

## WARNING

This is a case under the *Child, Youth and Family Services Act, 2017* and subject to subsections 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

**87(8) *Prohibition re identifying child*** — No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

**(9) *Prohibition re identifying person charged*** — The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

**142(3) *Offences re publication*** — A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(c) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

COURT OF APPEAL FOR ONTARIO

CITATION: Smith v. Youthlink Youth Services, 2022 ONCA 313

DATE: 20220425

DOCKET: C69478

Doherty, Huscroft and Harvison Young JJ.A.

BETWEEN

Lydian Smith

Appellant

and

YouthLink Youth Services

Respondent

and

Landlord and Tenant Board

Intervener

Mary Birdsell, Zahra Shariff, and Claire Millgate for the appellant, Lydian Smith

Lonny Rosen and Clancy Catelin, for the respondent, YouthLink Youth Services

Linda Naidoo, for the intervener, Landlord and Tenant Board

Heard: March 29, 2022 by video conference

On appeal from the judgment of the Divisional Court (Justices Nancy L. Backhouse, Freya Kristjanson and Shaun O'Brien) dated December 14, 2020, with reasons reported at 2020 ONSC 7624, affirming a decision of the Landlord and Tenant Board, dated June 22, 2020.

**Huscroft J.A.:**

[1] The appellant was admitted into a transitional housing program operated by the respondent YouthLink, a registered charity that provides a range of programs and services to young people aged 16-21. She was admitted on December 8, 2019 with a discharge date set for one year later, December 7, 2020.

[2] The appellant was discharged from the program after approximately one month and required to give up her accommodation. She applied to the Landlord and Tenant Board for an order to determine whether the protections of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 applied to the YouthLink program. The Board concluded that the Act did not apply to the program. The Board's decision was confirmed by the Divisional Court, and the appellant appeals to this court with leave.

[3] The sole issue on appeal is whether s. 5(k) exempts YouthLink's program from the operation of the Act. I conclude that it does.

[4] I would dismiss the appeal for the reasons that follow.

## **Background**

[5] The YouthLink Intake Package states the following program objectives:

The Co-op Housing Program provides affordable housing for young people ages 16-19. Young people can stay for up to one year. It provides young people the opportunity to practice life skills and live co-operatively with others. The program can help support young people in their schooling, employment, and in connecting with community resources and social supports. The program

also provides support in helping young people transition to their next housing option, which includes accessing financial and housing supports, and completing housing applications.

[6] The package sets out a detailed list of residents' responsibilities and requires that residents abide by all rules, including bans on alcohol and drugs, as well as rules on visitors and room inspections. It also sets out a detailed description of the support available to residents, including a mentor, transitional support worker, intake coordinator, and managers and directors. The package specifies that failure to meet program expectations could result in suspension or discharge from the program. The appellant signed the intake agreement prior to her acceptance into the program.

[7] The appellant was discharged from the program early because YouthLink alleged that she had failed to follow the program's rules and expectations. In particular, YouthLink was concerned that the appellant's failure to comply with COVID-19 directives and requirements posed a risk to the health and safety of other residents, as well as YouthLink staff. Despite being advised not to return to the premises until completing a period of self-isolation, the appellant returned on March 30, 2020. YouthLink staff called for the police and the appellant was removed.

[8] The appellant was formally discharged from the program on April 7, 2020. No notice was given, nor was there any mechanism for the appellant to contest

her discharge. The appellant applied to the Board to determine whether her tenancy in the YouthLink program fell within the jurisdiction of the Act.

### **The statutory provisions**

[9] Whether the Act applies to the appellant's tenancy in the YouthLink program depends on the exemptions set out in s. 5. The relevant provisions in this case are ss. 5(k) and 5.1.

[10] Subsection 5(k) provides:

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.

[11] Subsection 5.1, a much more detailed exemption, was added to the Act in 2017:

(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.

(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.

(3) The agreement between the provider of the living accommodation and an occupant of the living accommodation must meet all of the following requirements [*an extensive list is omitted*].

...

(5) Nothing in this section limits the availability of other exemptions under this Act. 2017, c. 13, s. 2.

(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.

### **The decisions below**

#### The Landlord and Tenant Board

[12] The Board interpreted ss. 5(k) and 5.1 as providing overlapping protections but concluded that s. 5.1 encompasses a wider range of housing situations. Section 5.1 does not replace or eliminate s. 5(k) because s. 5.1(5) specifically provides that “[n]othing in this section limits the availability of other exemptions” under the Act.

[13] The Board found that s. 5.1 did not apply to the appellant’s occupancy but s. 5(k) did. The Board endorsed *SOL-45003-14 (Re)*, 2014 CanLII 52441 (ON LTB), a prior Board decision, which held that “rehabilitative services” referred to in s. 5(k) do not have to be related to healthcare or specifically rehabilitative but may include other supports such as counseling or case management. Applying this interpretation, the Board found that the appellant’s occupancy was intended for therapeutic and rehabilitative purposes and was not to exceed one year. Accordingly, s. 5(k) applied and YouthLink’s program was exempt from the Act.

The Divisional Court

[14] The Divisional Court considered and rejected the appellant's argument that s. 5.1 is designed to apply to transitional housing programs and that YouthLink's claim for exemption from the Act should have been evaluated under that section. The court found that the Board considered the text, context, and purpose of s. 5.1 and correctly concluded that it does not replace or eliminate the s. 5(k) exemption. The court found, further, that there was no absurdity created by having both provisions in force and the evidence indicates this was the Legislature's intention.

[15] The Board made a factual finding that the services provided by YouthLink met the requirements of s. 5(k) and were more than incidental to the appellant's occupation. This was a factual determination that was outside the Divisional Court's jurisdiction. The court rejected the argument that the Board's reasons were inadequate.

**Standard of review**

[16] The appeal from the Board to the Divisional Court was limited to questions of law: s. 210 of the Act. Leave to appeal to this court from the decision of the Divisional Court also is limited to questions of law and it is clear, following *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, that the standard of review is correctness.

[17] Plainly, correctness review empowers the court to substitute its view for that of the administrative actor. The court should, of course, consider the legal analysis of the administrative actor, but it does not defer to it; the decision concerning the interpretation of the Act belongs to the court: *Vavilov*, at para. 54.

## **Discussion**

[18] The appellant raises several issues on appeal:

1. Did the Divisional Court err by failing to follow and apply the governing principles of statutory interpretation?
2. Did the Divisional Court err by failing to consider and apply the definition of transitional housing?
3. Did the Divisional Court err by failing to properly consider and weigh the remedial purpose of the Act?
4. Did the Divisional Court err by failing to take into account the legislature's intent and purpose for introducing s. 5.1 to the Act?
5. Did the Divisional Court err by failing to consider the appellant's arguments with respect to the evidentiary issues before the Board?

[19] These issues boil down to a single question: Does s. 5(k) continue to exempt the YouthLink program?

[20] The appellant argues that s. 5.1 creates a new regime governing transitional housing with which YouthLink and other transitional housing providers must comply to be exempt from the Act. The appellant contends that the Board and the Divisional Court erred in concluding that ss. 5(k) and 5.1 can co-exist.

[21] I disagree.

[22] Section 5.1(5) specifically preserves the other exemptions in s. 5, including s. 5(k). If s. 5(k) applied to the YouthLink program prior to the passage of s. 5.1(5), it continues to do so.

[23] We set out s. 5(k) again for convenience:

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.

[24] Section 5(k) is concerned with transitional housing. Although that concept is not defined in the Act, the nature of transitional housing in that section can be discerned from the terms of the exemption. Transitional housing is not concerned with simply the provision of short-term accommodation; rather, it is concerned with the provision of short-term accommodation for the purpose of receiving rehabilitative or therapeutic services. The duration of the accommodation is either fixed or tied to completion of an individual's particular program, following which that individual will transition to another housing option.

[25] How is s. 5(k) to be understood in the context of the Act? The starting point is that the Act is “remedial legislation designed to redress the imbalance of power between landlords and tenants. It removes leases from the ordinary contract law principles that would otherwise govern and establishes extensive statutory rights for tenants”: *White v. Upper Thames River Conservation Authority*, 2022 ONCA 146, at para. 10. But this remedial purpose is relevant only where a landlord-and-tenant relationship exists, and s. 5 makes plain that not every situation in which accommodation is provided is to be regarded as a landlord-and-tenant relationship.

[26] A narrow interpretation of s. 5(k) risks undermining the social programs it is intended to protect. The requirement that social programs comply with tenancy protections intended to regulate traditional housing relationships might frustrate or even preclude the achievement of a program’s goals.

[27] Having regard to the text, context, and purpose of the legislation, I conclude that rehabilitative and therapeutic services in s. 5(k) must be interpreted as including not only medically-related services but also a broader range of support services including counselling and case management – services that are designed to establish the ability for individuals to transition to independent accommodation. In short, *SOL-45003-14 (Re)*, relied on by the Board in support of its interpretation of s. 5(k), is correctly decided.

[28] The appellant's argument that the passage of s. 5.1 reflects the Legislature's intention to give s. 5(k) a different interpretation must be rejected. Section 5.1 expands the exemptions to the Act significantly. It does so by including programs longer than one year in duration; programs that need not include rehabilitative or therapeutic services; and programs that may be accompanied by services that are not necessarily provided by the housing provider. To be sure, there is some overlap between ss. 5(k) and 5.1, but nothing in s. 5.1 alters the operation of s. 5(k).

[29] A provider of services may be exempt from the Act by operation of one provision but not the other. Thus, the Board and the Divisional Court correctly held that even if s. 5.1 establishes a new, more comprehensive scheme for the regulation of transitional housing that overlaps to some extent with s. 5(k), the operation of s. 5(k) is not precluded on that account.

[30] The Legislature must be taken to have understood how s. 5(k) was interpreted prior to establishing the new exemption in s. 5.1. The Legislature's decision not to amend s. 5(k) but, instead, to preserve its operation regardless of s. 5.1 must be given effect.

[31] That is sufficient to dispose of this appeal. The application of s. 5(k) is a mixed question of fact and law that is not subject to appeal.

**Conclusion**

[32] I would dismiss the appeal. The parties shall bear their own costs.

Released: April 25, 2022 *DD*

*Justus Huang JA*

*Jaqueline Roberts JA*

*I agree. Harrison Young J.A*