Court File No. C69478

COURT OF APPEAL FOR ONTARIO

BETWEEN:

LYDIAN SMITH

Appellant

and

YOUTHLINK YOUTH SERVICES

Respondent

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PART I – IDENTIFYING STATEMENT AND ORDER APPEALED FROM

1. The Appellant, Ms. Lydian Smith, appeals the decision of the Divisional Court, (*per* Backhouse, Kristjanson, O'Brien JJ.), dated December 14, 2020 (the "**Decision**"), which dismissed Ms. Smith's appeal and upheld the decision of Member Ferguson of the Landlord and Tenant Board (the "**LTB**"), dated June 22, 2020 (the "**LTB Decision**").

2. The LTB Decision found that the Respondent, YouthLink Youth Services' ("**YouthLink**") transitional housing program was exempt from the *Residential Tenancies Act* ("***RTA***") under s.5(k), which applies to "rehabilitative and therapeutic" service providers. It found that, despite being a transitional housing provider, YouthLink was not required to comply with the exemption under s.5.1, a new exemption introduced in 2017 to specifically regulate transitional housing providers.

3. The Appellant seeks a finding that transitional housing programs are not exempt from the *RTA* under s.5(k). The Appellant further seeks a finding that to be exempt YouthLink must comply with the procedure laid out in s.5.1 of the *RTA*, which was written specifically to regulate evictions for transitional housing providers. This is the first time this statutory provision has been considered by the LTB or any court.

PART II – OVERVIEW STATEMENT

4. Ms. Smith was a tenant of YouthLink's transitional housing program from December 8, 2019, until her eviction on March 31, 2020.

5. Ms. Smith is a vulnerable young person who was unfairly evicted from her home at the beginning of the COVID-19 pandemic. She was 18 years old at the time. She was provided no notice of the eviction and was not given any recourse to seek a review or appeal of the decision.

YouthLink did not provide her with any assistance to find alternative accommodation. Indeed, when she returned to the home to collect her belongings, YouthLink called the police. This led to Ms. Smith being handcuffed without charge and removed from her home without her belongings. She has experienced unstable housing since her eviction – throughout the pandemic.

6. Ms. Smith is a vulnerable young tenant whose tenancy is intended to be, and should be, protected by the *RTA*. This appeal challenges the Divisional Court's finding that YouthLink's transitional housing program is exempt from the *RTA* under s.5(k), which applies to "rehabilitative and therapeutic" service providers.

7. The Divisional Court's reliance on the s.5(k) exemption creates a loophole in the *RTA* which permits transitional housing providers to be exempt from the *RTA* under both s.5(k) and s.5.1. This is problematic for three principal reasons:

a. It re-introduces back into the *RTA* the same confusion and conflicting jurisprudence that was intended to be remedied by the introduction of s.5.1 to the *RTA*;

b. It fails to consider, weigh and integrate into its analysis the actual text and intent of s.5.1, which specifically defines transitional housing and is intended to apply to programs, like YouthLink's, which are "intended to support the occupant of the living accommodation in subsequently obtaining and maintaining more permanent living accommodation"; and

c. It improperly focuses on undemonstrated concerns for the housing provider, while failing to put the demonstrated and devastating harms to the vulnerable young tenant at the centre of the analysis and to integrate the tenant-protection purpose of the *RTA* into its reasoning.

8. The Divisional Court's decision is the first- and only-time s.5.1 of the *RTA* has been considered by the LTB and the courts. This Court's decision will clarify the circumstances in which transitional housing providers are exempt from the *RTA* in Ontario and importantly, when they are required to comply with s.5.1 including having occupancy agreements in place with their tenants that comply with s.5.1(3). This is a question of general importance to very vulnerable tenants, all transitional housing providers, and many stakeholders within the housing and homelessness sector in Ontario.

PART III – SUMMARY OF RELEVANT FACTS

A. Background

(i) *YouthLink's Transitional Housing Program*

9. YouthLink is a registered charity that provides a variety of different programs and services for young people. YouthLink's transitional housing program, the "YouthLink Co-Op Program", is one of these programs. It aims to provide affordable housing for young people between the ages of 16 and 21 and to assist young people develop the skills they need to live independently. Young people stay for up to one year, with longer periods possible. During their time at the program, they are assisted by YouthLink staff to transition to their next housing option, to maintain their schooling or employment, and to connect to other social supports as needed.[1]

10. Contrary to paragraphs 5 and 40 of the Divisional Court's decision, YouthLink's transitional housing program does not provide "services to support participants' mental health or emotional wellbeing." Rather, the Intake Package specifically notes that the transitional housing

[1] YouthLink Co-Op Housing Program Webpage, Appellant's Appeal Book and Compendium Tab 12 at pp.122-124, YouthLink Co-Op Program Intake and Information Package ("**Intake Package**") pp.1-3, Appellant's Appeal Book and Compendium Tab 13 at pp.126-139.

program does not provide counselling and participants are required to be able to demonstrate they can "manage intense feelings", "higher levels of responsibility and lower levels of support", and access "community based supports" outside of the transitional housing program to address their mental health. [2]

11. The transitional housing program staff are not trained counsellors and their role does not include providing mental health support. Staff are intended to help tenants access employment or education, provide referrals to community resources, and transition tenants to more permanent housing. Their role is to assist the transitional housing program to be a "stepping stone to help you move out on your own."[3]

(ii) ***Ms. Smith's Tenancy at YouthLink's Transitional Housing Program***

12. Upon entering YouthLink's transitional housing program in December 2019, Ms. Smith faced multiple significant challenges as she went from being 17 years old to being 18 years old, including several barriers to securing permanent housing and to living independently:

a. On her 18th birthday, 2 days after moving in, she "aged out of care" of the Children's Aid Society of Toronto and no longer had any housing supports, nor any other personal support, from them;

b. She was not yet entitled to work or receive government-funded health care because her application for permanent residence was still being processed;

c. Her few family members in Canada were not able to support her; and

[2] Intake Package, *supra* note 1, at pp.1-3, Appeal Book Tab 13 at pp. 126-139.
[3] *Ibid.*

d. Ms. Smith needed to register at a new school closer to the transitional housing program but because of school board schedules wasn't able to do so until the beginning of the next term, in mid-January, 2020.[4] Of note, Ms. Smith managed her school registration on her own, without the assistance of anyone at YouthLink.

13. Despite being very much aware of these different challenges and obstacles, and despite Ms. Smith's assurances that she was registered to begin school on January 31, 2020, in mid-January, when Ms. Smith had lived at the housing program for only one month, YouthLink told Ms. Smith they felt she could not meet the expectations of the transitional housing program and suggested that she could apply to a different housing program.[5]

14. YouthLink didn't offer any therapeutic, rehabilitative or other similar supports –they didn't offer counselling or a referral to counselling of any kind, nor did they enquire into her mental health, discuss what barriers she might be facing or offer to assist her to register for school or support in finding a job. Their response to their inaccurate allegation of non-compliance with the requirement to attend school was to immediately threaten to evict her out of the program.[6]

15. YouthLink staff were able to abruptly threaten eviction because none of the documents provided at intake and admission set out a process by which to address disputes between a resident and the transitional housing program. They do not describe the rights and responsibilities of the tenant, the process by which a tenant may be asked to move out, nor do

[4] Schedule "A" in support of Form A1, dated April 7, 2020 at p.2, Appellant's Appeal Book and Compendium Tab 10 pp.97-111; YouthLink's CYSIS notes, dated December 9, 2019 ("**December 9 CYSIS notes**"), Appellant's Appeal Book and Compendium Tab 16 at p.152 YouthLink's CYSIS notes, dated December 18, 2019, Appellant's Appeal Book and Compendium Tab 17 at p.154.
[5] December 9 CYSIS notes, *supra* note 4, Appellant's Appeal Book and Compendium Tab 16 at p.152; YouthLink emails regarding House Meeting - Florence, dated January 8-14, 2020, Appellant's Appeal Book and Compendium Tab 19 at pp.158-161.
[6] *Ibid*.

they set out a policy for assisting tenants to find alternative accommodation or to seek readmission to the program if they are asked to move out.[7]

16. Ms. Smith was not in fact required to leave the program; she continued her tenancy and attended school when it began at the end of January.

(iii) Ms. Smith's Illegal Eviction

17. Contrary to paragraph 7 of the Decision, Ms. Smith was not evicted because she failed to follow the program's rules and expectations. Though there had been threats to evict Ms. Smith for noncompliance, it had not happened and there was no such finding at the LTB. The catalyst for her eviction was the onset of the COVID-19 pandemic and YouthLink's concern that Ms. Smith had stayed some nights away from the transitional housing program and, according to the House Mentor, had recently been unwell. [8]

18. In an email received on March 29, 2020, Ms. Smith was advised she was temporarily evicted from the rental unit and that "prior to returning, you will be required to complete a 14 day self-isolation at an alternative location and speak with a member of the pandemic team." No "alternative location" was suggested and it was unclear who constituted a "member of the pandemic team."[9]

19. YouthLink staff never advised or warned Ms. Smith that staying outside the home was not permitted. Staff did not hold a house meeting, make any changes to house rules or provide any information about their expectations of the tenants during the COVID-19 pandemic. Staff did

[7] Intake Package, *supra* note 1-3, Appellant's Appeal Book and Compendium Tab 13 at pp.126-139.
[8] Email from YouthLink to Ms. Smith, dated March 29, 2020, Appellant's Appeal Book and Compendium Tab 20 pp.163-164; YouthLink Discharge Letter, dated April 6, 2020, Appellant's Appeal Book and Compendium Tab 24 pp.176-177.
[9] *Ibid*.

not speak to Ms. Smith or her doctor to inquire about or verify any concerns about her recent illness.[10]

20. In fact, despite the fact that Ms. Smith did not have symptoms of COVID-19, she had sought and was receiving advice from her doctor. Her doctor had not advised her to self-isolate. She thought she was following the government directives by not gathering in large groups. The email of March 29, was the first notice Ms. Smith received that spending time outside of her home was not permitted.[11]

21. Ms. Smith tried to call and speak with the Housing Program staff but they did not return her calls. The next day, March 30, Ms. Smith returned to her home in order to collect her belongings; expecting, per the letter, that she would be required to isolate for 14 days before being allowed to return. She waited outside the residence and again tried to call housing staff. No one answered her calls. Needing to speak with someone and access her personal property, Ms. Smith went into the home. There she was confronted by the house mentor, who told her to leave and then called the police.[12]

22. Police officers attended the residence and told Ms. Smith to pack her belongings. When she didn't do so quickly enough, they arrested her, handcuffed her and sat her outside on the curb. She didn't have a coat or appropriate shoes. A police officer returned to the house to obtain Ms. Smith's personal ID, and then advised Ms. Smith to leave. The police officer didn't charge her with any offence.[13]

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[10] Letter from Claire Millgate to YouthLink, dated March 31, 2020 ("**March 31 Email**"), Appellant's Appeal Book and Compendium Tab 22 at pp.169-171; YouthLink emails - Florence, dated January 8-14, 2020, *supra* note 5, Appellant's Appeal Book and Compendium Tab 19 at pp.158-161.
[11] March 31 Email, *supra* note 10. Appellant's Appeal Book and Compendium Tab 22 at pp.169-171.
[12] *Ibid.*
[13] *Ibid.*

23. In a letter from YouthLink, dated April 6, and received by Ms. Smith on April 7, YouthLink advised Ms. Smith that she was "permanently discharged" from the Housing Program, citing concerns she was endangering the health and safety of staff and residents by failing to follow the government recommendations with respect to COVID-19. They provided no notice of the eviction and no dispute resolution, appeal route, or due process of any kind.[14]

24. Following the eviction, Ms. Smith has not had a stable place to live. No alternative housing was offered or provided by YouthLink. She has been reliant on various friends and relatives for temporary places to stay – "couch surfing" throughout the pandemic. Furthermore, it took a whole week for YouthLink to provide Ms. Smith with her clothing, personal care items and other property. The impact of the eviction on Ms. Smith was traumatic and negatively impacted her well-being and mental health.[15]

B. The LTB Decision

25. On April 8, Ms. Smith applied to the LTB under s.9 of the *RTA* to determine whether YouthLink fell within the jurisdiction of the LTB. She sought to have the application heard urgently because of her precarious housing following the eviction.[16]

26. On April 24, Member Nathan Ferguson held an expedited hearing, where two hours were provided for a telephone hearing. His decision was released on June 22. Member Ferguson

[14] YouthLink Discharge Letter, dated April 6, 2020, *supra* note 8, Appellant's Appeal Book and Compendium Tab 24 pp.176-177; Letter from Claire Millgate to YouthLink, dated April 3, 2020, Appellant's Appeal Book and Compendium Tab 23 pp.173-174; Email from YouthLink to Ms. Smith, dated March 29, 2020, Appellant's Appeal Book and Compendium Tab 20 pp.163-164; Email from YouthLink to Ms. Smith, dated March 30, 2020, Appellant's Appeal Book and Compendium Tab 21 p.166-167.

[15] YouthLink Discharge Letter, dated April 6, 2020, *supra* note 8 and 14, Appellant's Appeal Book and Compendium Tab 24 pp.176-177; Email from Ms. Smith, dated April 21, 2020, Appellant's Appeal Book and Compendium Tab 26 pp.181-188; Email from Tennylle Mason, dated April 21, 2020, Appellant's Appeal Book and Compendium Tab 27, p.190; Letter from Dr. Regisford, dated April 20, 2020, Appellant's Appeal Book and Compendium Tab 25 p.179.

[16] T2 Application, A1 Form and Schedule "A" in support of T2/A1, Appellant's Appeal Book and Compendium, Tabs.8-10, pp.82-111.

found that the Housing Program satisfied the exemption under s.5(k) of the *RTA* and was thus exempt from the *RTA* and the jurisdiction of the LTB. He found that YouthLink did not need to meet the requirements for exemption under s.5.1, because they could simply avail themselves of the s.5(k) exemption as transitional housing providers had done before s. 5.1 was enacted.

27. Since Member Ferguson determined the LTB did not have jurisdiction over the tenancy, he did not consider the question of whether the circumstances around Ms. Smith's eviction rendered it illegal.

C. The Divisional Court Decision

28. At the Divisional Court, Ms. Smith argued that the LTB erred in finding that YouthLink's transitional housing program could avail itself of the exemption under s.5(k). She argued that the LTB's interpretation of the *RTA*'s exemption provisions was contrary to the Legislature's intent to regulate transitional housing providers under s.5.1, and did not follow the modern approach to statutory interpretation that incorporates text, context and purpose to determine application and meaning.[17] Ms. Smith argued that transitional housing providers must comply with the provisions under s.5.1 of the *RTA* in order to be exempt.

29. In dismissing the appeal, the Court found no extricable legal error in the LTB's Decision. It framed the issue on appeal as a question of fact rather than law, namely whether the services provided by YouthLink's transitional housing program meet the test to be exempt under s.5(k).[18]

30. The Court determined that the LTB had correctly found that: a) transitional housing providers can seek to be exempt under either s.5.1 and s.5(k); b) that s.5.1 merely provides a

[17] Reasons for Decision of Justice Backhouse, Justice Kristjanson and Justice O'Brien, dated December 14, 2020 from the Divisional Court ("Decision") at para 3, Appellant's Appeal Book and Compendium Tab 5 at p.27.
[18] *Ibid,* at paras 4 and 18, Appellant's Appeal Book and Compendium Tab 5 at pp.27,33.

'broader' exemption; and c) that the main distinction between the two exemptions was the duration of the transitional housing program, with s.5.1 being applied to housing programs that exceed one year.[19]

31. The Court upheld the broad definition for 'rehabilitative and therapeutic services' set out in *SOL-45003-14* ("***SOL***"), a 2014 LTB decision that was decided before the introduction of s.5.1. In doing so, the Divisional Court considered the services listed on YouthLink's Service Options webpage and adopted the LTB's finding that YouthLink's transitional housing program meets the requirements of s.5(k). [20]

PART IV – ISSUES RAISED, LAW AND ARGUMENT

32. The Appellant appeals the determination of the Divisional Court that transitional housing providers can rely on both s.5(k) and s.5.1 to be exempt from the *RTA*. The Appellant asks that this Honourable Court consider the following questions of law:

a. Did the Divisional Court err by failing to follow and apply the appropriate governing principles of statutory interpretation?

b. Did the Divisional Court err by failing to properly consider and weigh the remedial purpose of the *RTA* and the focus on the protection of tenants in its analysis of the context, purpose and intent of the *RTA*? In particular, did it fail to consider the profound inequity of the tenancy and the significant power imbalance between the vulnerable young tenant and the landlord, the intention of the *RTA* to protect vulnerable tenants such as Ms. Smith, and specifically the demonstrated and devastating harms to Ms.

[19] *Ibid*, at paras 26 and 28, Appellant's Appeal Book and Compendium Tab 5 at p. 34.
[20] *Ibid*, at paras 40, 44-46, Appellant's Appeal Book and Compendium Tab 5 at pp.36-37.

Smith and instead improperly focus on undemonstrated concerns for the housing provider?

c. Did the Divisional Court err by failing to take into account the Legislature's intent and purpose behind introducing s.5.1 to the *RTA*; specifically, by making both s.5(k) and s.5.1 available to transitional housing providers, thereby re-introducing back into the *RTA* the same confusion and conflicting jurisprudence that was intended to be remedied by the introduction of s.5.1 to the *RTA*?

d. Did the Divisional Court err by finding that the "primary distinction" between s.5(k) and s.5.1 is the duration of the tenant's occupancy?

e. Did the Divisional Court err by failing to consider the Appellant's arguments with respect to the evidentiary issues before the LTB, thereby making the same errors on appeal? Specifically, did the Court err in accepting the LTB's finding that the services provided by the transitional housing program are substantially the same as those provided in the *SOL* decision, and in finding that the transitional housing program provides therapeutic and rehabilitative mental health services?

A. Standard of Review

33. The standard of review on a question of law is correctness.[21] Decisions of the Divisional Court are expected to be final and only reviewable with Leave to the Court of Appeal. Leave has been granted in this matter, which is on a question of law, specifically the interpretation of a statutory provisions that has not been considered by the LTB, or reviewed by any court until

[21] *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII) https://canlii.ca/t/51tl#par8 Para 8, Appellant's Book of Authorities Tab 1.

now. The appeal is a question of general public importance and no deference should be given to the decision of the Court below.[22]

B. Overview

34. The Appellant submits that the Divisional Court erred in its interpretation of the *RTA* and the relevant rules of statutory interpretation and therefore incorrectly applied the exemption provisions to YouthLink's transitional housing program.

C. Questions of Law on Appeal

(i) The Court failed to follow and apply the governing principles of statutory interpretation

35. The SCC has consistently applied Dreidger's Modern Approach as the prevailing rule of statutory interpretation:

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[23]

36. This Court must start its analysis by considering the text of the legislation. It must then consider the context in which the language is used and the purpose of the legislation in which it is found. Extrinsic material, including Hansard, are admissible to assist the court where the meaning of the challenged provision is unclear.[24]

37. The Decision failed to weigh and integrate into its analysis the actual text of the new provision, specifically the definition of transitional housing in s. 5.1 of the *RTA*, before turning to

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[22] *Ibid*, at paras 8-9.
[23] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 http://canlii.ca/t/51s6 at para 26, quoting E. A. Driedger, "The Construction of Statutes" 2nd ed. (1983) at 87, Appellant's Book of Authorities Tab 2.
[24] *Ibid*, at para. 29.

extrinsic materials. Instead, it turns immediately to extrinsic materials to determine the meaning and intent of s.5.1 and the circumstances in which s.5.1 applies. In doing so, it fails to read s.5.1 harmoniously with the exemption scheme and the object of the *RTA*.[25]

38. The exemptions to the *RTA* under consideration are s.5(k) and s.5.1. Section 5(k) applies to "living accommodation occupied by a person for the purpose of receiving rehabilitative or therapeutic services." The period of occupancy must be "intended to be provided for no more than a one-year period."

39. The exemption in s.5.1 was introduced to the *RTA* in 2017. It is divided into two parts. Subsection 5.1(2) provides a definition of transitional housing programs. This definition clearly defines the type of housing to which the exemption is intended to apply, namely a program that 1) "consists of the provision of living accommodation and accompanying services" and a program that 2) "is intended to support the occupant of the living accommodation in subsequently obtaining and maintaining more permanent living accommodation":

> **Program requirements**
> (2) A program referred to in subsection (1) is a program that meets all of the following requirements:
>
> 1. The program consists of the provision of living accommodation and accompanying services where,
>
> i. the living accommodation is intended to be provided for no more than a four-year period, and
>
> ii. the accompanying services include one or more of the following services, regardless of where and by whom the services are provided:
>
> A. rehabilitative services,
> B. therapeutic services,
> C. services intended to support employment, or
> D. services intended to support life skills development.

[25] Decision, *supra* notes 17-20 at paras 24-26, Appellant's Appeal Book and Compendium Tab 5 at p.34.

2. The program is intended to support the occupant of the living accommodation in subsequently obtaining and maintaining more permanent living accommodation.

3. All or part of the program is,

i. provided by, or funded under an agreement with,

A. the Crown in right of Canada or in right of Ontario,
B. an agency of the Crown in right of Canada or in right of Ontario,
C. a municipality, or
D. a service manager as defined in the *Housing Services Act, 2011*, or

ii. provided or funded by a registered charity within the meaning of the *Income Tax Act* (Canada). 2017, c. 13, s. 2.

40. The text of the respective provisions provides a clear distinction as to their relative application. Section 5(k) provides an exemption from the *RTA* where the purpose of the program is to provide therapy and rehabilitation services and accommodation is provided for the support of the therapeutic and rehabilitative service. Alternatively, s. 5.1 provides an exemption from the *RTA* where the purpose of the program is to provide accommodation and accompanying services to support the occupant in subsequently finding more permanent living accommodations.

41. The clear language of the statue supports the Appellant's submissions regarding the proper statutory interpretation – text read in the context of its application and harmoniously with the statute. The purposive approach argued by the Appellant is consistent with the remedial and protective scheme of the *RTA*.

42. Where a transitional housing provider meets the definition under s.5.1(2), it is required under s.5.1(3) to have an 'occupancy agreement' with the tenant in order for the program to be exempt from the *RTA*.

(ii) ***The Court failed to consider and integrate the new definition of transitional housing into its analysis***

43. Section s.5.1(2) introduced a definition of transitional housing providers to the *RTA*. The introduction of this definition was a key purpose of the Legislature's reform and evinces a clear intent that: a) current legislative exceptions did not currently meet the needs of transitional housing providers and their tenants; and b) s.5.1 is now the only exemption available for transitional housing providers. In its analysis, the Divisional Court failed to consider the language used in s.5.1 to define transitional housing providers, and didn't integrate its analysis of the text within the context of the exemption scheme of the *RTA*.

44. At paragraph 48, the Divisional Court acknowledges that s.5.1 adopts the same language used in the LTB's 2014 *SOL* decision to describe the types of services that are now exempt under s.5.1. It concludes the Legislature did so in order to 'clarify' the types of services that would qualify for the exemption.[26] However, it failed to incorporate the Legislature's clear intent to create a new definition for transitional housing in s.5.1(2) <u>that captures and applies to all transitional housing providers that previously relied on s.5(k) to be exempt from the *RTA*</u> (as occurred in *SOL*).

45. Instead, the Court's conclusion means s.5(k) and s.5.1 now <u>both</u> apply to housing programs providing exactly the same types of services and for the same duration. This creates overlap, redundancy and confusion within the exemption scheme. The Court erroneously concluded that the 'primary distinction' between s.5(k) and s.5.1 is that s.5.1 "covers occupancy agreements that are longer in term."[27]

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[26] Decision *supra* notes 17-20, 25 at para 48, Appellant's Appeal Book and Compendium, Tab 5, p.37.
[27] Decision, *supra* notes 17-20, 25-26 at para 28, Appellant's Appeal Book and Compendium Tab 5 at p.34.

46. We submit that the primary distinction between the exemption sections is not simply duration but is more properly understood as a distinction in the purpose of the tenancy and level of security to be provided to the tenant. Transitional housing providers are mandated under s.5.1(3) to provide occupancy agreements that provide some measure of protection to tenants against unfettered eviction – only then will transitional housing provider landlords be exempt from the *RTA*. If the legislature had intended to have a distinction that was simply related to duration, there would have been no need to provide the extensive description / definition in s.5.1(2) of what tenancies were intended to be governed.

47. Section 5(k) provides a broad exemption from the *RTA*; s.5.1 provides for exemption from the *RTA* only where protections provided under s.5.1(3) are in place. If both s.5(k) and s.5.1 are available to the landlord, that is identical tenancies can be exempt under either provision, landlords could in every case ever choose to circumvent the more onerous obligations of s.5.1(3) which are intended to protect vulnerable tenants.

48. Section 5.1 is specifically designed to apply to transitional housing providers - programs that offer support for life skills and transition to more permanent housing, it provides a greater level of security to tenants regardless of whether the tenancy is less than or greater than one year. Section 5(k) is to apply to programs that provide therapeutic and rehabilitative services for less than one year – it is a more broad ranging exemption from the *RTA* and does not provide as much security to tenants. However, where therapeutic and rehabilitation programs offer services for more than one year then they are to be governed s.5.1 providing greater security to those tenants.

49. A proper analysis of legislative text indicates that the Divisional Court's analysis is not correct: the distinction between s.5.1 and s.5(k) is not simply a matter of duration, but is related

primarily to the purpose of the tenancy. In fact both exemptions could apply to programs of the same duration. While on a narrow reading s.5(k) applies to occupancies *intended* to be provided for no more than a one-year period, the Court concluded it can apply to longer term tenancies. In *SOL*, s.5(k) was used to exempt a program that had lasted four years.[28]

50. The Decision doesn't consider this important distinction. It does not integrate the language of the text with the Legislature's clear intent to create a new definition of transitional housing in s.5.1(2) that would separately define and regulate transitional housing programs.

51. In support of its analysis the Divisional Court refers to s.5.1(5), which simply states "Nothing in this section limits the availability of other exemptions under this Act." It interpreted this to mean that despite the introduction of a new definition of transitional housing in s.5.1, s.5(k) should be interpreted and applied in exactly the same way as it had been previously.[29]

52. This interpretation makes s.5.1 redundant and creates overlap and confusion around the application of the two exemptions. Instead, the Appellant submits that s.5.1(5) ought to be interpreted so as to allow housing providers to argue that they don't meet the definition in s.5.1(2) and therefore the exemption doesn't apply to them.

53. The Appellant's interpretation proposed herein ensures the harmonious operation of the exemption scheme, where all exemptions continue to be available to those who meet the requirements, while ensuring each exemption has a clear meaning and application, and that tenants have the protections intended by the *RTA*. The Divisional Court's interpretation creates significant overlap between s.5(k) and s.5.1 and does not allow the two exemptions to be read

[28] *SOL-45003-14*, 2014 CanLII 52441 (ONLTB) http://canlii.ca/t/g8z5h at para 6 ("**SOL 2014**"), Appellant's Book of Authorities, Tab 3.
[29] Decision *supra* notes 17-20, 25-27 at para 48, Appellant's Appeal Book and Compendium, Tab 5 p.37.

and to operate harmoniously within the exemption scheme, contrary to established principles of statutory interpretation.

(iii) ***The Court failed to consider the Legislature's intent and purpose behind introducing s.5.1 to the RTA***

54. In deciding that both s.5.1 and s.5(k) can apply to transitional housing programs, the Divisional Court undermined the dual purpose of s.5.1: a) to provide greater certainty, clarity and flexibility for transitional housing providers; and b) implementing greater protections for vulnerable tenants, where there is a significant power imbalance between the tenant and the transitional housing landlord.

55. Furthermore, the Divisional Court's decision re-introduces back into the legislation the same confusion and uncertainty around the meaning, scope and application of s.5(k) to transitional housing providers that the introduction of s.5.1 was intended to remedy.

56. In 2016-17, the Ministry of Housing recognized the lack of clarity in the statute and jurisprudence, and the need to provide a new, separate exemption for transitional housing within the *RTA*. It consulted transitional and supportive housing providers and their participants and in September 2016 released its Consultation Paper describing options for legislative amendment.

57. The Consultation Paper clearly articulated the need for a separate exemption; the inclusion of transitional housing within s.5(k) had always been problematic:[30]

> Decisions by the former Ontario Rental Housing Tribunal, the LTB and the courts have not provided clarity regarding the interpretation. The 5(k) "rehabilitative or therapeutic services" exemption has been

[30] Ontario Ministry of Housing, "Legislative Framework for Transitional Housing Under the Residential Tenancies Act, 2006" (Ontario: September 2016) ("**Consultation Paper**"), http://www.mah.gov.on.ca/AssetFactory.aspx?did=15806 at 11, Appellant's Appeal Book and Compendium Tab 36 p.237.

interpreted in different, and sometimes inconsistent ways over time."

58. The options for reform proposed in the Consultation Paper all included a new definition for transitional housing to be included in the new exemption,[31] and each option sought "to balance increased flexibility for transitional housing providers with a level of assurance of appropriate protections for participants."[32] The Ministry highlighted the need to protect the interests and rights of vulnerable tenants who are transitional housing participants:[33]

> "Participants in transitional housing programs are among Ontario's most vulnerable residents, and it is necessary to ensure they are provided adequate rights and protections while they participate in these programs"

59. These purposes were reiterated in Hansard debates, where the Minister of Housing noted that the change had a dual purpose: "to provide flexibility for transitional housing providers while ensuring clients in vulnerable situations have appropriate protections." The Minister uses the specific example of vulnerable young people who have aged out of care – such as the Appellant before this Honourable Court - to illustrate the need for greater flexibility, for enhanced tenant protections and for written agreements with the transitional housing programs, to ensure participants understand the rules in place and their rights and responsibilities in the program. [34]

60. Finally, once the amendment was enacted the Assistant Deputy Minister ("**ADM**") wrote to transitional housing providers across the province, putting them on notice that they are now

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[31] *Ibid* at 19-25, Appellant's Motion Record Tab 36 pp.245-251.
[32] *Ibid* at 19, Appellant's Motion Record Tab 36 p.245.
[33] *Ibid* at 17-18, Appellant's Motion Record Tab 36 pp.243-244.
[34] "Bill 124, Rental Fairness Act, 2017", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41-2, No 74 (1 May 2017) at 3907 (Hon. Chis Ballard), available at: https://www.ola.org/en/legislative-business/house-documents/parliament-41/session-2/2017-05-01/hansard#para771, Appellant's Appeal Book and Compendium Tab 30 at pp.199-201. ["**Hon. Chis Ballard, Bill 124**"]

required to have agreements with their tenant clients that meet the requirements set out in the *RTA* s.5.1(3). The ADM's letter further makes clear that the intent of the legislative reform is to provide an exemption that specifically applies to and is tailored towards all transitional housing providers.[35]

61. The Divisional Court's decision allows transitional housing providers to rely on either s.5(k) or s.5.1. In doing so, it creates a loophole that permits transitional housing providers to rely only on s.5(k), thereby evading the requirement under s.5.1(3) to put in place occupancy agreements with their tenants.

62. Allowing transitional housing providers to avoid the occupancy agreements required under s.5.1(3) contradicts the intent of the legislature to ensure that some security of tenure and clear procedural protections are in place for vulnerable tenants living in transitional housing. It undermines the remedial and tenant protection purpose that first animated the introduction of s.5.1 and that informs the entire operation of the *RTA*.

(iv) ***The Court failed to consider and weigh the remedial purpose of the RTA***

63. The *RTA* is remedial legislation with a "tenant protection focus". As remedial legislation, the *RTA*'s provisions must be interpreted liberally to ensure the realization of its objectives. Section 1 of the *RTA* outlines its purpose: [36]

> The purposes of this Act are to **provide protection for residential tenants from unlawful rent increases and unlawful evictions**, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and

[35] Letter from Assistant Deputy Minister's Office, dated January 22, 2018, Appellant's Motion Record Tab 28 pp.192-194.
[36] *Honsberger v. Grant Lake Forest Resources Ltd*., 2019 ONCA 44 http://canlii.ca/t/hx688 at para.19, Appellant's Book of Authorities Tab 4; *Matthews v. Algoma Timberlakes Corporation*, 2010 ONCA 468 http://canlii.ca/t/2bbcz at paras 22-23, Appellant's Book of Authorities Tab 5.

> tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes. [Emphasis added]

64. The Ontario Legislature has also recognized housing as a fundamental human right, recognized and protected under international human rights instruments. The Legislature intends the *RTA* to be used to implement and support the right to housing as a human right. In addition to its remedial purpose, the *RTA* also seeks to protect fundamental human rights.[37]

65. The Decision fails to properly consider and weigh the remedial purpose of the *RTA*, the *RTA*'s intent to protect human rights, and its focus on the protection of tenants. The Decision makes no mention of Ms. Smith's precarious and vulnerable circumstances nor does it acknowledge that her circumstances are characteristic of tenants who seek housing through transitional housing programs. Further, the Decision doesn't acknowledge the trauma Ms. Smith experienced as a result of her abrupt eviction, nor the ongoing hardship and housing instability she has experienced since the eviction.[38]

66. Instead, at paragraph 30 the Court focuses on undemonstrated concerns for hypothetical housing providers who may lose their exemption under s.5(k) without putting in place occupancy agreements with their tenants. This is a concern not put before it by the Respondent, but rather raised by the Court for the first time at the hearing. No evidence on the record supported a concern about "potentially devastating impacts on existing programs."[39] In fact, as describe above at paragraph 61, the evidence that is on the record is that existing programs were given the

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[37] "Bill 124, Rental Fairness Act, 2017", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41-2, No 71 (25 April 2017) at 3871 (Mme Nathalie Des Rosiers) available at https://www.ola.org/en/legislative-business/house-documents/parliament-41/session-2/2017-04-25/hansard#para964, Appellant's Appeal Book and Compendium Tab 31 p.203-206.

[38] Decision *supra* note 17-20, 25-27, 29 at para 7, Appellant's Appeal Book and Compendium Tab 5 at p.27; Letter from Claire Millgate, dated April 3, 2020, Appellant's Appeal Book and Compendium Tab 23 pp.173-174; YouthLink Discharge Letter, dated April 6, 2020, Appellant's Appeal Book and Compendium Tab 24 pp.176-177; Letter from Dr. Regisford, dated April 20, 2020, Appellant's Appeal Book and Compendium Tab 25 at p.179.

[39] Decision, *supra* note 17-20, 25-27, 29, 38 at para.30, Appellant's Appeal Book and Compendium Tab 5 at p.35.

opportunity to prepare for the shift in legal obligations when the ADM wrote to transitional housing providers across the province to advise them that they would have to enter into occupancy agreements with their program participant tenants in accordance with s. 5.1(3)[40].

67. The Court's finding that no transitional provision was in place at the time s.5.1 was enacted is also incorrect: s.5.1(6) is a transitional provision that applies – it provides the exemption does not automatically apply to existing tenancies and program participants, but must be agreed to. These transitional arrangements are further described in the ADM's letter of January 22, 2018.[41]

68. By failing to integrate the underlying purposes of the *RTA* into its decision, the Court misapprehends and fails to uphold the Legislature's purpose and intent in enacting s.5.1. It fails to recognize Ms. Smith's circumstances as precisely those s.5.1 seeks to address. Rather than allowing a vulnerable young person to be evicted on the spot without notice or support, s.5.1 requires transitional housing providers to provide notice, recourse for dispute resolution and assistance to find alternative accommodation.

69. The Divisional Court's interpretation that transitional housing providers are not required to provide occupancy agreements fails to protect some of Ontario's most vulnerable tenants and frustrates the remedial and human rights focus of the *RTA*.

(v) ***Evidentiary Issues Amount to an Error of Law***

70. On appeal before the Divisional Court, the Appellant argued that LTB made findings of fact with respect to the 'rehabilitative and therapeutic' services provided by YouthLink that were

[40] Hon. Chris Ballard, Bill 124, *supra* note 34, Appellant's Appeal Book and Compendium Tab 30 at pp.199-201.
[41] *Ibid*.; *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, s.5.1(6); Letter from Assistant Deputy Minister's Office, dated January 22, 2018, Appellant's Appeal Book and Compendium Tab 28 at p.192-194.

not supported by any evidence on the record. In its decision, the Divisional Court erroneously characterizes this submission as an error of fact. However, those errors impacted the LTB's ultimate conclusions on the material issue of whether YouthLink met the legal test required to be exempt from the *RTA*. They are therefore errors of law.[42]

71. In its decision the Divisional Court failed to scrutinize the LTB's findings of fact with respect to the 'rehabilitative and therapeutic' services provided by YouthLink. In failing to do so, it perpetuated the same or similar errors in their own decision with respect to the services provided by YouthLink. In particular, it incorrectly describes the transitional housing program as providing 'mental health services,' which it explicitly does not.[43]

PART V: ORDER REQUESTED

72. The Appellant respectfully requests that this Honourable Court find that the Divisional Court erred as argued by the Appellant, and find that YouthLink is not exempt from the application of the *RTA* under s. 5(k), and that in this case YouthLink did not meet the requirements for exemption from the *RTA* under s.5.1 as there was no agreement in place pursuant to s.5.1(3), and that as such the eviction of Ms. Smith was illegal.

73. Alternatively, the Appellant asks that the question of whether the eviction was legal be sent back to the LTB for determination.

74. Ms. Smith does not seek costs and asks that no costs be ordered against her.

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[42] *Khanna v Buchanan*, 2009 CanLII 68480, http://canlii.ca/t/26zcx, at paras 2-3, Appellant's Book of Authorities at Tab 6; *Marcellos v Woodbridge Management Ltd*, 2006 CanLII 21314, http://canlii.ca/t/1np5k, at para 2, Appellant's Book of Authorities at Tab 7; *Sharbern Holding Inc. v Vancouver Airport Centre Ltd*,., 2011 SCC 23 http://canlii.ca/t/flc4r at para 71, Appellant's Book of Authorities at Tab 8.

[43] Decision, *supra* note 17-20, 25-27, 38-39 at paras. 4 and 40, Appellant's Appeal Book and Compendium Tab 5 at pp.27,36.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of June, 2021.

Zahra Shariff LSO #: 74788M
Mary Birdsell LSO#: 38108V
Claire Millgate LSO#: 69278B
Justice for Children and Youth

Counsel for the Appellant, Lydian Smith

CERTIFICATE

I, Mary Birdsell, lawyer for the Appellant, certify that:

1. an order under sub-rule 61.09(2) is not required; and
2. it is estimated that oral arguments for the Appellant will require 1.5 hours.

July 6th, 2021

Mary Birdsell

SCHEDULE A – LIST OF AUTHORITIES

Housen v. Nikolaisen, 2002 SCC 33.

Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42.

SOL-45003-14 (Re), 2014 CanLII 52441 (ON LTB).

Honsberger v Grant Lake Forest Resources Ltd, 2019 ONCA 44.

Matthews v Algoma Timberlakes Corp, 2010 ONCA 468.

Khanna v Buchanan, 2009 CanLII 68480.

Marcellos v Woodbridge Management Ltd, 2006 CanLII 21314.

Sharbern Holding Inc. v Vancouver Airport Centre Ltd., 2011 SCC 23.

SCHEDULE B – LEGISLATIVE PROVISIONS

Residential Tenancies Act, 2006, S.O. 2006, c. 17

PART I
INTRODUCTION

Purposes of Act
1 The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes. 2006, c. 17, s. 1.

Exception, Part V.1
(2) Subsection (1) does not apply to Part V.1. The purpose of Part V.1 is to provide protection to members of non-profit housing co-operatives from unlawful evictions under this Act and to allow non-profit housing co-operatives and their members access to the framework established under this Act for the adjudication of disputes related to the termination of occupancy in a member unit of a non-profit housing co-operative. 2013, c. 3, s. 20.

Application of Act
3 (1) This Act, except Part V.1, applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary. 2013, c. 3, s. 22 (1).

Exemptions from Act
5 This Act does not apply with respect to,

(k) living accommodation occupied by a person for the purpose of receiving rehabilitative or therapeutic services agreed upon by the person and the provider of the living accommodation, where,

(i) the parties have agreed that,

(A) the period of occupancy will be of a specified duration, or
(B) the occupancy will terminate when the objectives of the services have been met or will not be met, and

(ii) the living accommodation is intended to be provided for no more than a one-year period;

Other exemption from Act
5.1 (1) This Act does not apply with respect to living accommodation provided to a person as part of a program described in subsection (2) if the person and the provider of the living accommodation have entered into a written agreement that complies with subsection (3). 2017, c. 13, s. 2.

Program requirements
(2) A program referred to in subsection (1) is a program that meets all of the following requirements:

1. The program consists of the provision of living accommodation and accompanying services where,

    i. the living accommodation is intended to be provided for no more than a four-year period, and

    ii. the accompanying services include one or more of the following services, regardless of where and by whom the services are provided:

        A. rehabilitative services,
        B. therapeutic services,
        C. services intended to support employment, or
        D. services intended to support life skills development.

2. The program is intended to support the occupant of the living accommodation in subsequently obtaining and maintaining more permanent living accommodation.

3. All or part of the program is,

    i. provided by, or funded under an agreement with,

        A. the Crown in right of Canada or in right of Ontario,
        B. an agency of the Crown in right of Canada or in right of Ontario,
        C. a municipality, or
        D. a service manager as defined in the *Housing Services Act, 2011*, or

    ii. provided or funded by a registered charity within the meaning of the *Income Tax Act* (Canada). 2017, c. 13, s. 2.

Agreement between the provider and the occupant of the living accommodation
(3) The agreement between the provider of the living accommodation and an occupant of the living accommodation must meet all of the following requirements:

1. The agreement must state that the provider of the living accommodation intends that the living accommodation be exempt from this Act and must also state that the occupant may apply to the Board under section 9 of this Act for a determination of whether this Act applies with respect to the living accommodation.

2. The agreement must set out the following:

    i. the legal name and address of the provider of the living accommodation,

ii. the maximum period of the occupant's occupancy of the living accommodation,

iii. the circumstances under which and the process by which the occupant's occupancy of the living accommodation may be terminated by the provider of the living accommodation,

iv. the occupant's rights and responsibilities in respect of the occupant's occupancy of the living accommodation,

v. the rules that apply to the occupant's occupancy of the living accommodation,

vi. the amount of any consideration required to be paid by the occupant for the right to occupy the living accommodation, and

vii. the amount of any other charges to be paid by the occupant in conjunction with the living accommodation.

3. The agreement must set out a process to address disputes between the occupant and the provider of the living accommodation which must,

i. include a reasonable method by which either party may initiate the process,

ii. provide for the involvement of an individual not otherwise involved in the dispute, to assist the parties in resolving the dispute, and

iii. meet such other requirements as may be prescribed.

4. Unless the information is set out in a separate agreement under subsection (4), the agreement must set out the following information in respect of the program under which the living accommodation is provided to the occupant:

i. the occupant's rights and responsibilities in respect of the occupant's participation in the program, other than the rights and responsibilities described in subparagraph 2 iv,
ii. the rules that apply to the occupant's participation in the program, other than the rules described in subparagraph 2 v,

iii. the amount of any charges to be paid by the occupant in conjunction with the program, other than the charges referred to in subparagraphs 2 vi and vii,

iv. the policy of the provider of the living accommodation or the administrator of the program, as applicable, with respect to securing alternate living accommodation for an occupant whose participation in the program or whose occupancy of the living accommodation is terminated, and

v. the policy of the provider of the living accommodation or the administrator of the program, as applicable, with respect to readmission into the program.

5. The agreement must meet such other requirements as may be prescribed. 2017, c. 13, s. 2.

Requirements in subpars. 4 i to v of subs. (3)
(4) Where the provider of the living accommodation and the administrator of the program under which the living accommodation is provided to the occupant are not the same person or entity, any information required by subparagraph 4 i, ii, iii, iv or v of subsection (3) may be set out in the agreement in respect of the occupant's participation in the program entered into between the occupant and the administrator of the program, if the agreement,

(a) sets out the legal name and address of the administrator of the program; and

(b) meets such other requirements as may be prescribed. 2017, c. 13, s. 2.

No limitation
(5) Nothing in this section limits the availability of other exemptions under this Act. 2017, c. 13, s. 2.

Existing tenancy
(6) For greater certainty, nothing in this section exempts living accommodation that is subject to a tenancy to which this Act applies, unless the tenancy has first been terminated in accordance with this Act. 2017, c. 13, s. 2.

Application to determine issues
9 (1) A landlord or a tenant may apply to the Board for an order determining,

(a) whether this Act or any provision of it applies to a particular rental unit or residential complex;
(b) any other prescribed matter. 2006, c. 17, s. 9 (1).

Order
(2) On the application, the Board shall make findings on the issue as prescribed and shall make the appropriate order. 2006, c. 17, s. 9 (2).

Court File No. C69478

LYDIAN SMITH

Appellant

-and-

YOUTHLINK YOUTH SERVICES

Respondent

COURT OF APPEAL FOR ONTARIO

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