



2000

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Citation Information

Rapsey, Paul Stuart. "See No Evil, Hear No Evil, Remedy No Evil: How the Ontario Rental Housing Tribunal is Failing to Protect the Most Fundamental Rights of Residential Tenants." *Journal of Law and Social Policy* 15. (2000): 163-180.
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol15/iss1/5>

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SEE NO EVIL, HEAR NO EVIL, REMEDY NO EVIL: HOW THE *ONTARIO RENTAL HOUSING TRIBUNAL* IS FAILING TO PROTECT THE MOST FUNDAMENTAL RIGHTS OF RESIDENTIAL TENANTS

PAUL STUART RAPSEY*

RÉSUMÉ

Dans cet article, l'auteur laisse entrevoir que le nouveau Tribunal du logement de l'Ontario ne protège pas les intérêts des locataires d'habitation. Bien que le tribunal soit un organisme créé par une loi et qu'il soit lié par les dispositions de cette loi, l'auteur indique que le Tribunal a limité sa portée en adoptant une interprétation indûment étroite des pouvoirs qui lui sont conférés par la loi. L'article se penche sur l'approche adoptée par le Tribunal relativement à la protection des locataires évincés injustement, au report ou refus de l'éviction et aux recours mis à la disposition des locataires pour l'entrave à leur jouissance paisible des lieux. L'auteur termine en indiquant que le Tribunal tel qu'il est constitué présentement donne à croire que les locateurs possèdent un plus grand droit de possession immédiate des logements locatifs que les locataires.

I. INTRODUCTION

I am going to suggest in this paper that the *Ontario Rental Housing Tribunal* (Tribunal) has failed in the early days of its authority to assume its jurisdiction to the full extent possible where the rights and remedies available to tenants are concerned.¹ The legislation which governs it is far from perfect and leaves many apparent gaps. It has been poorly and inconsistently drafted. However, these shortcomings alone do not excuse or explain the refusal to fully protect tenants from wrongful eviction or to honour their right to security of tenure.

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1. The perception of bias against tenants is not helped by the Tribunal's location in the Ministry of Municipal Affairs and Housing office building, by its initial use of Ministry of Housing letterhead, or by the appointment of Ministry personnel to key Tribunal positions.

The Ontario *Tenant Protection Act, 1997*² (*TPA*) was proclaimed in force on June 17, 1998. The *Act* created a new adjudicative Tribunal to deal with residential tenancy disputes.³ In doing so it repealed the former legislation governing residential tenancies in the province.⁴ It consolidated matters relating to two statutes into one. It transferred both the former *Landlord and Tenant Act*⁵ (*LTA*) jurisdiction from the provincial superior courts and the former *Rent Control Act, 1992*⁶ (*RCA*) jurisdiction from the Ministry of Housing to the newly created *Ontario Rental Housing Tribunal*.

It was Part IV of the *LTA* which governed security of tenure issues. The provisions of the *TPA* dealing with security of tenure issues are, for the most part, the same as the former residential tenancy provisions of the *LTA*.

The Tribunal is governed by two pieces of legislation, the *TPA* and the *Statutory Powers Procedure Act*⁷ (*SPPA*). The Tribunal has promulgated a number of *Interpretation Guidelines*⁸ for Tribunal Members and *Rules of Practice*⁹ which flesh out some procedural and jurisdictional issues. It has produced a *Case Law Manual*, a *Procedures Manual* and an *Evidence Manual* for its adjudicators. The Tribunal has also published a number of information flyers for the public which purport to summarize the rights and obligations of landlords and tenants,¹⁰ and for the purpose of its adjudicators, a number of "Issue Sheets".¹¹ In addition, there are literally thousands of Tribunal decisions to date.¹² While it would be impossible to review all of these decisions, I

2. S.O. 1997, c.24.

3. *Ibid.*, s-s.157(1).

4. See *TPA supra* note 2, ss.209-222.

5. R.S.O. 1990, c. L-7.

6. S.O. 1992, c.11.

7. R.S.O. 1990, c. S-22.

8. These are non-binding guidelines authorized by *TPA* s-s.164(3).

9. These are authorized by *TPA* s-s.164(2).

10. Topics include general information about the Act and more specific information about the process (e.g., the hearing, mediation, filing an application, fees, location of offices), and substantive issues (e.g., grounds for eviction, rules about rent, privacy rights, care homes, mobile homes, landlord lease communities, offences).

11. Topics include: breach of mediated settlement, time lines for filing an arrears application, payment by tenant to avoid eviction, illegal eviction, abandoned property rules, mortgagee in possession, maximum rent, vital services, and landlord's own use eviction. These Issue Sheets are not posted on the Tribunal's Web Site and are not generally available to the public.

12. There are very few appeal decisions to date and only one we are aware of has touched on an issue upon which this paper focuses: *Hung v. C.L.K. Enterprises Inc.*, [1999] O.J. No. 3559 (Div. Ct.). This decision is somewhat of an anomaly and a departure from previous Divisional Court jurisprudence dealing with relief from forfeiture. The Court appears to have interfered with the exercise of discretion by the Tribunal adjudicator in that case simply because it disagreed with the result. Previous Divisional Court jurisprudence has disapproved of such interference even where the Court would have reached a different result itself: *Re Peel Non-Profit Housing and McNamara* (1991), 2 O.R. (3d) 414 (Div. Ct.). Further, the appeal involved an issue of mixed fact and law at best. The Court only has jurisdiction in an appeal from the Tribunal on questions of law alone: *TPA*, s-s.196. The Court exceeded its appellate jurisdiction.

have read over 1,000 reasonably significant Tribunal decisions. Each of these sources has helped form the opinion expressed in this paper.

The paper will address the scope of the Tribunal's general jurisdiction and its remedial authority. In particular, it will deal with the authority of the Tribunal to assist a wrongfully evicted tenant, to grant relief from forfeiture, and to adequately compensate tenants for a landlord's failure to comply with the legislation.

II. PURPOSE OF THE *TENANT PROTECTION ACT*

The short title of the statute is the "*Tenant Protection Act, 1997*."¹³ It has not been named the "Landlord Protection Act" or the "Landlord and Tenant Protection Act." The then Minister of Municipal Affairs and Housing, the Honourable Al Leach, stated in a proclamation day news release that the *Tenant Protection Act* "protects tenants first and foremost."¹⁴

The most significant amendments made to the former residential tenancy scheme were made to those provisions dealing with administrative rent control issues rather than with the landlord and tenant tenancy agreement and security of tenure issues.¹⁵ The stated emphasis in the *TPA* concerning the *LTA* provisions was to simplify the process but to retain tenants' security of tenure and protect tenants' rights.¹⁶ The new *Tenant Protection Act* was intended to continue the same protection from arbitrary eviction that tenants had under the previous legislation.¹⁷ The governing legislation should be interpreted with these expressed and implied purposes in mind.¹⁸ In doing so, the legislation should be given a large and liberal interpretation.¹⁹

13. *TPA*, s.229.

14. Ministry of Municipal Affairs and Housing News Release, June 17, 1998. This echoed a statement by the Minister before the *Standing Committee on General Government*, Hearings on Bill 96 (*Tenant Protection Act*), Hansard, 12 June, 1997. In response to the fear that landlords would be motivated to evict sitting tenants with the demise of rent control, the Minister stated:

That's hardly the case. First of all, tenants are protected from arbitrary eviction.

There are specific reasons laid out in the *Landlord and Tenant Act* for the eviction of a tenant, and these involve serious violations of the landlord-tenant relationship.

The new *Tenant Protection Act* would continue the same protection from arbitrary eviction that tenants currently enjoy.

15. *New Directions*, Ministry of Municipal Affairs and Housing, 1996 at 5.

16. *Ibid.*

17. Statement of the Minister of Municipal Affairs and Housing to the Standing Committee on General Government, Hansard, 12 June, 1997.

18. *R. v. Jagger*, [1993] 2 S.C.R. 451, (1993), 103 D.L.R. (4th) 678, 153 N.R. 272 at N.R. 302-303; *Athwal v. Canada*, [1998] 1 F.C. 489, (1997), 40 Imm. L.R. (2d) 160, 220 N.R. 355 at 359-361 (Fed. C.A.), motion for leave to appeal to Supreme Court of Canada refused (1998), 227 N.R. 91 (S.C.C.); see also P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed., (Cowansville: Les Éditions Yvons Blais Inc., 1991) at 373-383. While former views of statutory interpretation had been that the purpose of a statute could only be gleaned from the words of the Statute, the Supreme Court of Canada has stated that in determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable: *R. v. Morgentaler*, [1993] 12 S.C.R. 463, (1993), 107 D.L.R. (4th) 537, 157

III. EXCLUSIVE JURISDICTION OF THE TRIBUNAL

Subsection 157(2) of the *TPA*, states that the Tribunal has:

... exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

This is a very circular provision. Other statutes have far better worded “exclusivity” clauses.²⁰ Subsection 157(2) also contains an ambiguity. It might be read to say either:

1. “the Tribunal only has exclusive jurisdiction if there is an application *and* the application is with respect to a matter for which the Tribunal has jurisdiction”, or
2. (a) “the Tribunal has exclusive jurisdiction with respect to an application properly made under the Act” *and*
- (b) “the Tribunal has exclusive jurisdiction with respect to any matter in which jurisdiction is conferred on the Tribunal by the Act”.

The latter interpretation gives the Tribunal its broadest and most remedial authority. It does not depend upon an application having been made. It allows for full incorporation of the *SPPA* powers and jurisdiction. The second clause is superfluous in the first interpretation. Further, had the first interpretation been intended, it could have been more succinctly and precisely stated in terms such as:

“The Tribunal has exclusive jurisdiction respect to all applications properly made under this Act.”

1. Outline of Tribunal’s Statutory Jurisdiction

I suggest that the Tribunal has virtually the same authority that the courts had in respect of residential tenancy matters under the *LTA*. The Tribunal frequently declines to assume jurisdiction which the courts had because it assumes, wrongly, that the superior courts’ powers flowed from their inherent jurisdiction.²¹ The Tribunal’s powers do not hinge on

N.R. 97 (S.C.C.). This included related legislation and evidence of the “mischief” at which the legislation was directed. It also included legislative history, in the sense of the events that occurred during drafting and enactment. The court stated that “provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation”: See N.R. paragraphs 28 to 29.

19. *Interpretation Act* R.S.O. c. I-11, s.10. As any relevant evidence is admissible before the Tribunal under *SPPA* s.15, the usual concerns about admitting extrinsic evidence of statutory purpose should not exist. In any event, the traditional concerns are no longer a barrier to the admission of extrinsic evidence before the courts: see *ibid*.
20. *E.g.*, see the *Workplace Safety and Insurance Act* S.O. 1997, c.16 (Schedule A), s-s.118(1) and former *RCA*, s-s.127(2).
21. See *Ng v. Neilson* (1998; Feldman), File No. TSL-03412 (ORHT) in which the adjudicator wrongly assumed that the courts had and exercised an inherent jurisdiction to award a landlord damages for breach of contract; *GH Capital v. Pelopidas* (1999; Feldman), File No. TNL-06455 (ORHT) in which the same adjudicator refused to apply the equitable principle of laches because the Tribunal was not a court of inherent jurisdiction; and *In the matter of Basement, 8 Birchlea Boulevard, Toronto, Brenda Murphy (Tenant)* (1999; Braund), File No. TSL-10524-RV (ORHT) in which the

a determination of the scope of the Tribunal's exclusive jurisdiction. Rather, they depend on an examination of the Tribunal's statutory jurisdiction, regardless of exclusivity.²²

The Tribunal has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction.²³ One must still determine what that jurisdiction is. That jurisdiction can be determined by reading the *TPA* and the *SPPA* within the context of the expressed legislative purpose. The *TPA* was touted by the Ontario Government as providing a simpler forum of "one stop shopping" concerning residential tenancy matters. It has always been a principle of our judicial and quasi-judicial system that a multiplicity of proceedings was to be avoided.²⁴ Tribunals, no less than courts, rely on the principles of *res judicata* and issue estoppel.²⁵

The Tribunal has authority to determine interlocutory matters²⁶ and any interim matters²⁷ which may arise. The Tribunal may make any orders in proceedings to avoid an abuse of process.²⁸ The Tribunal may extend or abridge time requirements²⁹ subject to certain limitations contained in the regulations.³⁰ The Tribunal may set terms and

adjudicator held the Tribunal lacked inherent authority to restore a wrongfully evicted tenant to possession.

22. In *Simpson v. Milligan* (1999; Timms), File No. SOT-00544 (ORHT), the adjudicator correctly pointed out that the courts did not award damages to tenants on the basis of any inherent jurisdiction but rather on the basis of a statutory jurisdiction in LTA clause 94(4)(c). Further the notion that damages could be awarded by the courts to landlords on an inherent or equitable basis was overruled in *Re Belperio and Theriault* (13 October 1993), Barrie # G-9080 (Ont. Gen. Div.) [unreported]; aff'd (18 March 1996) (Ont. Div. Ct.) [unreported]; rev'd (26 March 1998) File # C24938 (Ont. C.A.) [unreported]. The Court of Appeal held that since there was no statutory basis for awarding a landlord damages in the circumstances, they could not be awarded by the court.
23. *TPA*, s.162.
24. *Courts of Justice Act* R.S.O. 1990 c. C-43, s.138. E.g., see *Santos v. Windsor* (1999; Guenette), File No. EAL-03900-RV (ORHT); *Crate v. Brennan* (1999, von Cramon), File No. EAT-00391 (ORHT); *Saikaly v. Swanson* (1999; Guenette), File No. EAL-05232 (ORHT); *Clanfield and Atkinson v. Apartment and Housing Services Queen's University* (1999; MacInnis), File No. EAT-00840 (ORHT); and *Simpson v. Milligan* (1999; Timms), File No. SOT-00544 (ORHT).
25. E.g., see *Ontario Rental Housing Tribunal* decisions in *Shen v. Dellasciucca* (1998; Timms), File No. SOT-00066 (ORHT) and *McMahon v. 1266078 Ontario Limited* (1999; Gascoyne), File No. SWT-00366 (ORHT); *Social Assistance Review Board* decision in *SARB T-0208-31* (February 18, 1999; McClure) or *Pension Appeals Board* decision in *Korkise v. Minister of Human Resources Development* (July 28, 1999), Appeal CP06577 (PAB) [unreported]. Issue estoppel and *res judicata* are really just tools used to avoid a multiplicity of proceedings.
26. *SPPA*, s-s.4.2(1).
27. *SPPA*, s-s.16.1(1). The Tribunal has authority to set terms and conditions in an interim order: *SPPA*, s-s.16.1(2).
28. *SPPA*, s-s.23(1).
29. *TPA*, s-s.176(2).
30. *O. Reg 194/98*, s.36. The *Act* refers to time limits "in its proceedings" but the regulation, in reference to the *Act* appears to contemplate time periods which are not strictly in a proceeding. This suggests that either the regulation is not authorized by the Act or the term "in its proceedings" is intended to be read broadly: see, for example, clause 2 of *O. Reg 194/98*, s.36.

conditions in an order based on considerations of fairness,³¹ and, in particular tenant applications, has a residual discretion to grant additional remedies to those expressly set out in the statute as required by the circumstances.³² The issues of interim and interlocutory relief and residual authority are addressed below.

2. Interim and Interlocutory Authority

The Tribunal has no *Rules of Practice* or guidelines relating to interim or interlocutory proceedings or emergency situations. This suggests the Tribunal does not take these powers seriously. The Tribunal often appears quick to deny its jurisdiction over situations involving great injustice to tenants.³³ While the courts arguably retain the jurisdiction to grant interim relief even where a tribunal has exclusive jurisdiction over the final remedy,³⁴ this does not lead to a practical result for most tenants.³⁵

Interim or interlocutory authority is usually given to preserve or restore the *status quo* pending a final decision and to address hardship issues. Interim relief is arguably distinct from interlocutory relief. The *SPPA* refers to both. *Black's Law Dictionary*³⁶ defines the latter as a temporary provision *between the commencement and the end of a suit*. The term "interim order" is defined as one made until something is done. I suggest it is one that can be made *before* a proceeding is commenced.³⁷ An interim order may be an interlocutory order, but the two need not be interchangeable. The

31. *TPA*, s-s.190(1).

32. *TPA*, paragraph 34(1)5 and clause 35(1)(e).

33. In response to a request by tenant advocates to formulate procedures for urgent *ex parte* motions to restore a wrongfully evicted tenant to possession of the premises, the Chair of the Tribunal stated:

I wish to advise that the Tribunal will not be considering emergency orders of the type that you obviously prefer. We will be shortening time frames when possible and expediting hearings when the situation warrants. We will not, however, be providing *ex parte* orders in the type of emergency situations you describe.

The Tribunal has formulated no rules or guidelines to address these emergency situations on an *ex parte* basis or otherwise.

34. In *Canadian Pacific Ltd. v. Brotherhood of Maintenance Way Employees*, [1996] 2 S.C.R. 495, (1996), 136 D.L.R. (4th) 289, 198 N.R. 161 (S.C.C.), the Supreme Court of Canada held that even though the court had no jurisdiction over the final disposition of the matter, where there was no adequate remedy before the tribunal, it had inherent jurisdiction to grant an interlocutory injunction to maintain the *status quo* until the matter was resolved by the tribunal. At D.L.R. 296, the Court held:

... the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined. ... This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum.

35. Court proceedings, particularly those in the nature of an injunction, are extremely complex and beyond the practical capabilities of all but the most sophisticated litigants. Further, they are time consuming and extremely costly.

36. 6th ed. (St. Paul, Minn.: West Publishing Co., 1990).

37. This argument is somewhat undermined by Rule 40 of the *Rules of Civil Procedure* which refers to an "interlocutory" injunction in a pending proceeding rather than to an "interim" injunction in a pending proceeding. Regardless, whether the interim or the interlocutory power may be exercised in a pending proceeding, the authority appears to exist.

SPPA does not define either term and only refers to each in a most cursory manner. However, in giving a power to a *quasi*-judicial body, a statute is presumed to give a meaningful power.³⁸ While the authority to address an abuse of process must be “in a proceeding”,³⁹ the authority to make interim orders need not be.⁴⁰ This raises the question of when a proceeding is made. Certainly, there is no proceeding until it is made. This issue was not resolved in the context of the *LTA*.⁴¹ I would argue that under the *TPA* a proceeding is made when the applicant obtains the Notice of Hearing from the Tribunal: *i.e.*, before service and filing of a certificate of service. Therefore, any step after the applicant receives the Notice of Hearing is arguably a “matter *in* a proceeding” for the purpose of subsection 176(2).⁴²

3. Restoring a Wrongfully Evicted Tenant to Lawful Possession

The *TPA* is intended to govern the broadest range of residential tenancy disputes and is specifically geared to security of tenure issues. To maintain that a statute that purports to protect tenants does not provide the Tribunal with authority to restore a wrongfully evicted tenant to lawful possession is incongruous and can only bring the administration of justice into disrepute. The purpose of the reforms to residential tenancy law begun in the late 1960’s was to restrain landlord self-help evictions.⁴³ This principle was enacted into the *LTA* in 1970 and was adopted by the *TPA*.⁴⁴ Further, to hold that there is no way, absent a pre-existing tenant application, to restrain a landlord’s wrongful conduct is to demonstrate a very blinkered approach to the legislative scheme. Yet this is precisely what the Tribunal’s position appears to be.⁴⁵

38. *E.g., A.G. (Canada) v. Findenigg*, [1984] 1 F.C. 65 (Fed. C.A.) at 71-2.

39. *SPPA*, s-s.23(1).

40. *SPPA*, s.16.

41. *I.e.*, some courts held that service was required before an application was made and some held that filing was all that was required. At one time, some courts held that an application was not made until the hearing. This last result was no longer a viable option after the *LTA* was amended to distinguish between “making”, “hearing” and “determining” an application: *LTA*, s-s.117.1, as amended by S.O. 1993, c.27. The procedure for making an application has been altered under the *TPA* and the same result need not be reached. Under the *TPA*, the applicant receives the Notice of Hearing from the Tribunal at the time of giving the completed Application form to the Tribunal.

42. Indeed, *O. Reg. 194/98*, paragraph 36.2 appears to suggest that the very step of attempting to make an application, before service or ultimate filing of a certificate of service, is a step in its proceeding.

43. Ontario Law Reform Commission, *Report on Review of Part IV, The Landlord and Tenant Act*, Department of Justice, 1972. The Report states at 6:

... As indicated previously, the recommendations [in the Commission’s first Report upon which Part IV of the *LTA* was enacted] were intended to require resort to the courts for relief and to make illegal such self-help remedies as ... recovery of possession by ejecting the tenant.

44. See *LTA* s-s.121(1) and *TPA* s.41.

45. An internal policy position of the Tribunal suggests that a tenant may only bring an application (T2) regarding alteration of the locks and makes no reference to other possible applications: Issue Sheet #4, “If the Tenant is Locked out of the Unit”. It also states that a tenant may be told by counter staff at the Tribunal Offices that the tenant can request in the application that he or she be given a key. However, the counter staff is not supposed to suggest any other remedy. Despite this internal

Moreover, the Tribunal takes the position that an order restoring the tenant to possession cannot be enforced.⁴⁶ This is absurd.⁴⁷ An order restoring a tenant to lawful possession is effectively an order evicting the landlord from unlawful possession. Section 85 of the *TPA*, states:

An order *evicting a person* shall have the same effect, and shall be enforced in the same manner, as a writ of possession.

Section 85 refers to evicting “a person”, not evicting “a tenant” or “an unauthorized occupant”. The Tribunal appears to equate eviction only with removing a tenant from possession of the premises. While this is the usual application of the term, I suggest that this is too narrow a view in the context of section 85. Eviction is not a defined term in the *TPA*. The word “evict” means “to recover anything from a person by virtue of a judgment of a court ...”⁴⁸ While it is most commonly used concerning the expulsion of a tenant, it is not limited to this connotation. Under the *TPA*, a Sheriff enforces the recovery of possession of land. Rule 60.03 of the *Rules of Civil Procedure* states:

An order for the recovery or delivery of the possession of land may be enforced by a writ of possession (Form 60C) under rule 60.10.

A writ is not something enforceable by only a landlord or landowner.⁴⁹ It is enforceable by anyone who has an order for the possession of land. I suggest that, in the context of what is supposed to be balanced and comprehensive legislation, it most certainly can and should apply equally to a tenant.⁵⁰

In *Luganda v. Service Hotels Ltd.*,⁵¹ the English Court of Appeal, under a similar residential tenancy statutory scheme to that of Ontario, held that, as the tenant would have been entitled to an interim order restraining a landlord’s intended wrongful

direction, individual adjudicators have demonstrated a willingness to depart from what appears to be the position of the Tribunal bureaucrats.

46. See the Tribunal’s *Issue Sheet #4: “If the Tenant is Locked Out”*. Note that there are two basic types of wrongful eviction: one is obtained by landlord self-help tactics and the second is obtained through abuse of the Tribunal’s process and under the guise of an order of the Tribunal. These are discussed in more detail later in this section of the paper.
47. The *SPPA* deals with the enforcement of orders generally. The Tribunal’s and Sheriffs’ views seem to be that the Sheriff has no authority to assist the tenant and that a tenant must rely on the more cumbersome procedure under *SPPA* s.19. A certified copy of the Tribunal’s order in a proceeding may be filed in the Superior Court of Justice by the Tribunal or by the tenant. On filing, it is deemed to be an order of that court and is enforceable as such.
48. *Black’s Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990).
49. Indeed, under the *LTA*, either a landlord or a tenant could apply for a writ of possession: *LTA*, clause 113(1)(b): *e.g.*, a writ of possession was granted to a tenant in *Re Magnus and Greene* (1989), 6 R.P.R. (2d) 261 (Ont. Dist. Ct.).
50. *Black’s Law Dictionary* (*op. cit.*) defines writ of possession as:
Writ of execution employed to enforce a judgment to recover the possession of land.
It commands the sheriff to enter the land and give possession of it *to the person entitled under the judgment*. [Emphasis added.]
51. [1969] 2 Ch. 209 (Eng. C.A.).

eviction, a wrongfully evicted tenant should be in no worse position and should have his or her tenancy restored.⁵² This was so despite the fact that another person had since occupied the room.

The Chair of the Tribunal, Mr. Chisanga Puta-Chekwe, has declared that the Tribunal will not accept *ex parte* emergency (interim) motions to address actual or pending wrongful evictions.⁵³ While the Chair has indicated that the Tribunal would deal expeditiously with tenant applications,⁵⁴ the Tribunal has, to date, prepared no guidelines or procedures for dealing with such requests.⁵⁵ Anecdotal evidence of tenant case-workers around the province suggests that adjudicators have been given no sense of how to address such matters.⁵⁶ In the result, many simply do not deal with them.

The commentary to the Tribunal's *Rules of Practice*⁵⁷ states:

The Tribunal will not review the portion of an order which orders the eviction of the tenant if the order has already been enforced by the Sheriff's office. *The Tribunal has no authority to order the tenant to be put back into possession of the rental unit, or to remove any new tenant to allow the evicted tenant back.*⁵⁸

There is no statutory basis for the position that a tenant should not be put back into possession after eviction by the Sheriff. The Tribunal however has made a Rule dealing with review hearings to this effect.⁵⁹ The argument is presumably based on principles

52. *Ibid.*, at 220. See also, for example, *Re Mohammed and Barr* (12 October 1988), Halton SCOM 1084/88 (Ont. Dist. Ct.) [unreported] in which an interim injunction had been granted prohibiting a landlord from illegally entering the premises; *Re Blikki and Saikaley* (22 April 1988) (Ont. Dist. Ct.) [unreported] in which a wrongfully evicted tenant was ordered restored to possession on an interim basis; *Re Y.L. Wong Holdings Ltd. and Kelly* (28 May 1985), York #M112734/85 (Ont. Dist. Ct.) [unreported] in which an interlocutory injunction was granted restoring tenants to possession; *Chamberlain v. Van Schilt* (2 December 1997), Peterborough File #12890/97 (Ont. Gen. Div.) [unreported] in which a permanent injunction restraining the landlord from interfering with services was ordered in an *LTA*, s.94 application.

53. *Supra* note 33.

54. These require ten days notice to the landlord in the normal course.

55. Indeed, in the Tribunal's internal *Issue Sheet #4* the Tribunal requires that requests to shorten time requirements where a tenant is trying to bring an emergency application to be put back in possession must be put in writing before they will be accepted. There is absolutely no guidance about how hearings are to be expedited.

56. Unfortunately the legal maxim "justice delayed is justice denied" is all too evident in tenant dealings with the Tribunal.

57. This is written by Tribunal bureaucrats.

58. Commentary under Rule 27.2 [Emphasis added]. There is no legislative basis for the commentary that the Tribunal has no authority to put a tenant back into possession or to remove a "new tenant": see *Luganda v. Service Hotels Ltd.*, *supra*, note 52. It is the "new tenant" who is the unlawful occupant and his or her remedy against the landlord is in damages.

59. Rule 27.2 states:

A request to review an order which terminates a tenancy will be considered only if the portion of the order evicting the tenant has not yet been enforced, but the Tribunal may review any portions of the order other than the termination.

The *Rules of Practice* provide that the *TPA*, *SPPA* and regulations take precedence but only where

of *functus officio*.⁶⁰ In many cases a Sheriff's⁶¹ eviction will not be a wrongful one and so to that extent the position is correct. However, even a Sheriff's eviction may be wrongful where it has been obtained through an abuse of process.⁶² A tenant should not have to wade through the costly and time consuming appeal or judicial review process to get back into lawful possession if a statutory basis exists for a more expeditious remedy.

There are two main types of wrongful eviction: 1) self-help eviction by or on behalf of a landlord and 2) eviction under authority of the law obtained by means of abuse of process.⁶³ The abuse of process may be the enforcement of a void order,⁶⁴ the enforcement of a stayed order,⁶⁵ the enforcement of an order that is not applicable to the tenancy in question⁶⁶ or the enforcement of an order that was obtained without

there is a direct conflict, Rule 1.2. The Rules are authorized by *TPA*, s.164 and *SPPA*, s.25.1. The *SPPA* requires that the Rules be "consistent with" the Act. This means more than not being in direct conflict with a provision. I suggest it means also that it may not be in direct or indirect conflict with the purpose of the enactment: *i.e.*, to protect tenants' security of tenure first and foremost. Rule 27.2 does not offer this protection. The whole purpose of review hearings is to obviate the need for an appeal where there is an obvious error in determinations of fact, law or jurisdiction: see *Interpretation Guideline* (No. 8 – Review of an Order).

60. The principle of *functus officio* is not rigid. Sopinka J. had held in *Chandler v. Alberta Assoc. of Architects*, [1989] 2 S.C.R. 848 at 861-2, (1989), 62 D.L.R. (4th) 577, 99 N.R. 277 that the application of the principle in administrative proceedings which are subject to appeals only on a question of law (as are proceedings under the *TPA*) must be less formalistic and more flexible. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts.
61. The "Sheriff" is now properly called a "Court Enforcement Officer", although the officer is still commonly referred to as "Sheriff".
62. *Re Metropolitan Toronto Housing Authority and Sullivan* (25 April 1997), Toronto #96-LT-125248 (Ont. Gen. Div.) [unreported] in which the Court held that the principle of *functus officio* was not applicable to a default judgment under the *LTA* and that an eviction order could be set aside even where the order had been enforced by the Sheriff. This case was followed by the Tribunal in *Metropolitan Toronto Housing Authority v. Ahmed and Saban* (1999; Faughnan), File No. TNL-06552-SA (ORHT); set aside on review on other (highly questionable) grounds in (1999; Braund), File No. TNL-06552-RV (ORHT). This decision is under appeal.
63. Contrary to the Tribunal's determination in *Metropolitan Toronto Housing Authority v. Ahmed and Saban*, *ibid.*, there is no requirement that malicious intent be demonstrated for there to be an abuse of process. It merely requires an improper use of legal process. It is a distinct concept from malicious abuse of process or malicious prosecution. In *Re Anderson and Acres* (11 January 1993), Ottawa # 67569/92 (Ont. Gen. Div.) [unreported], the court applied its power to prevent an abuse of process where a court had evicted a tenant in a situation where the tenant had had no notice of the proceedings. Abuse of process was used by the Divisional Court in *Re Mascan Corp. and Ponzi* (1986), 56 O.R. (2d) 750 (Div. Ct.) and by the Court of Appeal in *French v. Rank City Wall Canada Ltd.* (1985), 3 T.L.L.R. 210 (Ont. C.A.) in contexts which clearly had no implication of a party trying to mislead the court.
64. *E.g.*, the order was rendered void because the tenant made the payments required under *TPA*, s-s.72(2).
65. *E.g.*, the order was stayed because there was an appeal filed or because the order had been stayed by the Tribunal in review proceedings.
66. *E.g.*, the tenant was not an occupant to whom the order applied or the tenant has entered into a new agreement with the landlord since the order was obtained. Unfortunately, this is not such an uncommon situation. In *Re 1109222 Ontario Ltd. and Murad* (17 September 1999), File No.465/98 (Ont.

jurisdiction.⁶⁷ I suggest that, in the case of self-help or abuse of process, there is ample statutory basis found in the *TPA* and the *SPPA* to restore a wrongfully evicted tenant to lawful possession. In the latter case, the Tribunal has express statutory authority to avoid an abuse of process in its proceedings⁶⁸ and is authorized to make any order necessary.⁶⁹

Whether the wrongful eviction was obtained by self-help or by order of the Tribunal, the Tribunal can make interim or interlocutory orders. It may, as discussed earlier, do so whether or not a proceeding has been commenced. A foundation for such orders would be tenant or former tenant applications, actual or pending, under the *TPA* based on breach of the covenant of quiet enjoyment⁷⁰ and wrongful alteration of the locks.⁷¹ The Tribunal can shorten time requirements⁷² for serving applications and can expedite hearings. Some adjudicators have so shortened time requirements that a hearing is held almost immediately upon request by the tenant.⁷³ However, because there is no guidance from the Tribunal bureaucracy concerning these situations, too often adjudicators are reluctant to assume this remedial jurisdiction.⁷⁴

Div. Ct.) [unreported], for example, the Divisional Court held that the landlord's agent's conduct in misleading the court and obtaining an eviction through abuse of process was "the stuff that causes judges to have nightmares".

67. *E.g.*, the tenant had no notice of the proceedings, the notice was fatally flawed because of a limitation period or, for a variety of possible reasons, the Tribunal had no jurisdiction to entertain the application.
68. I suggest that rectifying an abuse of process in proceedings includes addressing the enforcement of an order obtained in those proceedings.
69. *SPPA*, s.23.
70. *TPA* paras. 32(1)6 and 7 provide for tenant applications where "the landlord, superintendent or agent of the landlord has substantially interfered with the reasonable enjoyment of the rental unit or residential complex for all usual purposes by the tenant or a member of his or her household" or "has harassed, obstructed, coerced, threatened or interfered with the tenant during the tenant's occupancy of the rental unit". In either of these applications, the Tribunal may make any order it considers appropriate: *TPA*, clause 35(1)(e). What is more appropriate than restoring a wrongfully evicted tenant to lawful possession?
71. *TPA* paras. 32(1)3 and 4 provide for tenant applications where "the landlord, superintendent or agent of the landlord has illegally entered the rental unit" or "has altered the locking system on a door giving entry to the rental unit or the residential complex or caused the locking system to be altered during the tenant's occupancy of the rental unit without giving the tenant replacement keys".
72. *TPA*, s-s.176(2).
73. *E.g.*, see *Vangesen v. Boomhower* (1999; MacInnis), File No. EAL-03225-I (ORHT) which was an interim motion by the tenant without notice to the landlord. A hearing was held immediately albeit with telephone notice by the adjudicator to the landlord. In *Avcan Management Inc. v. Kayser* (1998; Feldman), File No. TSL-03107-SA (ORHT), the adjudicator permitted the tenant to commence an application on only four hours notice if the landlord did not comply with an order to restore the tenant to possession of the unit.
74. Adjudicators are not experts in residential tenancy law. Only slightly more than half the Members have law degrees. While some adjudicators have a rent control background or other adjudicative qualifications, there are few who have experience with the critical concepts developed under the *LTA* or the common law of landlord and tenant. The absence of this knowledge is all the more critical because so many tenants go before the Tribunal without legal representation.

4. Residual Authority

The Tribunal is admittedly not a court of inherent jurisdiction. Its remedial authority must be found in the statutes which govern it. Some adjudicators have purported to base a residual remedial authority in section 190 of the *TPA*.⁷⁵ However, subsection 190(1) gives the Tribunal authority to set conditions on an order.⁷⁶ It is not a remedy section. A similar provision was found in the *LTA*.⁷⁷ The Divisional Court has approved the use of terms and conditions to reach “sensible and practical” results.⁷⁸ Appropriate terms and conditions, as demonstrated by the case law, include the following:

- indefinite adjournments;⁷⁹
- time to pay arrears;⁸⁰
- directions as to method and time of payment of rent;⁸¹
- time for compliance in undertaking repairs;⁸²
- direction as to permitted occupants;⁸³

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75. *E.g.*, *Yang v. Hird* (1999; Guenette), File No. EAL-06337 and EAT-00801 (ORHT) and *Clark v. MacNeil* (1999; Guenette), File No. EAL-07173-RV (ORHT) in which the same adjudicator held that an award of damages to the landlord could be based on s.190 absent an express provision authorizing such an award.
76. Subsection 190(1) states:
190(1) The Tribunal may include in an order whatever conditions it considers fair in the circumstances.
77. *LTA*, s.113(11).
78. *Re Manufacturers Life Property Corp. and Senkow* (1990), 75 O.R. (2d) 254, 41 O.A.C. 374, 73 D.L.R. (4th) 381 (Div. Ct.). The trial judge had adjourned the application by the landlord for termination due to persistent late payment. The purpose of the adjournment was to give the tenant another chance. The Divisional Court approved of this.
79. *Ibid.*
80. In *Re Palkowski and Gjoni*, (13 December 1995), Toronto File # LT-103499 (Ont. Gen. Div.) [unreported], the tenant was given a period of time in which to pay the arrears before a writ would be issued. Moreover, the writ could only be issued after prior notice by the Sheriff to the legal clinic representing the tenant. The tenant was also given thirty days to pay the arrears in *Re Toronto Apartment Buildings Co. Ltd. and Gambhir* (1987), 60 O.R. (2d) 21, 23 O.A.C. 357, 39 D.L.R. (4th) 444 (Div. Ct.). Arrears were to be repaid by instalments in order to avoid termination in *Re Fort William First Nation and Pervais* (26 November 1996), Thunder Bay #96-1121 (Ont. Gen. Div.) [unreported].
81. In *Re Celano and Griffiths*, [1994] O.J. No. 2358 (Gen. Div.), the tenant was directed to make all future rent payments by cheque and on the first of the month.
82. In *Re Cormier and Norman* (1989), 19 A.C.W.S. (3d) 427 (Ont. Dist. Ct.) [unreported], the Court expressly relied on the power to set terms found in clause 113(1)(g). An order was made giving the tenants thirty days to carry out certain stated repairs, failing which the tenancy would be terminated and a writ of possession would issue.
83. In *Re Burda and Johnson*, [1994] O.J. No. 1562 (Gen. Div.), an application for termination for substantial interference was adjourned on the condition the offending occupant move out. This was to give the court a chance to see if matters settled down. Likewise, in *Re Pinecrest Heights and Gordon* (23 October 1996), Ottawa #101960/96 (Ont. Gen. Div.) [unreported], the troublesome male tenant was required to stay away from the premises as a condition of allowing the female tenant to

- directions as to use;⁸⁴ and
- directions as to method of communication with landlord.⁸⁵

They do not include devising additional remedies to those set out in specific provisions of the relevant legislation.⁸⁶

However, there is specific residual remedial authority contained in two provisions of the *TPA* which authorize the Tribunal to make “any other order that it considers appropriate”.⁸⁷ These provisions are ones which give the Tribunal authority with respect to remedies available to a tenant in particular applications. The Tribunal needs no inherent jurisdiction. It is this residual authority provided with respect to tenant applications for disrepair,⁸⁸ or breach of “quiet enjoyment”⁸⁹ upon which the Tribunal’s power to fully protect tenants rests, whether in an existing or intended application.

remain.

84. In *Re Joe Moretta Investments Limited and Burrell* (2 October 1991), Kitchener #LT377/91 (Ont. Gen. Div.) [unreported], the tenants were granted relief from forfeiture provided they discontinued operation of a business which was being operated illegally on the premises. In *Re Kidd and Grieve*, [1994] O.J. No. 2060 (Gen. Div.), termination was denied on the condition that the tenant offer a basement apartment in the rented house to the landlord’s son at \$350 per month.
85. Quite broad terms and conditions were imposed in *Re Fenwick and Lahaye*, [1996] O.J. No. 3849 (Gen. Div.). The order included a direction to the tenants to give the landlord post-dated rent cheques, to undertake certain repairs, and to communicate with the landlord via an agent.
86. In *Baumann v. House* (1999; Guenette), File No. EAL-02361-RV (ORHT), the adjudicator correctly held that s.190 did not go so far as to permit the Tribunal to impose general equitable remedies. (But see decisions by same adjudicator, *supra*, at note 76.) Appropriate conditions set by adjudicators can be found in a number of Tribunal decisions: *Ceasor v. Denny and Snider* (1998; Guenette), File No. EAL-00465-RV (ORHT) in which it was ordered that the order could not be filed with the Sheriff until a certain date; *Gates v. Piercey* (1998; MacVicar), File No. TEL-01828 (ORHT) in which the tenant was ordered to pay the arrears by a certain date in two installments to avoid eviction; *Jerome v. Sweeney and Weir* (1998; Savage), File No. EAL-02642 (ORHT) in which the landlord could bring on the same application on five days notice to the tenants if there were recurrences of the conduct within 6 months. The order required that affidavit evidence of the further incident be filed at the time of requesting the application be reopened. In *Avcan Management Inc. v. Kayser* (1998; Feldman), File No. TSL-03107-SA (ORHT), the order stated that, if the landlord failed to comply with an order putting the tenants back into the premises immediately, the tenants were to be entitled to commence an application for such relief as they deemed appropriate on 4 hours’ notice to the landlord. This notice could be given by fax to the landlord’s agent and the hearing of the application was to take place as soon as possible on an emergency basis.
87. *I.e.*, *TPA* paragraph 34(1)5 and clause 35(1)(e).
88. A tenant or former tenant’s repairs application is made under *TPA* paragraph 32(1)2 for breach of a landlord’s obligations under s.24. It is linked to the Tribunal’s authority to grant the remedies listed under s-s.34(1). This includes the residual authority under paragraph 34(1)5.
89. The specific applications are found in *TPA* paragraphs 32(1)3-10: illegal entry, illegal alteration of locks, interference with vital services, interference with reasonable enjoyment of the premises, harassment and certain bad faith evictions. These are dependent on the Tribunal’s authority to grant remedies under s-s.35(1). This includes the residual authority under clause 35(1)(e).

5. Damages Awards to Tenants

The failure of the Tribunal to protect tenants who have been wrongfully evicted is likely the greatest travesty associated with the TPA to date. It is difficult, however, to document this accurately because the basis of this conclusion depends in large part on anecdotal evidence.⁹⁰ What is more evident is the Tribunal's failure to respond to tenant complaints⁹¹ by offering them the full range of contractual remedies.⁹² In particular, the Tribunal has refused to acknowledge that tenants may be entitled to an award for damages based on a breach of a landlord's obligations under the statute or tenancy agreement.⁹³

The lack of guidance has placed tenants in a catch-22 situation. If they go to the Tribunal to request damages, they are likely to be told the Tribunal has no such authority.⁹⁴ If they go to the Courts, they are likely to be told that the Courts must defer to the Tribunal's exclusive jurisdiction in this regard.⁹⁵

Would it be a good thing if the Tribunal only assumed partial or limited jurisdiction to award damages?⁹⁶ I think not. It must be all or nothing, otherwise tenants are left with the unenviable task of knowing to which tribunal they must go in any given fact situation.⁹⁷

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90. The reason for this is that when the Tribunal refuses to take jurisdiction, the cases do not show up in Tribunal statistics.
 91. These complaints are uttered by way of tenant applications.
 92. A tenancy agreement is, after all, first and foremost a contract: see *Reference re Residential Tenancies Act, 1992, Nova Scotia*, [1996] 1 S.C.R. 186, 131 D.L.R. (4th) 609, 193 N.R. 1 (S.C.C.) per McLachlin J. at N.R. 28-9 [hereinafter *Reference re Residential Tenancies Act, 1992, Nova Scotia* cited to N.R.].
 93. Neither the Tribunal's *Interpretation Guidelines, Information Brochures, Rules of Practice, or Application Forms* for tenant applications refers to the possibility of a tenant being entitled to claim damages in an application under the TPA. Boiler plate reasons by adjudicators denying damages claims suggest that the Tribunal has an unspoken rule that damages may not be awarded.
 94. *E.g., Wilson v. Gourani Management* (1998; Wright), File No. EAT-00015 (ORHT); *Tassew v. Tran* (1998; Lee), File No. TST-00139 (ORHT); *Fisher v. Murovec* (1998; Kozak), File No. TST-00193 (ORHT); *MacKay v. Sanghera* (1999; McCutcheon), File No. SOT-00213 (ORHT), aff'd on varied grounds (1999; Moore), File No. SOT-00213-RV; *Blackburn v. Singh and Aery* (1999; Rogers), File No. TST-00700 (ORHT); *Ahaluwalia v. Randhawa* (1999; Braund), File No. CET-00129-RV2 (ORHT); *Contosoros v. Laheux* (1999; Gascoyne), File No. SWT-00242 (ORHT); *Levere v. Four Palms Investment Limited c/o Signet Group Inc.* (1999; McDermott), File No. TET-00286 (ORHT); *MacGillivray v. Burton* (1999; Tinker), File No. SWT-00499 (ORHT); *Essex v. Lee* (1999; Feldman), File No. TNT-00486 (ORHT); *Kolonji v. Geican Corporation* (1999; Lee), File No. TST-00727 (ORHT); *Beatson v. Agostino* (1999; Gregory), File No. SOT-00382 (ORHT); *Hollier and Parmegiani v. Junger* (1998; Fahigren), File No. CET-00084 (ORHT); *Leitao v. Ruffolo* (1999; Moore), File No. CET-00244-RV and CET-00423 (ORHT) in which it was held there was no jurisdiction in the Tribunal to award damages in a tenant application.
 95. *E.g., Sood v. Ontario (Ministry of Municipal Affairs & Housing)*, [1999] O.J. No. 669 (Sm. Clms. Ct.).
 96. In *Crate v. Brennan* (1999; von Cramon), File No. EAT-00391 (ORHT), the adjudicator acknowledged that the Tribunal had the jurisdiction to award damages but held that it was a very limited one because the Tribunal was one of summary jurisdiction.
 97. There would also be many instances when a tenant would have to advance part of a claim before the

Frequently the argument is raised that it is inappropriate to allow complicated claims for damages in summary proceedings.⁹⁸ This rationale lacks merit. The Small Claims Court is also a tribunal of summary jurisdiction⁹⁹ as was the former Ontario Court (General Division)¹⁰⁰ when hearing cases under the *LTA*.¹⁰¹ The only limitation on the Small Claims Court's jurisdiction to award damages is its monetary jurisdiction of \$6,000.¹⁰² Similarly, I suggest that the only limitation on the jurisdiction of the Tribunal to award damages is its monetary jurisdiction limit of \$10,000.¹⁰³

Summary proceedings are intended to be more accessible and to proceed more quickly than other judicial or *quasi*-judicial proceedings. However, they are intended to be expeditious only to the extent they can be in the context of the particular matter in dispute. Where a longer time is required to effect a fair hearing, this should be taken. Indeed, many "summary" but complicated proceedings under the *LTA* were given whatever time was necessary, sometimes several days of hearings, to deal properly with evidence, examination and legal submissions of the parties. The fact that proceedings are labelled as "summary" does not mean they are to be conducted in a sloppy manner inappropriate to a claim for damages. If they were, then Small Claims Court would be denied that same jurisdiction over damages claims. The Tribunal has the same powers over evidence that the Small Claims Court has.¹⁰⁴ It has the same power to order pre-trial disclosure in an appropriate case.¹⁰⁵ There is nothing that stands in the Tribunal's way as to damages except its willingness to address the issue. We should not presume that the Legislature intended to discriminate between landlords and tenants in permitting damage awards. Where the Tribunal is presumed to have the skills to adjudicate damages claims of up to \$10,000 *vis à vis* landlord claims for damages under section 87 of the *TPA*, it would be absurd to argue that the Tribunal is an inappropriate forum to address damages claims by tenants.

Like the two residual clauses discussed in this section of the paper, the *LTA* also contained a provision which permitted the courts to make "such further or other order as the judge considers appropriate".¹⁰⁶ Under the *LTA* the courts awarded

Tribunal and part of the claim before the courts in order to obtain a full remedy.

98. *Ibid.*

99. *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended, s.25.

100. The Ontario Court (General Division) is now called the "Superior Court of Justice".

101. *LTA*, s-s.117.1(2).

102. *O. Regulation 92/93* (under the *Courts of Justice Act*), s-s.1(1).

103. *TPA*, s-s.193(1).

104. *SPPA* s.15 which governs the issue of the admission of evidence is virtually identical to s.27 of the *Courts of Justice Act*, above, which governs the admission of evidence in Small Claims Court. It is also virtually identical to the former *LTA* s.120 which governed the admission of evidence in residential tenancy disputes under the *LTA*.

105. *O. Regulation 258/98* (Small Claims Court Rules of Practice) rule 13 provides for pre-trial conferences and disclosure as the *SPPA* s.5.3 and rule 18 of the Tribunal's *Rules of Practice* provide for pre-hearing conferences and *SPPA* s.5.4 and rule 17 provide for disclosure.

106. *LTA*, clause 94(4)(c).

damages to tenants, not by reason of any inherent jurisdiction, but by reason of the express wording of the Act found in the residual clause of s.94.¹⁰⁷ The same principle applies to the *TPA* where there is an equally legitimate basis for advancing the claim.¹⁰⁸

A recent Tribunal decision accepts much of this analysis. In *Simpson v. Milligan*,¹⁰⁹ the adjudicator held that under *TPA* clause 35(1)(e) the Tribunal, like the courts under *LTA* clause 94(4)(c), could award damages.¹¹⁰ This authority was to be used fairly and was to be logically connected with the main substance of the application.¹¹¹ The Member respectfully disagreed with those adjudicators who declined to award damages. He held that a multiplicity of proceedings was to be avoided. These same residual clauses offer the Tribunal the authority to right many wrongs, if only it were willing to do so.¹¹²

6. Relief from Eviction

Anecdotal evidence from tenant advocates seems to raise concerns that the Tribunal has taken a disturbingly new approach from that of the courts in dealing with relief against forfeiture, including the power to postpone an eviction. A review of various Tribunal decisions, however, appears to indicate this fear is only partially true.¹¹³ The view of some adjudicators appears to be that a landlord is entitled to eviction if the tenant has done anything “wrong” and that relief should be granted sparingly and only in the most exceptional situations.¹¹⁴ This approach seems to reinforce the assertion

107. See, e.g., *Re Shaw and Pajelle Investments Ltd.* (1985), 11 O.A.C. 70 (Ont. Div. Ct.) and *Re Phillips and Dis-Management* (1995), 24 O.R. (3d) 435 (Gen. Div.). In *Re Shaw*, the Divisional Court pointed out that a multiplicity of proceedings should be avoided and it made little sense to require the tenant to divide his claim between two forums.

108. The residual clauses in s-s.34(1) and s-s.35(1) provide the Tribunal with authority not only to award tenants damages in appropriate cases, or to restore wrongfully evicted tenants to lawful possession of the rental unit but also, I suggest, to return a tenant’s possessions which have been wrongfully seized by the landlord. The analysis of the latter issue is not addressed here although it is similar to that advanced with respect to damages claims.

109. (1999; Timms), File No. SOT-00544 (ORHT).

110. The adjudicator correctly noted that the courts’ authority had not been based on any inherent jurisdiction but on statutory language which was nearly identical to the *TPA* provision.

111. To support its conclusion, the Tribunal cited *Re Herbold and Pajelle Investments* (1974), 4 O.R. (2d) 133, 47 D.L.R. (3d) 321 (Ont. C.A.). This decision was varied on a different issue at [1996] 2 S.C.R. 520, 7 N.R. 461, 62 D.L.R. (3d) 749.

112. These “wrongs” are not limited to a claim for damages. For example, this residual authority allows the Tribunal to order that a landlord put a wrongfully evicted tenant back into possession of a rental unit, continue providing a service or return goods to a tenant, etc.

113. Having said this, there are a great many decisions by adjudicators which do properly apply *TPA* clause 84(1)(a) to preserve a tenancy.

114. E.g., *Lander and Rubino v. Gorlick* (1999; von Cramon), File No. EAL-06218 (ORHT) in which the adjudicator held that although the scope of the discretion under s-s.84(1) appeared virtually unlimited, it was not intended to subvert the substantive and procedural regime set out in the Act and the Tribunal should not refuse eviction unless the tenant would suffer manifest and serious hardship which has resulted from a landlord’s misconduct. This position is bolstered by the Tribunal’s *Interpretation Guideline No. 7*, “Relief from eviction: refusing or delaying an eviction”, which states:

that some Tribunal members do not take tenants' security of tenure and rights to possession of the rental unit and residential complex seriously. The failure to prevent wrongful evictions, or to right them once the wrong has been identified, is really the opposite side of the coin to the manner in which the Tribunal addresses its authority under section 84 of the *TPA*.¹¹⁵

The sparse reliance on the relief from eviction provision to preserve a tenancy is an approach which is diametrically opposed to that developed by the courts over centuries. I suggest that there is nothing that justifies ignoring a well established body of case law in this regard.¹¹⁶ The premise on which the courts based their approach, was, at least in principle, that a landlord's right to eviction was not absolute,¹¹⁷ and eviction should be a remedy of last resort.¹¹⁸ This law applied to both commercial and residential tenancies.¹¹⁹

Of particular note is that, despite the expressed power to postpone an eviction being broader under the *TPA* than it was under the *LTA*,¹²⁰ the Tribunal has chosen to apply

"Clearly, there must be a good reason to refuse the eviction." I would suggest that the opposite is true: *i.e.*, there must be a good reason to grant an eviction.

115. Clause 84(1)(a) provides the Tribunal with the authority to grant relief from eviction even though grounds for termination of the tenancy may exist. Clause 84(1)(b) provides the Tribunal with the authority to indefinitely postpone an eviction.
116. A comparison of *TPA* clause 84(1)(a) to *LTA* clause 121(2)(a) (relief from eviction) demonstrates that the two provisions are identical in scope. A comparison of *TPA* clause 84(1)(b) and *LTA* clause 121(2)(b) demonstrates that the authority to postpone an eviction is far broader under the *TPA* than it was under the *LTA*.
117. *Mikhail v. Conev*, [1998] O.J. No. 3063 (Gen. Div.).
118. *Re Rexdale Investments Ltd. and Gibson*, [1967] 1 O.R. 251, (1966), 60 D.L.R. (2d) 193 (C.A.) in which the Ontario Court of Appeal held that relief should not be refused where landlord can be made whole by money and terms of payment. The Court of Appeal held that the power of termination should be regarded as mere security for arrears of rent. Numerous decision applied the principle that where the remedy of eviction was out of proportion to the breach, relief should be granted.
119. If it applied to commercial tenancies, then it is much more applicable to residential tenancies where the notion of security of tenure is the backbone. I acknowledge that not all judges followed this principle when rendering decisions in residential tenancy cases.
120. Under the *LTA*, the power to postpone was limited to a one week period: *LTA*, clause 121(2)(b). However, most judges found jurisdictional ways around this limitation. It was not uncommon to see evictions effectively delayed by one or more months: *e.g.*, *Re Metropolitan Toronto Housing Authority and Smith* (1989), 33 O.A.C. 347, 40 C.R.R. 379 (Div. Ct.): the order was not to issue for 30 days, after which it was to be enforced at the end of 7 days; *Re Bicanic and Grannen*, [1993] O.J. No. 1893 (Gen. Div.): enforcement of writ postponed for "a couple of months"; *Re Tempus Investments and Foxton*, [1994] O.J. No. 2210 (Gen. Div.): two months' postponement of execution of writ; *Re Katz and Bedder*, [1994] O.J. No. 1947 (Gen. Div.): enforcement of the writ was expressly postponed for eight weeks to give tenants a chance to look for other accommodation; *Re Shakell and Robichaud*, [1994] O.J. No. 1531 (Gen. Div.); rev'd on other grounds *Re Shakell and Cleveland* (21 March 1995) Newmarket #33505, #33506, #33507 and #33497 (Ont. Div. Ct.) [unreported]: issuance of the writ was postponed 5 weeks; *Metropolitan Toronto Housing Authority v. Hewitt* (1990), 9 R.P.R. (2d) 36 (Ont. Dist. Ct.): termination was delayed 3-1/2 months; *Janstro Corporation Ltd. v. Lazarevic* (1990), 11 R.P.R. (2d) 244 (Ont. Dist. Ct.): enforcement of the writ of possession was delayed one month; *Re Stefani and Walsh* (1 March 1990), Peterborough #4326/90

the authority to postpone an eviction much more restrictively. In *Taft-Wingarden v. Cox and Samuels*,¹²¹ it was held on review that there was a serious error in granting a six week delay of eviction. The Tribunal's *Interpretation Guideline*¹²² itself suggests that the usual order would be for a short delay of up to one week¹²³ and that only in exceptional circumstance would a "somewhat longer" delay be warranted. This demonstrates the Tribunal's view that landlords have a far superior right to possession than do tenants.¹²⁴ I suggest that the Tribunal's approach is wrong. The Tribunal's position is not dictated by law or public interest. It appears to be dictated by a perception that it is open season on tenants.

IV. CONCLUSION

The *SPPA* and *TPA* together provide the Tribunal with a comprehensive jurisdiction to fully protect tenant rights. The Tribunal, however, has remained reluctant to provide tenants with a full range of remedies or to establish consistent practices and procedures for dealing with emergency situations. Delayed or reluctant justice is no justice at all for many Ontario tenants. One would have hoped for some active leadership from the Tribunal Chair and the bureaucrats. However, this seems to be absent. Despite ample basis for assuming a comprehensive authority over residential tenancy disputes, the Tribunal has taken the conservative position that only the courts, if anyone at all, can compel it to assume the full breadth of its authority. As a result, tenants are left with the uncertainty of choosing between two forums. When the Supreme Court of Canada opened the gates for the transfer of residential tenancy matters from the courts to *quasi-judicial* Tribunals,¹²⁵ it did not intend to minimize the importance of the power of eviction.¹²⁶ Yet that appears to be what has happened in Ontario.

(Ont. Dist. Ct.) [unreported]: writ of possession was delayed 3 months to allow tenant's children to complete school; *Cassandra Towers v. Ryll* (1989), 6 R.P.R. (2d) 299 (Ont. Dist. Ct.): order for termination and writ of possession were delayed two months less a day. There are numerous other examples.

121. (1998; Braund), File No. TEL-00139-RV (ORHT).

122. Guideline No. 7, "Relief from eviction: refusing or delaying an eviction".

123. This was the statutory maximum under the *LTA* but in reality the *de facto* minimum where delay was considered appropriate by the courts. *Supra* note 120..

124. This is not only demonstrated in the Tribunal's jurisprudence but in the Tribunal's *Interpretation Guidelines* and *Case Law Manual*.

125. *Reference re the Residential Tenancies Act, 1992, Nova Scotia* (1996), *supra* note 92.

126. *Ibid.* at para. 22, *per* McLachlin J. In *Reference re Ontario Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 747, (1981), 123 D.L.R. (3d) 554, 37 N.R. 158, Dickson J. referred to a comparable Ontario residential tenancies statute to the *TPA* as one involving the "transfer" of jurisdiction over "a large and important body of law".