

Court File No. CV-22-00000074-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ELSIE KALU

Plaintiff

- and -

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO represented
by THE ATTORNEY GENERAL OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION

THE DEFENDANT His Majesty the King in right of Ontario (“HMKRO”) will make a motion to Justice Valente on September 22, 2023.

PROPOSED METHOD OF HEARING: The motion is to be heard: in person.

- ☐ In writing under subrule 37.12.1 (1) because it is on consent/unopposed/made without notice;
- ☐ In writing as an opposed motion under subrule 37.12.1 (4);
- ☒ In person;
- ☐ By telephone conference;
- ☐ By video conference.

at the following location:

Cayuga Superior Court, 55 Munsee Street North, Cayuga, ON, NOA 1E0

THE MOTION IS FOR:

1. An order

- (a) striking the Amended Statement of Claim (the “Claim”), without leave to amend;
- or

(b) In the alternative, an order striking the Claim with leave to amend;

2. The costs of

(a) this action, or in the alternative

(b) this motion; and

(c) the motion in this matter returnable June 13, 2023; and

3. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Overview of the Claim

4. On December 22, 2022, the Plaintiff commenced this proceeding as a proposed class action against the Defendant, HMKRO. The Statement of Claim was amended December 30, 2022. The Claim pleads *de facto* expropriation as the sole cause of action.
5. The Claim alleges that the Defendant has engaged in *de facto* expropriation through enactment of the *Residential Tenancies Act, 2006*, SO 2006, c. 17 (“RTA”), and the “operational decision to permit perpetual delays” by the Landlord Tenant Board (“LTB” or “Board”), which has allegedly deprived Ontario landlords of use of their private property.
6. The proceeding is being advanced on behalf of a proposed class consisting of all Ontario landlords who were or are a party to eviction proceedings before the Landlord and Tenant Board (“LTB”) within the relevant limitation period.
7. The Claim pleads the Plaintiff purchased a property in Ottawa on April 6, 2022 with the intention of moving in with her daughter. At the time of the purchase, there was a tenant (“Tenant”) residing in the property.

8. The Plaintiff alleges that the Tenant failed to pay rent and was non-cooperative when asked to move out. As a result, the Plaintiff commenced proceedings at the LTB to obtain an order to terminate the tenancy for personal use of property and for non-payment of rent.
9. The Plaintiff pleads she filed an application before the LTB on May 10, 2022 and requested an expedited hearing. The Plaintiff's request was initially denied, but an expedited hearing was eventually scheduled for December 12, 2022.
10. The Claim alleges that on November 23, 2022, the Tenant filed a request for French language services which was granted by the LTB, and required rescheduling of the Plaintiff's hearing.
11. The Plaintiff alleges that at the time the Claim was issued, a hearing at the LTB had not been scheduled, and that all issues remain to be adjudicated.

Overview of Relief Sought

12. The Claim should be struck pursuant to Rules 21.01(1)(a), 21.01(1)(b), 25.06(1), 25.06(9) and 25.11 of the *Rules of Civil Procedure*, without leave to amend, on the grounds
 - (a) the Claim discloses no cause of action;
 - (b) the Claim does not specify the nature of the relief or the amounts claimed;
and
 - (c) this proceeding is a nullity
13. This motion to strike, if granted, will dispose of the entire proceeding and would provide the most expeditious and least expensive determination of the case. Pursuant to section 4.1 of the *Class Proceedings Act, 1992*, SO 1992, c.6, this motion should be heard prior to a certification hearing.

Rule 21.01(1)(b): the Claim discloses no reasonable cause of action

The Claim discloses no reasonable cause of action in *de facto* expropriation

14. In order to meet the legal test for *de facto* expropriation or constructive taking, the Plaintiff has to establish that (1) the public authority acquired a beneficial interest in the property or an advantage flowing from the property to the state, and (2) that the impugned regulatory measure removes all reasonable uses of the property.
15. Accepting the pleaded facts as true, the Claim does not establish that the Defendant as a public authority acquired any beneficial interest in or advantage flowing from the rental properties at issue in this proceeding. On the contrary, the relationship between a landlord and tenant is private in nature, whereby both parties enjoy the benefits flowing from the rental property: a tenant enjoys the exclusive possession and use of the rental property in exchange for payment of rent to the landlord. As a non-party to this relationship, the Crown acquires no beneficial interest or advantage flowing from the rental properties.
16. The mere fact that the legislature of Ontario enacted the *RTA* for a public purpose does not establish that the Crown acquired a beneficial interest in or that there is an advantage flowing from the rental properties to the state.
17. The statutory scheme of the *RTA* has a remedial purpose - to regulate the private relationship between landlords and tenants in the public interest. Both parties are afforded rights and obligations under the *RTA*. The enactment of the *RTA*, and its requirement that a tenancy be terminated in accordance with the Act, does not change the private nature of a landlord-tenant relationship and cannot be assumed to create a beneficial interest or advantage flowing to the Crown in the private rental properties.
18. The pleading does not meet the second part of the *de facto* expropriation test. The impugned regulatory activity (i.e. delays at the LTB) does not remove all reasonable uses of rental property such that it amounts to a confiscation by the state.

19. The *RTA* contains provisions allowing landlords to recover compensation from tenants for situations such as arrears for rent, and continued use and occupation of the rental unit after a notice of termination or agreement to end tenancy.
20. Further, the material allegations underpinning the *de facto* expropriation claim are directed at the LTB. The LTB is an independent administrative statutory body that does not have the legal capacity to be sued at law. Its members are protected from suit based on statute and common law.
21. In naming the Crown as a Defendant, the Claim rests on an incorrect legal contention that the delays at the LTB can be attributed to the Crown. As an independent quasi-judicial body, the LTB is authorized by statute to create and administer its own rules and procedures, including scheduling. The Crown does not exert any control over the LTB or its processes, nor does it have any discretion to do so.

Rule 25.06: the Claim does not comply with the rules of pleading

22. Rule 25.06(9) provides that where a pleading contains a claim for relief, the nature of the relief claimed shall be specified. The Claim does not specify the nature of the relief at issue in this proceeding.
23. At paragraph 1 b) of the Claim the Plaintiff claims “compensation in a sum to be determined, or such sum as this Court finds appropriate for the *de facto* expropriation of the lands owned by the Class members”.
24. The relief, compensation or damages at issue in this proceeding are not otherwise identified in the Claim. The nature of the relief claimed is not specified.
25. Where damages are claimed, Rule 25.06(9) (a) provides that the amount claimed for each claimant in respect of each claim shall be stated.
26. The amount claimed for damages (if any) is also not articulated in the Claim.
27. The Claim includes pleadings at paragraph 21 that the Plaintiff “has spent over \$150,000.00 to maintain a property she has never been able to make any use of”. It

is unclear whether these facts are material, as mandated by Rule 25.06(1); the Claim does not plead a claim for this amount as against the Defendant.

Rule 25.11: the Claim as drafted would prejudice and delay the fair trial of this action

28. The deficiencies in the Claim prevent the Defendant from ascertaining the case to be met at trial. The Claim does not adequately define the issues in the action. In these circumstances it should be struck, as provided for under Rule 25.11 (a).

Rule 21.01(1)(a): no CLPA Notice was provided

As a question of law, this proceeding is a nullity

29. As a question of law, this proceeding is a nullity pursuant to section 18 of the *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sch 17 (the “CLPA”).

30. The Plaintiff failed to serve the Crown with any notice of the claim before it was issued on December 22, 2022, as is required pursuant to section 18 of the CLPA.

Applicable Authorities

31. Rules 1.04, 21.01(1)(a), 21.01(1)(b), 25.06(1), 25.06(9), 25.11, 37.02, 57.01 and 57.03 of the *Rules of Civil Procedure*;

32. *Class Proceedings Act 1992*, SO 1992, c. 6;

33. *Residential Tenancies Act, 2006*, SO 2006, c. 17, ss 1, 86-88, 88.1, 88.2, 89;

34. *Landlord Tenant Board Rules of Procedure* (effective September 1, 2021), rules 16, 21;

35. *Statutory Powers Procedure Act*, RSO 1990, c. S.22, ss 6, 33, 25.1(1), 184(1);

36. *Protecting Tenants and Strengthening Community Housing Act, 2020*, SO 2020, c. 16 – Bill 184;

37. *Attorney General of Ontario v Persons Unknown*, Endorsement of Chief Justice Morawetz dated March 19, 2020 (Ont Sup Ct), <https://www.ontariocourts.ca/scj/chief-justice-court-order-susp-resid-evict/>
38. *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020, c. 17;
39. *Residential Evictions*, O Reg 266/21 (effective April 7, 2021 to June 1, 2021);
40. *Emergency Management and Civil Protection Act*, RSO 1990, c. E.9 and regulations thereunder;
41. *Fire Code*, O Reg 213/07, ss 1.4.1.2, 2.1.3.1, 2.7.1.4;
42. *Building Code*, O Reg 332/12, s 3.1.3.2;
43. *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sch 17, ss 6(a), 18(1), 18(6), 1(1); and
44. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Amended Statement of Claim;
2. Documents incorporated into the Claim by reference:
 - (a) Amended L2 Application dated May 10, 2022 with attachments;
 - (b) Endorsement dated September 26, 2022;
 - (c) Endorsement dated October 31, 2022;
 - (d) Endorsement dated December 28, 2023;
3. Response to Demand for Particulars dated April 12, 2023;

4. Documents incorporated by reference into the Response to Demand for Particulars:

(a) Consent Order of the Landlord Tenant Board dated February 23, 2023.

5. Affidavit of Lori Blaskavitch, sworn May 17, 2023, on consent of the parties; and

6. Such further and other evidence as counsel may provide and this Honourable Court permit.

July 13, 2023

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and

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OF THE PROVINCE OF ONTARIO
Defendant / Moving Party

Court File No. CV-22-00000074-00CP

Plaintiff / Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Cayuga

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(Motion Returnable September 22, 2023)

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