

## Clawing Back of Excess Rent Paid After Unlawful Increases Charged by Landlord

### Claw Back of Rent Paid

#### Factual Summary



In the case of *MM (Tenant) v. AP and MP (Landlord)*, CET-72689-18 (Re), [2018 CanLII 42806](#), the Tenant moved into the rental unit in 2004. In 2004, the agreement for rent was \$550 per month. Subsequently, with some change in hands of ownership (an issue disregarded or unapplicable and ignored here), on the first of January each year, starting in 2015, a \$25 per month rent increase was charged. Accordingly, from 2004 through the end of 2014, the \$550 per month rent was charged. In 2015, rent of \$575 per month was charged. In 2016, rent of \$600 per month was charged. In 2017, rent of \$625 per month was charged. In 2018, the Tenant paid only \$625 per month and sought relief from the Landlord Tenant Board for excess previous rent paid.

#### Applied Law Findings

The Landlord Tenant Board, by application of the *Residential Tenancies Act, 2006*, [S.O. 2006, Chapter 17](#) (the "*RTA*"), deemed that the rent increases were unlawful charges:

9. The rent increases imposed by the Landlords in 2015, 2016 and 2017 are void because they were not made in accordance with of ss. [116\(1\) and \(4\)](#) of the *RTA* which state:

116(1) A landlord shall not increase the rent charged to a tenant for a rental unit without first giving the tenant at least 90 days written notice of the landlord's intention to do so.

...



(4) An increase in rent is void if the landlord has not given the notice required by this section, and the landlord must give a new notice before the landlord can take the increase.

The Landlord Tenant Board then went on to say that while the Landlord failed to provide proper notice of a rent increase, contrary to s. 116 of the *RTA*, that despite the failing, any increase in rent was 'saved' by section 136 of the *RTA* which imposes a one year period within which a matter may be brought for the purpose of deeming the unlawfulness of a rent increase:

10. Section [136\(1\)](#) of the *RTA* provides that in certain circumstances an illegal rent increase may be deemed lawful. These provisions read as follows:

#### **Rent deemed lawful**

136(1) Rent charged one or more years earlier shall be deemed to be lawful rent unless an application has been made within one year after the date that amount was first charged and the lawfulness of the rent charged is in issue in the application.

#### **Increase deemed lawful**

(2) An increase in rent shall be deemed to be lawful unless an application has been made within one year after the date the increase was first charged and the lawfulness of the rent increase is in issue in the application.

However, and appearing almost contrary to interpretation of the [s. 136](#) statutory provisions within the *RTA*, the Landlord Tenant Board went even further and added that despite the original unlawfulness per s. 116, which was then saved by the s. 136, a nullity is incapable of being saved as where a nullity is 'nothing', there is nothing therefore to save:

11. However, in [Price v. Turnbull's Grove Inc.](#) the Ontario Court of Appeal concluded that a rent increase imposed by a landlord without any written notice cannot be saved by what are now subsections 136(1) and (2) of the *RTA* because a void rent increase is a nullity which leaves nothing to be saved.



12. Thus, the lawful rent remains at \$550 per month because this was the rent charged at the beginning of the tenancy. All of the subsequent rent increases imposed by the Landlord were illegal because they were not made in accordance with of sections 116 (1) and (4) of the *RTA*, and they cannot be saved by the deeming provisions in section 136 of the *RTA*.

There then remained the actual ultimate issue in the matter as to whether the excess monies collected, as were deemed unlawful per s. 116 of the *RTA*, then saved from unlawfulness per s. 136 of the *RTA* due to the passing of more than one year, then deemed without 'saving' whereas a nullity is without saving per *Price*, should be returned to the Tenant. In reviewing this ultimate question at issue, the result was that despite the excess rent being paid, and therefore collected by the Landlord illegally, s. 135 of the *RTA* stands as a one year bar to seeking return of excess monies previously paid despite any illegality of those monies; and accordingly, the Tenant was awarded the remedy of return of excess monies as were paid only in the one year preceeding the Application to the Landlord Tenant Board:

13. However, this does not mean that the Board can order the Landlord to return all of the rent that the Tenant paid that is in excess of the lawful monthly rent of \$550. Subsection [135\(1\) and \(4\)](#) states that a tenant's claim for a rebate for an unlawful rent increase must be made not more than one year after the landlord collected or retained money in contravention of the *RTA*. Those subsections read:

#### **Money collected illegally**

[135\(1\)](#) A tenant or former tenant of a rental unit may apply to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money the person collected or retained in contravention of this *Act* or the *Tenant Protection Act, 1997*.

#### **Time limitation**

(4) No order shall be made under this section with respect to an application filed more than one year after the person collected or retained money in contravention of this *Act* or the *Tenant Protection Act, 1997*.

14. The Tenant's application for a rebate challenging the lawfulness of each void rent increase since January 1, 2015, was made on January 10, 2018. In accordance with section 135 of the *RTA*, the Tenant can seek any illegal rent that was collected by the Landlord on or after January 10, 2017.



### Closing Summary

This case shows just how many twists and turns can apply within the law and appear to produce a 'giveth' and then 'taketh away' result. The almost confusing back and forth application of various sections of the *RTA* as well as the Price decision provide excellent examples as to why deep research and understanding of the relevant law is necessary - and why well qualified legal representation in such matters is always a wise choice.