasten, the resumption of non-urgent residential evictions;
4. deposed the parallel suspension of non-urgent eviction hearings by the LTB, but did not disclose the LTB’s intention to resume hearing all types of eviction applications and issuing all types of eviction orders as soon as enforcement of non-urgent evictions resumed, and
5. offered no evidence as to the current risk of COVID-19 community transmission in Ontario or public health experts’ current recommendations thereof, much less how that evidence would relate to the health and safety of tenants and homeowners being evicted, or whether the Applicant’s statistics on average eviction rates by community are correlated with local COVID-19 community transmission rates.

17. The Applicant’s motion, and the varied order, fail to respect the proper institutional boundaries between separate branches of government. Specifically:

1. the Application and original order were founded upon the inherent jurisdiction of the Superior Court to control enforcement of writs of possession and eviction orders, the refusal or suspension of which is not a power assigned to the executive branch of government;
2. therefore, the Application provided the Court with evidence of extraordinary global public health risks and the Court issued the original order based on an independent assessment of those risks as they apply to a matter within the Court’s exclusive institutional competence;

3. the Applicant's (variance) motion substituted a different foundation for the Court's original moratorium against enforcement of non-urgent evictions, deposing that it "was issued in response to the declaration of a State of Emergency" by the executive branch;
4. in seeking the varied order, the Applicant improperly sought a power that has not been assigned to the executive branch of government under the separation of powers that exists within Canada's constitutional order;
5. the varied order effectively delegates to the Applicant, without restriction, the ability to select a date that would end the moratorium against enforcement of non-urgent evictions;
6. the Applicant's motion also reframed the original order as a collateral attack on the ability of individual judges and LTB members to grant discretionary relief (that was always exclusively theirs, subject to a right of appeal by parties affected), and deposed that those judges and LTB members were now ready to "adequately" consider risks arising from COVID-19 in each new case; and
7. this type of speculation about the reasonableness of discretionary relief decisions by individual judges and LTB members past, present and future is not proper evidence and could never have been the foundation of the original order, which was sought and granted on the basis of the Court's jurisdiction to supervise the enforcement process, not to place the Court in the position of reviewing the substance of individual decisions in light of new facts.

18. Rules 10.01, 14.05, 16.04, 37.14 and 39.01 of the *Rules of Civil Procedure*.

19. Sections 71, 72, 76 and 106 of the *Courts of Justice Act*.

20. The preamble and section 96 of the *Constitution Act, 1867*.

21. The inherent jurisdiction of the Superior Court.

22. Such further and other grounds as counsel may advise and as this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the Hearing of the Motion:

1. The affidavit of Kenn Hale, to be sworn, and exhibits attached thereto;
2. The affidavit of Dr. Andrew Bond, to be sworn, and exhibits attached thereto;
3. The Notice of Application dated March 19, 2020;
4. The affidavit of Vaia Pappas affirmed March 18, 2020 and exhibits attached thereto;
5. The original order of the Chief Justice issued March 19, 2020;
6. The Applicant's Notice of Motion dated July 6, 2020;
7. The affidavit of Vaia Pappas affirmed July 6, 2020 and exhibits attached thereto;
8. The varied order of the Chief Justice amended July 6, 2020;
9. Such further and other evidence as counsel may advise and this Honourable Court permit.

July 27, 2020 **Downtown Legal Services**

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