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# THE ONTARIO TENANT PROTECTION ACT: A TRUST BETRAYED

ELINOR MAHONEY\*

## RÉSUMÉ

Cet article analyse et commente les répercussions de la *Loi sur la protection des locataires* de l'Ontario quant à la disponibilité des logements locatifs et aux loyers. On y traite également de l'administration de la justice par le Tribunal du logement de l'Ontario, notamment en ce qui concerne le droit au maintien dans les lieux. L'auteur est d'avis que les modalités et procédures du Tribunal ont eu pour effet de faciliter l'expulsion d'un nombre accru de locataires au détriment de leurs droits fondamentaux et procéduraux.

## INTRODUCTION

When Al Leach, Ontario Minister of Municipal Affairs and Housing, introduced the *Tenant Protection Act* in late 1996, he assured the Legislature that the Act represented "a crucial step in creating a climate where the private market will again invest in the rental real estate market."<sup>1</sup> Mr. Leach predicted,

With this legislation, we are moving to create a strong and healthy housing market for Ontario. We are protecting tenants against unfair rent increases and arbitrary evictions, we are improving maintenance and we are helping to increase the supply of new rental housing. We are creating a balanced system that will benefit tenants, property owners and taxpayers.<sup>2</sup>

Mr. Leach made it clear that creating a "balanced" system entailed loosening the regulation of rents in Ontario to stimulate the housing market to build and upgrade rental units. There would be some adjustments for tenants, but ultimately they would benefit:

We've created a system in which property owners will have to compete for new tenants. That's an important change. There has not been any competition among property owners in many years and it's a critical aspect of a healthy rental market.<sup>3</sup>

Four years have passed since these promises were made, and almost three years have elapsed since the *Tenant Protection Act* became law in Ontario. It is an appropriate

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1. Ontario, Legislative Assembly, *Debates* (26 November 1996).

2. *Ibid.*

3. Ontario, Legislative Assembly, *Debates* (12 June 1997) (A. Leach). Opening statement at public hearings into Bill 96.

time to evaluate the success of the *Tenant Protection Act* in achieving Mr. Leach's stated goals. This paper examines the impact of the *Tenant Protection Act* on the supply of rental housing, the affordability and fairness of rents, the administration of justice to landlords and tenants under the Act through its creation, the Ontario Rental Housing Tribunal (OHRT), and the security of tenure of tenants in Ontario.

## RENTAL HOUSING SUPPLY

Since Al Leach first released the housing policy paper "New Directions," the vacancy rate in most Ontario centres has dropped to or remained at an all-time low. Of the 11 Ontario cities surveyed by the Canadian Mortgage and Housing Corporation (CMHC), 9 have experienced a drop in their vacancy rate since 1996. When Mr. Leach made his comments, Toronto's vacancy rate was 1.2%. By October 2000, it had decreased to 0.6%. Ottawa, which had a healthy vacancy rate of 4.6% in 1996, has become the tightest rental market in the province with a current vacancy rate of 0.2%.<sup>4</sup>

The passage of the *Tenant Protection Act* has not stimulated the construction of new rental apartments to ease this vacancy crisis. In 1996, Mr. Leach told the CBC that a number of developers had told him that "upwards of 20,000 rental units in the GTA areas alone would be built" in response to the Conservative government's policy initiatives.<sup>5</sup> Unfortunately the developers have fallen 18,300 units short of their promise for Toronto.<sup>6</sup> In fact, provincially, developers have built substantially *less* private rental housing annually under Conservative rule than under either the Liberal or New Democratic governments. Only 2% of housing starts since 1995 have been private rental units compared with 12% of housing starts in the late eighties and more than 5% in the early nineties.<sup>7</sup>

More important, some developers have made the vacancy crisis worse since passage of the *Tenant Protection Act*. Minto Development Inc. is a good example. At the time the Act was introduced in the Legislature, the Conservatives anticipated that Minto would reinvest \$3 million in the rental market.<sup>8</sup> Minto had other plans. Recently, *The Toronto Star* reported that Minto is converting a 205-unit rental building to condominium ownership in Etobicoke, investing \$2 million in renovations and offering a discounted purchase price to existing tenants.<sup>9</sup> True, Minto is also planning to construct a massive complex at Yonge and Eglinton, part of which it claims will be operated as a rental complex (if the city allows Minto a triple-height and double-den-

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4. CMHC, News Release (30 November 2000).

5. Interview with Minister A. Leach (26 January 2001) replayed by CBC *Metro Morning*.

6. According to statistics quoted on CBC *Metro Morning* (26 January 2001), only 1300 rental units have been built in Toronto since 1996.

7. Ontario Non-Profit Housing Association and the Coop Federation of Ontario, "Where's Home? A Picture of Housing Needs in Ontario" by Noreen Dunphy and Linda Lapointe (Toronto, March 1999) [hereinafter "Where's Home?"], table: Housing Starts, Ontario (1988-1998.).

8. Ontario, Legislative Assembly, *Debates* (26 November 1996).

9. *The Toronto Star* (3 February, 2001) Homes.

sity variance).<sup>10</sup> However, the building will be registered as a condominium, for tax reasons, which means that the security of tenure for the tenants is at risk, should Minto decide to convert to condominium use during the first two years of occupancy.<sup>11</sup> Other developers have also eyed the condominium market, taking steps to demolish their buildings to construct new condo properties or convert those rental buildings with draft approval for condominium status into ownership properties. In Toronto alone, more than 1,500 units have been threatened to date.<sup>12</sup> It appears that major landlords are investing their rental revenue in developments that will result in the dislocation of their tenants and a reduction in the supply of rental accommodation in Ontario.

Tenant activists were skeptical of industry claims from the outset. We assumed the claims were made to help the Minister justify the transfer of billions of dollars from tenants to landlords. We noted that Mr. Leach failed to put developers' grandiose estimates in writing. In his 1998–99 business plan, he projected an increase of just 32 rental units for the entire province. He arrived at this extraordinary target by noting that just 215 units per year had been built in areas with vacancy rates less than 3%. From 1994 to 1996, his goal was a 30% increase over three years, with half the increase—32 units—to be realized in 1998–99.<sup>13</sup> Not surprisingly, this “goal” was surpassed. Tony Clement, then minister of municipal affairs and housing, reported there were 474 private rental starts in 1998–99 yet kept the modest target of 247 annual rental starts in his own Business Plan for 1999–2000 (which, inexplicably, was not released until after the beginning of the 2000–2001 Ministry year).<sup>14</sup>

By this time, this arbitrary target was woefully out of date. In March 1999, a study prepared by Noreen Dunphy and Linda Lapointe entitled “Where’s Home?” had projected a shortfall of almost 74,000 rental units in Ontario by 2001.<sup>15</sup> In October 1999, two additional communities joined those with vacancy rates below 3%. Still the Minister did not revise his target. His 2000–2001 Business Plan did not even indicate how many rental units had been produced in the previous year and failed to set any target at all for the production of new rental housing for 2000–2001. None of the “business plans” mention that there may have been a net loss in rental housing units since 1998, due to the abolition of demolition and conversion controls.

It was not until the media asked questions that the Minister even acknowledged the failure of the government’s strategy to create new rental housing. In defence of his housing policy, Mr. Clement suggested that there has been a significant growth in non-traditional rental housing units in accessory suites and rented condominiums.<sup>16</sup>

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10. Gord McLaughlin, *National Post* (27 January 2001); Amit Gupta, *National Post* (5 March 2001),

11. See s. 51 and 54, *Tenant Protection Act*.

12. City of Toronto Planning Department statistics, 1998–2000.

13. Ontario, Ministry of Municipal Affairs and Housing, *Ontario Government Business Plans: 1998–1999* (Toronto, 1998).

14. Ontario, Ministry of Municipal Affairs and Housing, *Ontario Government Business Plans: 1999–2000* (Toronto: 2000).

15. “Where’s Home?” *supra* note 7 at 24.

He offered no evidence of this claim, and some industry experts discount it. Brad Lamb, a Toronto realtor who specializes in condominium developments, predicts fewer than 1000 of the 9000 new condo units available for occupancy in Toronto this year will be rented.<sup>17</sup> Not only are the numbers insufficient to make a dent in the rental housing shortage, Mr. Lamb says, but rents for condo units are far above the means of most tenants. For example, according to Mr. Lamb, a typical 700-square-foot one-bedroom unit with parking will rent for about \$1,500 per month. More important, rented condominium apartments do not provide the same security of tenure as traditional apartment buildings, because of the potential for the owner to evict for owner's own use at any time.

### AFFORDABILITY OF RENTS

Many of the 3 million rental units remaining in Ontario are rapidly becoming unaffordable for the majority of tenants. The Minister makes much of the fact that the guideline for rent increases has been lower since the *Tenant Protection Act* became law than at any other time in the history of rent review.<sup>18</sup> Yet average rents, which had risen at twice the rate of inflation during the first half of the nineties under Liberal and NDP rent-review systems,<sup>19</sup> rose even more dramatically following proclamation of the *Tenant Protection Act*. In the first year, CMHC attributed the increase to landlords making "catch-up" increases (maximum rents no longer increase automatically, so landlords "caught up" quickly so that they would not forfeit future guideline increases on the highest lawful rents).<sup>20</sup> In subsequent years, an apartment shortage, vacancy decontrol, and above-guideline applications were identified as the chief contributors to the increase in rent.

Ottawa is a prime example of a community where a reduction in vacancy rates has resulted in steep rent increases. From 1997 to 2000, the rent for a two-bedroom apartment increased by 20%, as the vacancy rate plunged from 4.6% to 0.2%. In Toronto, where vacancy rates are also low and vacancy decontrol and above-guidelines are also significant factors, rents for two-bedroom apartments rose 20% between 1997 and 2000, while rents for bachelor apartments rose an astonishing 23.5%. The

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16. Interview with Tony Clement, *CBC Metro Morning* (26 January 2001).
  17. Jennifer Prittie, "Little Relief Ahead as Apartment Vacancies Reach Record Lows" *National Post* (2 February 2001). CMHC's Condo Survey of 1992-99 statistics found that "[w]hile the supply of new condominium apartments has increased, the actual number . . . available for rent has steadily decreased."
  18. Ministry of Municipal Affairs and Housing, *Tenant Protection Act Fact Sheet* by Amanda McWhirter (Toronto: Ministry of Municipal Affairs and Housing, June 2000).
  19. The Liberal rent review program awarded rent increases so high that landlords were unable to charge them. As Mr. Leach noted, half of Ontario rents were still below the maximum legal rent in 1996. Under the NDP system, a twice-inflation rate of rent increases was achieved almost entirely through the extremely generous guideline formula. Few above-guideline applications were filed under the *Rent Control Act*.
  20. CMHC, *Rental Market Report* (Ottawa, October 1998) at 1.

average rent for a one-bedroom apartment increased by 22%, reaching a record level of \$833<sup>21</sup> by October 2000.

Startling as these figures appear, they do not tell the whole story. CMHC tracks rents charged for occupied apartments. Rents chargeable for *vacant* units are typically much higher. Thus tenants in areas of high turnover and lowest vacancy rates face the toughest markets. For example, the going rate for a modest one-bedroom apartment in a 30- to 50-year-old building in downtown Toronto varies between \$950 and \$1150 (without parking).<sup>22</sup> In 1997, before vacancy decontrol, these units rented for as little as \$600.<sup>23</sup>

CMHC considers rent affordable if it is no more than 30% of a tenant's pre-tax income. In 1995, before vacancy decontrols were introduced, 44% of Ontario tenants spent more than 30% of their pre-tax income on housing, and 22% paid more than half their income on housing.<sup>24</sup> These percentages are likely higher today. Evidence is mounting that tenant incomes may not have kept pace with either the booming economy or the rent increases enjoyed by their landlords. A study for the Vanier Institute of the Family indicated that the bottom 60% of families in Canada earned less in real terms in 1998 than in 1989, with the poorest 20% suffering a loss of 5.2% in after-tax income.<sup>25</sup> In Ontario, the situation for poor people was particularly bleak, due to a 22% cut in welfare rates imposed by the Conservative government in the fall of 1995. The affordability gap for people on assistance is especially acute, because shelter allowances have not been increased since the cut, despite the steep increases in rents. Tenants with jobs have fallen behind, too. Few have experienced wage increases of 20% to 23.5% necessary to keep pace with average rent increases over the past three years, let alone to pay the market rent for a vacant unit.

## PROTECTION FROM UNFAIR RENT INCREASES

Ministry publications have consistently promised to protect tenants from "unfair" rent increases.<sup>26</sup> Some examples are Ministry of Municipal Affairs and Housing, "Tenant Protection Legislation: New Directions for Discussion" (1996) online: <<http://mah.gov.on.ca/business/discussn/goals-e.asp>>; and a speech by Steve Gilcrist, then Parliamentary Assistant to the Minister of Municipal Affairs and Housing, to the Multiple Dwelling Standards Association's Annual Meeting on June 25, 1998, where he claims

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21. Derived from CMHC *Rental Market Reports* of October, 1998, 1999, and 2000. CMHC measures vacancy rates and rents in private buildings containing three or more rental units.
  22. An apartment-hunter researched rents in the Yonge/Bloor area for a one-bedroom apartment in January 2001.
  23. In 1993 I paid \$499 for a one-bedroom apartment in a building now charging new tenants \$950.
  24. "Where's Home?" *supra* note 7 at 8-9.
  25. Roger Sauve, *The Current State of Canadian Family Finances: 2000 Report* (Vanier Institute for the Family, 2001). The 22% cut in welfare rates in Ontario would ensure that the bottom 20% of income earners suffered more than the Canadian average.
  26. Numerous references to "unfair rent increases" appear on the Ministry's Web site <<http://www.gov.on.ca/mbs/English/index.html>>

that “the new law protects tenants from unfair rent increases, evictions, and harassment, and provides them with strong security of tenure” online: <<http://www.mah.gov.on.ca/inthnews/backgrnd/19980625e.asp>>. Also see *supra* note 18 and Ontario, Legislative Assembly, *Debates* (21 November 1996) at 36-1 L126 (Al Leach), and (18 November 1997), at 36-1 L246 (Al Leach) for references to the need to prevent “unfair” rent increases. Yet increases taken since passage of the *Tenant Protection Act* are much higher than both the rate of inflation and guideline for rent increases established by the Act. How can this be justified as fair in a tight housing market where renters have no choice and incomes are not increasing by similar amounts? When gasoline prices skyrocketed, the Conservative government called for an investigation of the gasoline industry, but no outcry of “rent gouging” has been raised. Why not?

During debate on third reading, Mr. Leach told the Legislature,

There’s absolutely no evidence anywhere to support claims that rents would skyrocket under this new system. As a matter of fact, right now about 50% of the rental units in Ontario are rented below what the landlord could legally charge. This means that already many rents are determined by what the market can bear, not what rent control determines.<sup>27</sup>

This speech prepared the way for justifying the jump in Toronto rents that took place the year the Act was proclaimed. CMHC recorded an average rent increase of 7% in the Toronto area in its October 1998 survey (seven times the rate of inflation<sup>28</sup>). It attributed much of this increase to landlords taking advantage of Toronto’s tight rental market by raising their rents to the maximum legal rent on renewal of leases. There was nothing “unfair” about that by Leach’s standard, which equated fairness with legality and opportunity. The legislating of vacancy decontrols finally gave landlords the opportunity to charge maximum rents to their *in situ* tenants, without fear their tenants could move to cheaper apartments as an alternative. Starting from the premise that half the rents in Ontario were too low, it was not hard to argue that large rent increases for which no extra service had been provided were “fair”—at least, fair to the landlords who charge them.

The Conservative government also decided that large rent increases were necessary to encourage landlords to make the \$10 billion in repairs deemed necessary to upgrade Ontario’s existing rental housing stock.<sup>29</sup> The *Tenant Protection Act* increased the allowances a landlord could claim in applications for above-guideline rent increases for repairs.<sup>30</sup> Thus landlords were not encouraged to reinvest *their* profits into their

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27. Ontario, Legislative Assembly, *Debates* (18 November 1997) (Al Leach).

28. Statistics Canada, *The Daily* (19 November 1998), reported that the Consumer Price Index has risen 1% from October 1997 to October 1998.

29. Ontario, Legislative Assembly, *Debates* (12 June 1997) (Al Leach).

30. Every piece of rent-review legislation in Ontario has passed through the costs of necessary repairs and renovations to the tenant by amortizing the costs over the expected life of the repair and adding the monthly amortized amount to the tenant’s rent. The NDP *Rent Control Act* permitted above-guideline applications for necessary repairs only and removed the ordered increase from the monthly rent charge when the landlord had recovered the cost. The *Tenant Protection Act* has few restrictions

buildings, as Leach claimed, but encouraged to have their *tenants* pay more rent to improve the value of their landlord's building, with no say in how the money would be spent.<sup>31</sup>

The benchmark that Mr. Leach established to measure improved maintenance was a 10% increase in rent applied for relating to capital improvements in the first year of the new Tribunal.<sup>32</sup> The government's target was to transfer at least 10% more money from tenants to landlords through orders relating to capital expenditures applications. No rationale was given for this target, which—assuming that one accepts the premise that tenants should foot the entire bill—seems modest, given the claim that \$4 billion worth of upgrades were necessary. Tony Clement reiterated this target in both his 1999–2000 and 2000–2001 business plans.<sup>33</sup>

In the fall of 1999, Ministry officials decided to review a sample of Tribunal orders relating to above-guideline increases to see what sort of decisions were being made. They reported in June 2000 that landlords had claimed \$67 million worth of capital expenditures and that the Tribunal had allowed them \$70 million.<sup>34</sup> When asked how the Tribunal could allow 3 million more than submitted in claims, they said they didn't know. They also could not tell us how much of this total related to necessary upgrades, and how much was cosmetic work designed to attract new tenants at market rents. They undertook to give us an explanation and to prepare a summary of their findings. As of March 2001, we had not received either.

Tenants quickly found some very unfair rent increases ordered as a result of above-guideline applications relating to capital work. First, the Conservatives enacted a special provision to permit landlords to apply for 1999 rent increases based on work done three years before, when a different rent review-system had been in place. Landlords could claim expenditures that would have been ineligible under the former regime and obtain larger rent increases than would have been possible under the previous rules.<sup>35</sup> Since the work had already been done, allowing these above-guideline increases did nothing to encourage repairs. It simply rewarded landlords by changing the rules retroactively to make their tenants pay more.

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on eligibility of capitals, allows extra management fees not actually incurred to be passed through, and does not remove the monthly amortized amount from the tenant's rent after the landlord has recovered the full cost of the repair with interest. This is a reversion to the Conservative and Liberal rent-review practices of the 1980s.

31. Although tenants have always believed their rent should pay for a roof over their heads, every rent-review system in Ontario has affirmed the opposite. When the roof eventually wears out, the tenant—not the landlord—must pay extra for the replacement.
32. Both the 1999–2000 and 2000–2001 Business Plans of the Ministry include this benchmark.
33. Clement's "Business Plans" would be laughed out of business school. His "key performance measures" either statically repeat commitments made by Leach in 1997 and 1998 or fail to flow logically from the goal.
34. Kevin Sullivan, Tenant Stakeholders meeting, Toronto, June 2000.
35. *Ontario Regulation 194/98* s. 22, para. 2.



Second, the interplay of vacancy decontrol with above-guideline applications created inequities that the government has taken no steps to remove. The most common inequity occurred where a new tenant agreed to a certain rent because the landlord had plastered and painted the apartment, and had installed a new refrigerator and stove. Nine months later, the tenant would receive a notice for an above-guideline rent increase. In these situations, tenants paid twice for the renovations: once when assuming occupancy and again, a year later, by order of the Tribunal.<sup>36</sup>

We do not know what percentage of capital expenditures applied for relate to this type of situation, but until landlords are precluded from double-charging new tenants for capital improvements, these unfair rent increases will continue to occur. More varieties will be seen in the future as landlords apply for extraordinary operating-cost increases in rent that relate to expenses incurred before most-recent tenants moved into the building.

It is clear that the *Tenant Protection Act* weakens the logical connection between rent paid and service/amenities received. A tenant's rent will now buy only the right to occupy a unit. Upkeep of the building, capital improvements, and service are extra. It is akin to condominium ownership, without the right to build equity, establish a capital reserve fund, or elect a governing board of directors to maintain the building. As more and more rent review orders are issued, it will become harder to mount a convincing argument that these rent increases are fair and justified and an appropriate way to ensure that landlords maintain and upgrade their properties.

By current Ministry standards, the only unfair rent increases are illegal ones. The benchmark for determining how well the Government has protected tenants from unfair rent increases has been a projected *decrease* in tenant applications regarding illegal rent.<sup>37</sup> Presumably, the Ministry believes that if fewer tenants are applying, fewer illegal rents are being charged. This is an uncertain proposition, given that the abolition of the rent registry and significant changes to the rent rules—particularly concerning discounts and agreements to raise rents—make tenants less able to discern what is legal and what is not.

Under previous legislation, 198 applications per month were filed. In his two annual business plans, Tony Clement set the commitment to lower this to fewer than 100 per month. Once again, he met his goal.

Little wonder, since the *Tenant Protection Act* changed the rules. Most *Rent Control Act* applications for return of unlawful rents had related to illegal increases charged upon a change of tenancy. By introducing vacancy decontrol, the Conservatives eliminated the most common ground for illegal rent applications. They also limited the number of applications by changing the limitation period from six years to one. If a tenant fails to file an application within one year of paying an unlawful amount, the

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36. Regulations of the *Tenant Protection Act* deem capital work completed within the previous 18 months to be eligible for above-guideline review.

37. Ontario, Ministry of Municipal Affairs and Housing, *1999-2000 Business Plan* (Toronto: 2000), *2000-2001 Business Plan* (Toronto: 2001).

rent becomes lawful (and, by extension, “fair”). A newly imposed \$45 application fee also created a barrier not present under the NDP rent regime.

Contrary to Mr. Leach’s predictions, the *Tenant Protection Act* has not led to a strong, healthy housing market, with protection against unfair rent increases for tenants. Even conservative journalists recognize the Conservative Government’s housing strategy has been a flop, reporting stories of 30% to 100% rent increases due to vacancy decontrol. *The Globe’s* John Ibbitson wrote,

Mr. Clement and his government should come clean: The Mike Harris strategy to revive the housing market failed. New measures are required. The private sector is not up to the job.<sup>38</sup>

### ONTARIO RENTAL HOUSING TRIBUNAL

Tenants lost more than affordable housing when the Conservatives proclaimed the *Tenant Protection Act*; they also lost their access to justice at the courts. For the previous 25 years, while rent-review matters had been adjudicated by provincial commissions, boards, and other administrative bodies to adjudicate, the “bread and butter” of landlord/tenant disputes had remained the jurisdiction of the federally appointed courts. All this changed with the proclamation of the *Tenant Protection Act*. Though the duties of landlords and tenants remained basically the same, the process for settling disputes was removed from the courts and handed to a newly established Tribunal with a very different set of procedures and practices.

The theory advanced by the Conservatives was that the court system was slow and cumbersome and that justice could be dispensed more efficiently and cheaply by a Tribunal, while maintaining fairness to all parties. This theory seems incredible, considering the 20-year history of backlogs at Ontario’s rent boards, offices, and commissions, which took up to a year or more to process rent-review applications. There has been nothing in the history of rent review to indicate a Tribunal could perform more efficiently than the courts.

The fact was that the Courts had been fairly efficient in dealing with landlord and tenant matters while preserving each party’s right to due process. Justice was not dispensed as cheaply as the Conservatives felt it could be; they decided to create their own tribunal to handle all landlord and tenant disputes so that they could control and reduce the cost.<sup>39</sup>

When introducing his “New Directions” white paper, which became the blueprint for the *Tenant Protection Act*, Al Leach promised,

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38. John Ibbitson, “Admit It: Harris’s Strategy Is a Flop” *Globe and Mail* (1 October 2000).

39. Ontario, Ministry of Municipal Affairs and Housing, *1997-1998 Business Plan* (Toronto: 1998) 7: “The proposed Tribunal would take over landlord and tenant dispute resolution, which is currently delivered through 50 courthouses . . . It is estimated that the cost of administering tenant protection legislation, which is currently shared by MMAH and the Ministry of the Attorney General, would be reduced by 25 per cent when the proposed new Act is fully implemented in 1999-2000.”

We have long aimed to make the system more efficient and responsive to tenants. Therefore the Landlord and Tenant Act will be moved out of the courts and become part of the new legislation.

Tenants rights won't change under this Act. Matters will be resolved through an administrative body to streamline the dispute process and provide one-stop shopping in all tenancy related matters. Our system will mean faster decisions.<sup>40</sup>

In November 1999, Tony Clement, then minister of Municipal Affairs and Housing, repeated this myth, despite mounting evidence to the contrary, when he informed the Standing Committee on Estimates,

The new Ontario Rental Housing Tribunal has proved to be very effective. This tribunal, to remind members, was set up to ensure a fair, more efficient process of hearing landlord-tenant disputes, moving them from the court system into a less formal system of mediation and adjudication. It has meant that disputes are heard much more quickly. It used to regularly take months and months to get a court date. Applicants are now generally getting their cases heard within three weeks. Members of the tribunal are getting their decisions out to the parties within two to three days.<sup>41</sup>

In June 2000 I wrote a report that challenged these claims.<sup>42</sup> I examined several sets of statistics released by the Tribunal and concluded that the Ontario Rental Housing Tribunal discriminated against tenants in the handling of applications and the scheduling of hearings on tenant applications, and hence its procedures could not be called "fair." Disputes were not heard more quickly, certainly not heard within three weeks as the Minister had claimed. A statistical analysis for the month of July 1999 (the only month for which such data was provided) showed:

- The Tribunal processed tenant default orders more slowly than landlord default orders.
- Landlord applications were heard sooner than tenant applications.
- Landlords waited an average of 31.56 working days for a hearing on a non-arrears eviction application, while tenants experiencing harassment, threats, or suspension of vital services waited an average of 35.2 working days for a hearing.
- Tenants waited 11.8 working days for their orders, while landlords waited less than 7 days.<sup>43</sup>

This information was obtained in August 1999 from a document prepared by the Tribunal. It is inconceivable that the Minister did not have this information when he addressed the Legislative Committee in November of that year.<sup>44</sup>

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40. Ontario, Legislative Assembly, *Debates* (25 June 1996) (Minister's statement).

41. Ontario, Legislative Assembly, *Debates* (November 1999) Standing Committee on Estimates.

42. Parkdale Community Legal Services, "The Ontario Rental Housing Tribunal: No Justice for Tenants" by Elinor Mahoney (Toronto: Parkdale Community Legal Services, 2000). Also online: <<http://www.parkdalelegal.org/ORHT.htm>>.

43. *Ibid.* at 4-5.

44. *Ontario Rental Housing Tribunal: Monthly Statistics, July 1999*, Toronto.

Other statistics supported the conclusion that tenants were not treated fairly. Landlords generated the vast bulk of the Tribunal's workload during the first 18 months of operation, while tenants accounted for only 8% of the total. Yet it was tenants who suffered delay. For example, from September 1998 to December 1999, the backlog in illegal-charges applications filed by tenants grew by 140% while the backlog for eviction-arrears applications fell by 4%.<sup>45</sup>

Mr. Clement dismissed the findings that landlord applications were given priority over tenant applications at the Tribunal. *The Toronto Star* quoted the Minister: "We do have a 72 hour tenant turnaround on health and safety issues . . . If there is an elevator that needs repair, or a rat infestation, then these things get dealt with more quickly."<sup>46</sup>

At a subsequent press conference held by tenant groups to release a report card on the Minister's lacklustre performance, an unidentified Ministry official handed out a "fact sheet" on the Tribunal to all assembled. Among its claims:

Through the Tribunal, most applicants' cases are heard within three weeks and the members of the Tribunal are getting decisions out to parties within two to three days . . .

The Tribunal schedules tenant applications with the same urgency as landlord applications . . .

Applications that involve threats to health or safety of tenants are heard within 72 hours . . .<sup>47</sup>

The Minister and his staff ought to have known the inaccuracy of their claims. Months earlier, an operational review by KPMG of the Ontario Rental Housing Tribunal had reported to the Minister that "the data indicate that the waiting period between filing an application and the actual hearing date has *increased* [emphasis mine] from a program start of 21 days up to 36 days."<sup>48</sup> It should be recalled that KPMG tracked arrears applications, which are dealt with much more quickly, on average, than any type of tenant application.<sup>49</sup>

Fortunately, *The Toronto Star* did not allow the Minister's assertion to remain unchallenged. It interviewed a tenant whose Scarborough building had been the subject of media attention because its only elevator had been broken for weeks. Three disabled tenants and several elderly tenants were virtual prisoners in their apartments, and tenants had to use pulleys to haul their groceries upstairs. Desperate and frustrated, the tenants applied to the Ontario Rental Housing Tribunal for help, only to discover, as the tenant told the *Star*, they had to wait five weeks for a hearing.

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45. Mahoney, *supra* note 42 at 8.

46. Hamida Ghafour, "Panel and 'Eviction Machine' Tenan Group's Report Finds" *The Toronto Star* (7 June 2000).

47. *Tenant Protection Act* Fact Sheet, *supra* note 18.

48. KPMG, "Operational Review of the Ontario Rental Housing Tribunal" (Toronto, December 9, 1999) at 3.

49. See Mahoney, *supra* note 42, for comparison. The one exception to slower treatment for tenant applications is one type of T2 application involving an illegal lockout. The Tribunal can (and does) exercise its discretion to abridge the time requirements for serving the landlord with a copy of the application and Notice of Hearing so that a hearing can be held quickly, sometimes within four days. Other T2 applications are not treated so expeditiously, as the Tribunal statistics clearly demonstrate.

The Ministry and the Tribunal considered scheduling delays for tenant applications to be fair and justified, because they have adopted a “customer service” model of operation instead of an “equal access to justice” model. Since most of the Tribunal’s “customers” are landlords, they should get the “best service.” One ORHT official has likened the Tribunal to the Family Responsibility Office and said, “[A]lthough you might think our job is tawdry, we are doing it.”<sup>50</sup> (Apparently ORHT equates tenants with deadbeat dads). The Tribunal clearly perceives its role as a service provider to landlords seeking to evict tenants.

KPMG’s operational review of the Tribunal took the same view. They chose to focus their “process analysis” on the handling of eviction/arrears applications, because such applications “represent 75% of the volume of applications processed by the Tribunal” and was “where we could expect the greatest return on investment.”<sup>51</sup> Apparently, KPMG believed that improving service to the majority of applicants was the most important task, even if the majority were all from one class of applicants—landlords. The concept of “justice for all” appears not to have been considered.

KPMG explored ways to ensure that more eviction applications could be handled by default judgement (a cheap alternative) instead of proceeding to a hearing (an expensive option). They recommended that tenants responding to an eviction application be required to “substantiate their dispute” to staff before a hearing would be scheduled.<sup>52</sup> They suggested that Tribunal staff should help landlords fix any deficiencies, so the matters would not be pushed to a hearing:

Where information is missing or incorrect, a quick telephone call to obtain the necessary information means fewer defaults are pushed to a hearing.<sup>53</sup>

Adopting a “cost/benefit perspective,” KPMG recommended a focus on “minimizing the range of administrative tasks” assigned to adjudicators, such as signing default orders and writing “lengthy” reasons for decisions.<sup>54</sup> Staff members—presumably not the ones who help the landlords complete their applications or reject tenants’ disputes as insufficient—could assume responsibility for signing default orders. They projected that the default rate could increase to 70% of all eviction applications if these efficiencies were introduced.<sup>55</sup>

KPMG also examined the processing of tenant applications. While ORHT officials acknowledged delays in hearing tenant applications in general, they have blamed the delays on tenants who they say bring “a lot of emotion” and “complex issues” into their applications.<sup>56</sup> Tenant applications take longer to hear than landlord applications, they

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50. Comments by senior official, Ontario Rental Housing Tribunal, to Tenant Advocacy Group, Toronto, April 4, 2000.

51. KPMG, *supra* note 48 at 25.

52. *Ibid.* at 48.

53. *Ibid.* at 30.

54. *Ibid.* at 35-36.

55. *Ibid.* at 50.

56. ORHT official at April 2000 meeting with Tenant Advocacy Group, Toronto, April 2000. See also the Ministry Fact Sheet, *supra* note 18.

say. Consequently, the Tribunal schedules them only sparingly in order to keep the processing of landlords' eviction applications at an acceptable rate.

KPMG accepted this explanation and recommended that tenants-rights applications be diverted to mediation because "they tend to lead to lengthy hearings."<sup>57</sup>

Tenant applications tend to be the most labour intensive and time consuming. Therefore, streamlining opportunities around the tenant applications were also a focus of our research and analysis.

The process recommendations are also based on the premise that efficiencies and cost savings can be achieved through the resolution of landlord and tenant applications at the earliest stage in the process.<sup>58</sup>

Overall, process improvements and a refocusing of mediation activities should result in fewer applications proceeding to a hearing, and *generally the applications that will be heard will be primarily landlord applications*<sup>59</sup> [emphasis added].

It is interesting to note that the Minister refused to release the Operational Review, despite promises by ORHT officials to the contrary. Perhaps the Minister knew KPMG's recommendations would alert tenant advocates to the "new direction" the Minister intended to take. It took a Freedom of Information request by the Centre for Equality Rights in Accommodation to make this document—essentially the blueprint for future practice at the Tribunal—public.

Clearly the concept of "first come, first served" is lost on the people who run the Ontario Rental Housing Tribunal and the accountants they hire to evaluate their performance. Increasing the number of applications processed and decreasing the average processing time has become all-important, even though accomplishing this goal has been at the expense of tenants and their access to justice.

Imagine a grocery store run on these principles. Only the express lines would be open, and customers with more than eight items would be told to line up at the closed checkouts. They would wait and wait while other customers—some who came to the store after them—were ushered through the express line quickly and efficiently. The manager would congratulate himself at the number of customers served, while ignoring the desperate, hungry, and annoyed lineup of people with full grocery carts.

Eventually, one or two of these customers would make it to an open checkout counter. Undoubtedly, they would stop to express some anger and frustration to the clerk because of the length of their wait. "You see," the manager would say, "these shoppers are too emotional; they're wasting our time. It's their own fault they don't get served!"

For tenants in Ontario, dealing with the OHRT is like shopping at this grocery store. Unfortunately, they cannot take their business to another store; the Tribunal has exclusive jurisdiction to deal with matters between landlords and tenants. This means that issues of importance to tenants—such as maintenance, harassment, and illegal rents—are placed

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57. KPMG, *supra* note 48, at 33.

58. *Ibid.*

59. *Ibid.* at 48.

on the back burner so that eviction applications can be processed more quickly.<sup>60</sup> (last modified: May 2000) for a fuller examination of the barriers that tenants face in attempting to resolve disrepair problems.

### SECURITY OF TENURE: AN INCREASE IN EVICTIONS

ORHT statistics for the year 2000 indicate there were 61,278 eviction applications filed province-wide in 2000,<sup>61</sup> compared to 49,679 applications in 1997, the last calendar year that the courts handled landlord and tenant disputes.<sup>62</sup> This is an increase of 24% in the annual rate since the *Tenant Protection Act* became law.

Clearly the changes in law have threatened security of tenure for an alarming number of tenants in Ontario, despite Mr. Leach's promises. The gutting of rent controls combined with the elimination of social-housing programs (which could have offered some competition to the private developers) has created an opportunity for rent gouging every time a unit changes hands. This, in turn, has created a financial incentive for landlords to encourage lower-rent tenants to move out. Ontario tenants are under siege, as table 1 shows.

**Table 1**  
**Eviction Applications Filed**

Type of application	June 17/98 – June 30/99 (First year of ORHT operation)	January 1/00– December 31/00 (Latest calendar year)	Percentage Increase (rounded to nearest%)
A2: Sublet & assign	227	336	48%
A3: Combined application	1,594	2,393	50%
L1: Arrears/eviction	46,104	49,257	6%
L2: Eviction—other (owner's own use, disturbance, etc.)	5,473	6,632	21%
L3: Eviction—tenant gave notice but failed to leave	1,340	1,411	5%
L4: Eviction—failed settlement	828	1,248	51%
<b>TOTAL Eviction Applications</b>	<b>55,566</b>	<b>61,278*</b>	<b>10.3%</b>

\*Includes one L7 care-home "transfer and eviction" case

60. See Elinor Mahoney, "Tenant Disrepair Applications: Justice Delayed Is Justice Denied" (May 2000) online: <<http://www.parkdalelegal.org/LSUC.htm>>.

61. The total of all A2, A3, L1-L4, and L7 applications filed in 2000.

62. City of Toronto, "Options for Eviction Prevention: Final Report" by Lapointe Consulting Inc., Toronto, November 1998.

Eviction and Arrears applications are still on the rise. The 6% increase in applications filed and the 51% increase in failed settlements of previous applications show that an increasing number of tenants are unable to afford their rent, and that landlords are less willing to work out a settlement within the tenant's power to uphold. The increase of 21% in eviction applications for non-arrears problems or landlord's own use is remarkable. Can it be that 21% more tenants are misbehaving? Or that 21% of small landlords suddenly want to move their family back to rental accommodation? More likely, this steep increase demonstrates that landlords are being creative finding reasons to evict tenants who pay their rent on time. Similarly, the 48% increase in applications to evict overholding sub-tenants or assignees is likely connected to a growing phenomenon witnessed by Legal Aid Ontario Community Legal Clinics, where landlords evict family or household members from their home because their names are not on the lease, and the head tenant has died or moved out.

Add the Tribunal's one-sided "customer service" approach to the increasing demand for evictions, and tenants find themselves out in the cold. Not only are eviction applications on the rise, but so is the rate of default judgments against tenants. During the first year of operation, eviction orders were issued without a hearing in 56% of applications.<sup>63</sup> The Operational Review recommended ORHT staff take measures to increase the number of tenants evicted without a hearing. The ORHT must have agreed with the recommendation because the default rate rose to 61% in 2000, and currently fluctuates between 59% and 65% monthly.<sup>64</sup>

The process established by the *Tenant Protection Act* is confusing to tenants and contributes to the high default rate. Tenants receive a Notice of Hearing that specifies a hearing date for the eviction matter, but the hearing does not take place unless the tenant files a written dispute within five days of receiving the notice. For two years, tenant advocates have lobbied the ORHT to revise its very confusing Notice of Hearing, submitting our own draft form more than a year ago.

Despite the Tribunal's repeated promises to revise the form (last repeated at a July 2000 meeting between tenant representatives and the Minister of Housing) no new Notice has materialized. Tenant representatives have been provided many excuses ("We are moving to electronic forms," "We have to hire a consultant," "Our consultant will be contacting you soon"). As of March 2001 we have not seen even a preliminary draft. The inescapable conclusion is that the Tribunal does not want tenants to understand the Notice, because if tenants understood, they might file disputes, and this would lead to expensive hearings.

Perhaps this is why the Tribunal misleads tenants about the eviction process by omitting the dispute mechanism altogether from the Frequently Asked Questions on the ORHT's Web site:

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63. Ontario Rental Housing Tribunal, *supra* note 44.

64. Conversation with Carol Kiley, manager, Program Development, Ontario Rental Housing Tribunal, January 2001.



### 1. What is the process for evicting a tenant?

The landlord must serve the tenant with a Notice of Eviction, wait the prescribed number of days set out in the notice and then make an application to the Ontario Rental Housing Tribunal. *A tenant will always have an opportunity to present arguments against the eviction at a hearing* [emphasis added]. When a landlord obtains an eviction order, it must be filed with the Sheriff at the Court. Only the Sheriff can evict a tenant.<sup>65</sup>

KPMG's Operational Review was of the opinion that "landlords are typically looking for faster methods of processing their applications, while tenants want more advice and guidance on their rights under the Act."<sup>66</sup> The Tribunal has seen to the landlords admirably, while leaving the tenants shut out of the process almost completely, both as respondents to eviction applications and as applicants to enforce their own rights. What "advice and guidance" the Tribunal has given may have done as much harm as good.

As for Tribunal members, tenant advocates have complained about inept adjudication, lengthy unexplained delays in issuing orders, and a high rate of bad decisions, which has resulted in a large number of review requests.<sup>67</sup> Advocates say the \$75 review fee is prohibitive to tenants and that too many review requests and set-asides are denied. They note that Tribunal members treat landlord applications differently than tenant applications. It is common for landlords to be granted eviction orders when the tenant fails to show up on time for the hearing; tenants—who wait longer for a hearing in the first place—usually find their disrepair applications adjourned to a later date if the landlord fails to appear.

The Tribunal is meant to offer "one-stop shopping" for landlords and tenants, yet tenants have found it difficult to have their issues heard, and not just because of delay. The Tribunal claims lack of jurisdiction to deal with several serious tenant concerns. Awarding damages; ordering landlords to give evicted tenants access to their possessions; and issuing interim orders—during illegal lockouts—to prohibit the re-renting of a unit before the hearing, are three examples of remedies the Tribunal says are beyond its power to grant. Significantly, the Tribunal has shown no initiative or leadership in "thinking outside the box" to come up with other ways of helping tenants facing these situations.

Neither the Chair of the Tribunal nor his staff has exhibited much concern about complaints made by tenant advocates. It took tenant advocates more than a year of

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65. Ontario Rental Housing Tribunal, online: <<http://www.orht.gov.on.ca/faqs/index.html>> (date accessed: 21 June 2000).

66. KPMG, *supra* note 48 at 15.

67. Landlord advocates also complain about the calibre of decision makers. "My experience has been that many of the recent appointments lack even the most fundamental knowledge with respect to the regime put in place by the *Tenant Protection Act*. Needless to say, this has a detrimental effect on the quality of the decisions made and makes attendances before the Tribunal comparable to a game of Russian roulette." The Law Society of Upper Canada, *Residential Tenancies and the Tenant Protection Act: The First Two Years in Review* by Jane Ferguson (Toronto: Law Society of Upper Canada, 2000).

repeated requests to obtain a meeting with the Chair, to discuss problems with ORHT procedure and quality of adjudication. His staff has been more accessible, but many concerns brought to their attention remain unresolved, despite frequent meetings.<sup>68</sup> The ORHT bureaucracy seems bogged down: as of March 1, 2001, it had not released its annual report for 1999-2000. It is as though the constant struggle to process a growing number of eviction applications more quickly and at lower cost has sapped Tribunal members and staff of all energy to do anything else.

The result has been ruinous for Ontario. The Ontario Rental Housing Tribunal has become a mechanism for Ontario landlords to dislocate tens of thousands of tenants from their rent-controlled apartments and throw them into the wilds of a rental market with no vacancies and no affordable rents. It has aggravated the homelessness crisis evident throughout Ontario. Shelter use in Hamilton jumped by 35% between November 1998 and December 2000.<sup>69</sup> Toronto's homeless families have grown from 320 to 2070 in the past decade and must stay in shelters as long as eight months before they can find a place to live.<sup>70</sup> Ottawa, which just three years ago had a healthy rental housing market, has seen a rise in shelter use corresponding to a sharp decrease in vacancies; in December 2000 the city was beyond its capacity, serving 650-700 homeless people on any given night.<sup>71</sup>

The response of the Ministry of Municipal Affairs and Housing has been to increase to \$50 million the amount of rent supplements paid to landlords who rent to low-income tenants.<sup>72</sup> At the same time, the Ministry continued to reduce the monthly subsidy for Ontario Housing Corporation and other social housing as it prepared to download social housing to the municipalities. The Ministry of Community and Social Services has increased spending on shelters and hostels. Its Minister, John Baird, has pledged "to spend what it takes to ensure that everyone has a warm place to sleep at night."<sup>73</sup> The *per diem* rate for shelter beds was raised to \$38 on January 1, 2001. It now costs more than \$1,155 per month to keep someone homeless.

Mr. Clement, while admitting Ontario has not seen the rental-housing starts promised by the housing industry, stubbornly continued to defend both the Ontario Rental Housing Tribunal and the gutting of rent control until his move to the Health portfolio.<sup>74</sup> It will be up to the new Minister, Chris Hodgson, to assess whether Mr. Clement and his predecessors were right, or whether another "new direction" is needed.

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68. Poor quality of recording in hearings tapes, consistent failure to send copies of orders to the legal representatives of tenants, and scheduling delays for hearings on disrepair applications involving several tenants, are just three examples. It has become a standing joke at the Tenant Advocacy Group that our agenda items have not changed since our first meeting with ORHT officials.

69. "No Limit to Shelter Bed Funding, Province Says" *The Toronto Star* (3 February 2001).

70. Krista Foss, "Family Use of Shelters on the Rise" *The Globe and Mail* (5 February 2001).

71. Bob Harvey, "No Room at Shelter for Homeless Women" *Ottawa Citizen* (23 December 2000).

72. MMAH Business Plans, 1999-2000 and 2000-2001, under the Homelessness Initiatives Program.

73. *Supra* note 69.

74. Expect to see privatization and two-tiered access to health care.

Given the failure of the private rental market to create new housing, maintain the current stock, or stop rent gouging at every opportunity, the Minister would be well advised to abandon it and look elsewhere for solutions. The strategy of cronyism with landlord lobby groups has created the worst housing crisis in 30 years. It is time to develop a radically different strategy—to promote home ownership for tenants of all incomes and create real competition for the rental industry. Tenant groups believe government should have a role in creating housing, preferably non-profit, in order to provide stable homes at the best price. The Ontario government has rejected this role, maintaining that housing built by government-funded developers cost taxpayers more than privately developed housing. To adapt OXFAM's motto: Rent a man an apartment and you house him for a day; build a man a home and you house him for a lifetime. But Mr. Hodgson has another option.

The growth of the condominium market in recent years has given middle- to high-income renters a way out of the rental-housing quagmire. Perhaps the Minister could establish a program to assist low-income tenants to do the same. Most would require a subsidy of their monthly mortgage and condominium fees. Unlike shelter subsidy programs proposed by landlords, a condominium subsidy plan would be manageable, since mortgage charges would remain stable from year to year, where rents increase at several times the rate of inflation in Ontario. Only new condos or buildings built in the last five years should be eligible. This would stimulate the construction industry and protect unwary tenants against purchasing units from landlords seeking to unload aging buildings in need of expensive repairs. For that reason—and to ensure that tenants would not be displaced—tenanted buildings converting to condominiums should not qualify. Developers of conversion projects are capable of coming up with their own program for tenants, as Minto has demonstrated in Etobicoke.

The Minister should also admit that the Ontario Rental Housing Tribunal has failed to treat tenants fairly in the handling of landlord and tenants disputes and has not matured into an effective, competent, administrative tribunal. Shelter is a basic need, and the courts should handle disputes that would jeopardize tenants' security of tenure. A return to justice is the least that Ontario tenants deserve.