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A Closer Look at Seemingly Pro-Tenant Provisions in the *Residential Tenancies Act*

Mary Truemner*

Résumé

Écrit dans le sillage de changements législatifs importants apportés au droit du logement, cet article étudie à fond comment certaines modifications dans la *Loi sur la location à usage d'habitation* nouvellement promulguée influent sur la dynamique de pouvoir entre les locataires et les locateurs. D'une façon générale, l'article laisse entendre que, malgré les nouvelles dispositions, adoptées soi-disant pour la protection des locataires, la *Loi sur la location à usage d'habitation* n'améliore pas la position du locataire vis-à-vis de son propriétaire ou de la Commission de la location immobilière.

L'article se penche sur quatre dispositions de la *Loi sur la location à usage d'habitation* : l'abolition des ordonnances d'éviction par défaut; une disposition établissant une date réputée de résiliation; l'interdiction aux propriétaires d'obtenir des augmentations de loyer alors que l'entretien des lieux est de mauvaise qualité ou même inexistant; et de nouvelles défenses accessibles aux locataires faisant face à une demande de résiliation de location avant le terme.

L'auteur présente une argumentation probante pour démontrer que, malgré les apparences, les gains pour les locataires demeurent largement illusoires. Les locataires dans la province de l'Ontario continuent à se battre à armes inégales, ce qui continue à les exposer aux expulsions de leurs foyers.

Introduction

On 31 January 2007, the *Residential Tenancies Act, 2006*[1] ("*RTA*") replaced the *Tenant Protection Act* ("*TPA*"), the legislation governing landlord and tenant relations in the Province of Ontario for almost a decade. Referred to by tenant advocates as the "Tenant Rejection Act", the *TPA* was widely criticized in its decade-long reign for its misleading title, given that it weakened tenant rights.[2] Having anticipated a

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1. *Residential Tenancies Act, 2006,* S.O. 2006, c. 17, proclaimed into force 31 January 2007.

2. See for example K. Laird, "Re-Constructing the Work of the Ontario Rental Housing Tribunal: First Steps to a Fairer Process" (2002) 17 J.L. & Soc. Pol'y; E. Mahoney, "The Tenant Protection Act: A Trust Betrayed" (2001) 16 J.L. & Soc. Pol'y; P. Rapsey, "See No Evil, Hear No Evil, Remedy No Evil: How the

new law more protective of tenants in the context of a changed political climate, tenant advocates were initially surprised by how similar the *RTA* was to the *TPA*, and how the Landlord and Tenant Board—the administrative tribunal created under the *RTA*—was the same as its predecessor in most respects.[3] Particularly devastating to the tenant movement, the *RTA* failed to include a section to reverse the *TPA*'s elimination of rent controls on units in the private rental market. Rents continue to increase dramatically across the province after decades of landlord and tenant legislation that had protected the affordable housing stock.[4]

It is not the object of this paper, however, to critique the decision to enact legislation that, like the *TPA*, allows the twenty-first-century private market to determine rents. Instead, this paper explores how the following changes systemically affect the power imbalance between landlords and tenants: (1) the abolishment of the default eviction, (2) the return of orders prohibiting rent increases where the landlord has not properly maintained the rental premises, (3) the deeming of a termination date where the tenant has not provided proper notice, and (4) additions to defences to eviction applications. Do these seemingly significant changes really assist tenants?

The Abolishment of Default Evictions

Without a doubt, the most far-reaching change to the eviction procedure is the elimination of default orders that had been available under the *TPA*.[5] These orders were routinely issued to evict tenants who had not filed written disputes to landlord applications within five days of receiving the application. Under the *TPA*, tenants regularly appeared at the Ontario Rental Housing Tribunal (the "Tribunal") expecting an opportunity to argue against evictions on the day indicated in their Notices of Hearing. Having misunderstood the notices, they would instead discover that their hearings had been cancelled because default orders had already been issued. While some tenants managed to file and serve set-aside motion documents, 56 per cent of tenants receiving landlord applications for termination were ordered evicted from their homes without hearings.[6]

In his 2003-04 Annual Report, the Ontario ombudsman expressed concern that the fairness of the eviction process had been compromised by the pursuit of

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Ontario Rental Housing Tribunal Is Failing to Protect the Most Fundamental Rights of Residential Tenants" (2000) 15 J.L. & Soc. Pol'y.

3. *RTA*, s. 168(1) continues the Ontario Rental Housing Tribunal as the Landlord and Tenant Board.
4. The *RTA* perpetuates the *TPA*'s system of vacancy decontrol, which allows a landlord to increase rents without limit once a unit has been vacated. In Toronto, according to the Canadian Mortgage and Housing Corporation's Toronto CMA Rental Market Survey Reports, the average rent for a two-bedroom unit climbed from $819 per month in 1996 to $1,085 per month in October 2008.
5. *TPA*, ss. 177, 192.
6. *Workload Report of the Ontario Rental Housing Tribunal*, 1998-2005.

greater administrative efficiencies, due in part to the default eviction process.[7] A subsequent decision of the Tribunal showed that these concerns were justified. In *Karoli Investments Ltd. v. Reid*[8] the member relied extensively on internal policies and procedures at the Tribunal that placed too much emphasis on efficiency, at the expense of fair process. The member cited the Tribunal's statistics, Rules of Practice and Procedure, internal Procedures Manual, Annual Report and even quotes from the Tribunal's director of operations to demonstrate that the Tribunal's focus was primarily to move cases through the system, and that its role in ensuring justice was compromised as a result.[9]

The *RTA* corrects the injustice perpetrated by the default order and does not make the filing of a dispute a prerequisite for an eviction hearing. An eviction order cannot be made without a hearing by the Landlord and Tenant Board ("the Board"). Under the *TPA*, the default orders particularly offended natural justice and procedural fairness in cases where the tenant did not file a dispute because the tenant had never received the application before the five-day dispute period expired.[10] While the administrative processing of the default order occurred only where landlords had filed affidavits swearing that the tenants were served, there was ample room for error or unfairness. Under the Tribunal's Rules, service was allowed by regular mail. Tenants who were on holiday, even for an extended long week-end, often opened their mail too late, given that the dispute period was five *calendar*—not business—days. Moreover, the reality for many rural and northern locations is that five-day delivery of mail is very optimistic. Even in many urban multi-unit buildings, the reality is that mail is not delivered to individual units, but to unsecured slots, or even to common window sills or ledges on radiators. The deemed receipt provision of five days after mailing inappropriately assumed that regular mail would take only five days to reach its destination.

The process has improved under the *RTA*. Under s. 189, tenants are no longer reliant on landlords exclusively to inform them of eviction applications and hearings, and may rely on the Board to notify them directly that applications have been filed:

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7. Ombudsman Ontario, *2003-2004 Annual Report*, at 2.
8. (22 September 2005; Reasons issued 31 January 2006; DeBuono), file no. TNL-68501-SA, [2006] O.R.H.T.D. No. 8 (QL) (ORHT).
9. Given that the member did not refer to all this documentary information during the hearing, another member allowed a review on the basis that the landlord had not been given a chance to respond to the information relied on, and the parties had therefore not been provided with a full opportunity to make submissions with regard to the internal Tribunal information relied on by the member. The matter was eventually resolved on consent, with the landlord withdrawing the eviction application.
10. As stated by the ombudsman in the 2003-2004 annual review, the dispute period of five calendar days is "extraordinarily brief when one considers the severe consequences eviction can have on individuals and families".

> 189(1) Where an application is made to the Board, the Board shall notify the respondent in writing that an application has been made and, where possible, shall provide the respondent with information relating to the hearing and such other information as is prescribed.

Unfortunately, the Board will "notify" tenants only by regular mail. Again, tenants whose mailboxes are not secure are vulnerable to careless neighbours or even to unscrupulous landlords who are anxious that their tenants not be made aware of the eviction hearings.

Some landlords illegally evict tenants from their homes to avoid the legal route.[11] The temptation for landlords to avoid the proper eviction process at the Board stems from many factors. First, in addition to the time involved in processing the paperwork over a course of several weeks, an eviction may be expected to entail at least half the day at the Board. Hearing blocks of over twenty matters per day are not unusual. All hearings are scheduled to begin at the start of the hearing block, despite the reality that only one hearing may proceed at a time. A Board member will first deal with matters that appear to be uncontested, given the absence of one of the parties. Where both parties to an application are in attendance, that particular hearing may not proceed until hours after the scheduled time, if it proceeds that day at all.

The second factor to tempt unscrupulous landlords to evict outside of the law arises from the provision in the *RTA* that makes mandatory a consideration of whether the Board should refuse to grant the eviction application, "having regard to all the circumstances".[12] This mandate for the Board is an important policy addition to landlord and tenant legislation and will be discussed more fully below. It means that landlords may not be entitled to an eviction order, even where otherwise justified, such as when the tenant admits to being in arrears of rent. Given that this rule opens the door for the Board to dismiss applications of landlords who have paid fees, have properly completed the paperwork and have been waiting most of the day for their hearings, at least some landlords will be motivated to avoid hearings by arranging that their tenants never receive notices from the Board. This possibility is particularly true in cases where evidence supporting an eviction application is weak, and where claimed arrears are minimal and may be recovered easily in repayment plans proposed to the Board by the tenant, because a landlord's real objective is to charge higher rents not permitted unless units are vacant.

While the demise of default orders means that tenants are no longer evicted without a hearing, hearings now will proceed often in the absence of the tenant for many of the same reasons that a default order would have issued under the *TPA*. Tenants will often have good reasons for having missed the hearing that was held in their

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11. See for example *Briere v. Bigaouette* (15 October 2002; Gascoyne), file nos. SWT-03708, SWL-42732 (ORHT); *Contosoros v. Laheux* (28 January 1999; Gascoyne), file no. SWT-00242 (ORHT); *Tenant of 123 King Street, London Ontario N6A 1C3 and Dencev* (4 April 2007; Wallace), file no. SWT-08227 (LTB).

12. *RTA*, s. 83.

absence—they may not have received the documents, they may have had difficulties in reaching the hearing location or may not have understood the documents received. Unfortunately, the procedure to deal with these scenarios before the Board is more difficult than it was under the *TPA*.

Although there was no fee to file a motion and have a hearing on a set aside under the *TPA*, under the *RTA* a review request is the only recourse open to tenants seeking to challenge an eviction resulting from a hearing that they were unable to attend. To make the review request, the tenant must pay the Board a fee of $50, an unaffordable sum for many low-income tenants.[13]

The legislation does incorporate the test used under the *TPA* for setting aside default orders, i.e. that the tenant "was not reasonably able to participate in the proceeding".[14] However, the Board's Rules of Practice and Interpretation Guidelines make no attempt to distinguish between the very different scenarios of a review request where a party did not appear, and a review request where both parties were present and the case was fully argued on the merits. Whereas under the *TPA* a respondent could file a set aside motion as of right and have a hearing on the issue, neither the *RTA* nor the Board extends this right to a review of an uncontested order. The payment of the fee does not guarantee an in-person hearing. Rather, the decision is made by means of a preliminary paper review of the request, where the Board may deny the request without a hearing.[15]

In *Lamontagne v. Sutherland*,[16] the eviction hearing was by telephone, as is typical of hearings in the North. The tenant originally dialled the wrong number to be connected to the hearing at the commencement time. He searched through his documents to find the correct number and minutes later reached the Board member who told him that he was too late, the order had been made, and he would receive an eviction order requiring payment of $1,500 in the mail. Insistent that he have an opportunity to defend the eviction, the tenant was able to come up with the $50 fee. However, his review request was denied without a hearing, despite his written explanation on the review request form referencing the telephone difficulties, and despite the documentation attached to his request that indicated the monthly rent claimed by the landlord was incorrect—an error that if accepted by the Board would have resulted in the dismissal of the landlord's application. Despite the five-minute delay and the evidence directly challenging the entire basis for the application, the Board refused to grant a hearing on the issue. The review order merely stated:

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13. As of 1 December 2008, a single recipient living south of the Fiftieth Parallel receives a maximum of $572 per month for basic needs and shelter under the *Ontario Works Act*.

14. Landlord and Tenant Board, Interpretation Guideline 8.

15. LTB, Rule 29.10.

16. (7 August, 2007; Cormier), Sudbury NOL-01079-RV, (LTB) (B. Cormier, LTB Member) (unreported). Overturned on appeal, *Sutherland v. Lamontagne* (3 March 2008), Sudbury DV-756-07 (Div. Ct.) (unreported).

> The Tenant did not attend the hearing and offered no reasonable explanation of why he was prevented from participating in the hearing process.[17]

Even in cases where tenants know that they will not be available at the scheduled time, there is no procedure or practice of the Board to reschedule the hearing in advance unless the tenant has managed to obtain the landlord's consent to an adjournment. Given the fast pace of the processing of evictions from the filing of the application to the hearing, effective communication with the landlord and then with the Board requires a level of legal sophistication not possessed by many tenants. Tenants whose first language is neither French nor English, who live without access to transportation to Board offices, who lack literacy skills or who lack the resources to fax the Board are at a disadvantage as compared to most landlords. Landlords are generally familiar with Board practices and can often afford the expense of retaining an agent. Hearings are inevitably missed by tenants who were ill, who were absent from the rental premises, who never received notice or who could not manage to organize their affairs in time to attend. Many, if not most, do not deserve to lose their homes.

For disadvantaged tenants floundering in the eviction process despite reasonable defences to their landlords' applications, the *RTA* has failed to correct the system's imbalance in favour of landlords who are more likely to find the eviction system accessible. Unlike the tenant, landlords are operating a business *vis-à-vis* the property and may be assumed to have familiarized themselves with the processes at the Board.

The RTA should provide for the Board to hold a hearing where tenant motion documents indicate, even with simple check marks, that the tenants were unable to participate in the process. The merits of the application could then be heard, and the superficial examination of whether the tenant was reasonably able to participate in the first hearing would be neither the issue in setting aside the original order nor the issue in the second hearing scheduled pursuant to the motion being filed.

At the very least, the Board should be encouraged to provide more stringent rules for the service of documents in the context of a very fast-paced eviction process, given that the only procedural remedy is the costly and discretionary review process to correct an unfair termination of a tenancy. For expedited hearings to be heard within seven days of the application being filed,[18] the Regulations state that the Board shall courier the notice about the eviction application to the tenant or attempt to contact

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17 *Ibid.* No reasons were provided for why the Board determined that the tenant offered no reasonable explanation of why he was prevented from participating in the hearing. Even though this decision was later overturned on appeal to the Divisional Court, the LTB review decision serves as a sharp reminder of the peril in which tenants may find themselves for even slight procedural default. Not all tenants would be able to bring a successful Divisional Court appeal in the same circumstances.

18. *RTA*, ss. 61, 63, 65, 66, 80 and 84.

the tenant by telephone and also mail the notice.[19] Regulations could require similar methods of contacting the tenant in all eviction applications.

The Return of Orders Prohibiting Rent Increases

Rent regulation legislation predating the *TPA* allowed orders prohibiting the landlord from increasing the rent if the landlord had failed to comply with obligations to properly maintain the residential premises to which the rent attached.[20] An order prohibiting a rent increase (an "OPRI") can be particularly effective at inspiring a landlord to make repairs to substandard buildings. The OPRI has been restored under the *RTA*,[21] but given the absence of statistics from the Board on the matter, it is questionable whether it has been or will be actually used to any significant extent.

Given that the annual allowable increase to a sitting tenant's rent is currently quite low,[22] the OPRI is a weak tool for the tenant who reported the disrepair. An OPRI will not necessarily give an irresponsible landlord an incentive to effect repairs unless the landlord had contemplated an above-guideline increase,[23] but even then, given the 3 per cent per annum cap on such increases, the incentive is small.

Though an OPRI remains in effect even where there is a change of tenants, there is no means for the new tenant to find out whether an OPRI has been issued against the building and thus whether the rent being charged is legal. Naively, the system assumes that the landlord against whom there is an outstanding order will admit having ignored a Board order to improve the unit, and that the rent cannot be increased beyond what was charged to the previous tenant until the ordered repairs are made. Given that there is no means for a tenant to verify this, it will hardly be surprising if many landlords choose not to advise prospective tenants of this limitation.

Section 114 of the *RTA* requires a landlord to give written notice to a new tenant of what the legal rent is under the OPRI, and what it will be if the OPRI is lifted. This information is not provided by, nor available from, the Board or any other government agency. Even if a new tenant calls the Board to inquire whether an OPRI is in place, the Board will not say, citing privacy issues. A breach of s. 114 will be dealt with by the Board only if a new tenant makes an application under s. 115 for a determination of the rent and a rebate of any money paid in excess. A new tenant is unlikely to do so, unless aware of the law and of a significant breach of the landlord's responsibility to maintain the premises in a state of good repair.

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19. O.Reg. 516/06, s. 55.
20. *Rent Control Act, 1992*, S.O. 1992, c. 11, s. 38.
21. *RTA*, ss. 30(1), 114.
22. The allowable increase is 1.8% for 2009.
23. *RTA*, s. 126.

This problem is compounded by the continuation in the *RTA* of deeming illegal charges legal after one year.[24] Unless there is disclosure, it could well be more than one year before a new tenant finds out that the rent charged had violated an OPRI, but it would be too late to challenge that rent.[25] True enough, s. 11 of the *RTA* mandates that before a tenancy begins, the landlord is to provide the new tenant with information about each party's rights and responsibilities, and this form will refer to the duty of landlords to inform in the event of an OPRI; however, again, the system naively assumes that the offending landlord will provide that information form.[26]

In the context of vacancy decontrol and the unlikelihood of OPRI enforcement, the OPRI is also unlikely to encourage the proper maintenance and repair of the remaining affordable rental housing stock. For most landlords, the real motivation to upgrade buildings is the market itself. Landlords who upgrade their buildings in cities like booming Toronto or Ottawa are finding they can charge rents to new tenants that are far higher than those charged to previous tenants. As long as vacancy rates allow some choice for tenants, OPRIs are barely needed to encourage the proper maintenance of units in Toronto, where the average rent for a two-bedroom unit climbed from $819 per month in 1996 to $1,085 per month in 2008.[27] It is the lack of rent control for new tenants and the consequent possibility of greater profits that motivates landlords to improve those parts of the housing stock that were indeed falling into serious disrepair but could fetch significantly higher rents if improved enough to be competitive.

Units at lower rents are often in disrepair. Fixed up, they become unaffordable. By choosing to introduce vacancy decontrol to encourage repairs and proper building maintenance instead of introducing another strategy such as legislating landlord licensing and auditing buildings, the Government of Ontario has further shifted the balance of power towards landlords.

Deemed Termination Dates

Deemed Termination Date When the Tenant Leaves

Prior to the *RTA*, landlords had been successful in arguing that tenants who gave their landlord a technically flawed notice of termination could be responsible for rent long past the day on which they had vacated the unit.[28] Landlords could take

24. *Ibid.* s.136.

25. Failing to comply with s. 114 is an offence under *RTA* s. 234(i). However, even if a prosecution is pursued, it is not clear that there would be any benefit to the tenant once the one-year period has passed.

26. There are no repercussions and no express remedy for a tenant under the Act if a landlord fails to comply with s. 11.

27. Canadian Mortgage and Housing Corporation, *Toronto CMA Rental Market Survey Reports*.

28. *George V. Apartments Ltd. v. Cobb* (6 December 2002), Court file no. 61791/02 (Ont. Div. Ct.); *Viscount Properties (c.o.b. Oxford Square Investments) v. Rock*, [2005] O.J. No. 3092 (QL), file no. 86/2005 (Sm. Cl. Ct.).

advantage of departing tenants' mistakes and lack of legal sophistication, and keep them on the hook for rent until the unit was re-rented. This has been addressed by s. 88 of the *RTA*, which deems termination dates for tenants who vacate without proper notice, or for tenants who abandon their units:

> 88(1) If a tenant abandons or vacates a rental unit without giving notice of termination in accordance with this Act and no agreement to terminate has been made or the landlord has not given notice to terminate the tenancy, a determination of the amount of arrears of rent owing by the tenant shall be made in accordance with the following rules:
>
> 1. If the tenant vacated the rental unit after giving notice that was not in accordance with this Act, arrears of rent are owing for the period that ends on the earliest termination date that could have been specified in the notice, had the notice been given in accordance with section 47, 96 or 145, as the case may be.
>
> 2. If the tenant abandoned or vacated the rental unit without giving any notice, arrears of rent are owing for the period that ends on the earliest termination date that could have been specified in a notice of termination had the tenant, on the date that the landlord knew or ought to have known that the tenant had abandoned or vacated the rental unit, given notice of termination in accordance with section 47, 96 or 145, as the case may be. 2006, c. 17, s. 88 (1).

The tenant now will owe arrears only up to the date that would have been stipulated in a *valid* notice given the same day the *invalid* notice was given or the unit was vacated without notice.[29] The Board will calculate arrears by determining when the landlord knew or ought to have known the tenant was gone, and then by determining the first valid date of termination had notice been properly given. Section 88 also ensures that a landlord cannot collect arrears if the unit is re-rented;[30] this is essentially a clarification of the obligation to mitigate under *RTA* s. 16.

Another problematic area of landlord and tenant law prior to the *RTA* was with respect to tenants who vacated pursuant to notices given by landlords seeking to evict for alleged bad behaviour such as non-payment of rent, overcrowding or interference with the reasonable enjoyment of the premises for other tenants. Under the *TPA*, a tenant receiving a notice of early termination was encouraged to vacate because of language on the notice form provided by the then Tribunal. The form stated that the tenant *must* move out of the unit on or before a specified termination date; however, there was no provision under the *TPA* that confirmed that the tenancy would indeed terminate on the termination date specified in the Notice if the tenant vacated by that date. The unsophisticated tenant who simply left instead of entering into a formal

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29. For example, in a monthly tenancy where the tenancy begins on the first day of the month, if the tenant gives an invalid notice on 8 January of terminating the tenancy on 25 February, the tenant will be ordered to pay arrears only up until 31 March, the date that would have been the first valid date on any notice given 8 January. However, in the situation where the tenant is locked into a lease until 30 June and gives invalid notice 8 January of terminating for 25 February, the tenant will be ordered to pay arrears to 30 June.

30. *RTA*, s. 88(3).

agreement to terminate was then in jeopardy of being pursued for arrears for time after the date on the landlord's notice, given that the tenancy had indeed not been terminated.

The *RTA* corrects the problem for the vacating tenant by simply stating that the tenancy is terminated on the termination date set out in the notice:

> 37(2) If a notice of termination is given in accordance with this Act and the tenant vacates the rental unit in accordance with the notice, the tenancy is terminated on the termination date set out in the notice. 2006, c. 17, s. 37 (2).

With the tenancy terminated, the landlord is prevented from pursuing the tenant at the Board for arrears, because arrears may be calculated only up to the termination date. While some landlords may attempt to pursue damages for breach of contract in court, the *RTA*'s clarification that the tenancy was terminated on the date in the landlord's notice results in the Board's losing jurisdiction to deal with losses that the landlord claims arose during the period after the rental unit was vacated. The *RTA* has thus corrected a confusing area of landlord and tenant law that historically allowed sophisticated landlords to claim arrears of rent for rental periods tenants justifiably understood were no longer their responsibility.

The new provision deeming the termination date according to the notice given by the landlord may give rise to a more cautious use of notices and applications to evict, particularly in cases of non-payment of monthly rent. Instead, landlords may pursue arrears alone and negotiate a repayment plan, leaving the tenancy intact so as not to jeopardize their potential income from tenants whose financial situations may improve.[31] Certainly, given that the *RTA* requires a voiding period of fourteen days between the service of the Notice and the filing of the Application,[32] given that eviction hearings sometimes take several weeks to schedule, and given that a more healthy vacancy rate in many Ontario municipalities no longer guarantees landlords new tenants immediately, even the most diligent of litigious landlords are likely to find themselves without revenue for at least one month. Particularly in cases where the landlord has been prohibited from collecting a last-month rent deposit in order not to violate the human rights of social assistance recipients,[33] landlords are well advised to weigh the near certainty of losing several weeks' income throughout eviction proceedings and the period before a new tenancy begins, with the possibility of working out a responsible relationship with existing tenants who are temporarily

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31. A new section introduced with the *RTA*, s. 206, sets up a procedure under which a landlord can obtain an order from the Board without a hearing on consent, with a repayment agreement. Such an order can be reopened for a full hearing on the merits, with notice, in the case of a breach. As opposed to a consent order at a hearing, the advantage to a tenant is that a s. 206 order preserves the tenant's right to notice and a full hearing on the merits in the case of a breach. The advantage to the landlord is that the order can be obtained without the time and expense of attending at a hearing.

32. *RTA*, s. 59.

33. *Garbett v. Fisher* (1996), 25 C.H.R.R. D/379; [1996] O.H.R.B.I.D. No. 12 (QL) (Ont. Bd. of Inq.).

stressed. Landlords in the business of rental housing will have factored the risk into their management of the property.

Termination Date When Only One Co-Tenant Leaves

While the new provision deeming a termination date according to the Notice to Terminate discussed above assists in correcting the power imbalance between landlords and tenants, the *RTA* does little to address the lack of security for the co-tenant who does not agree, or want, to leave despite a notice of termination having been submitted by the other tenant. Case law is confusing with respect to rights and responsibilities of joint tenants versus tenants in common when one tenant abandons or provides a notice to terminate the tenancy. It is often the case that the parties involved make no agreements about which tenant remains responsible for rent, and about the rent amount. In the context of vacancy decontrol, some landlords were seeking notices of termination from spouses abandoning their families and then approaching the remaining spouses with new leases at significantly higher rents.[34] If the remaining spouses refused to pay higher rents but had not signed the initial lease or rent cheques so that they did not easily meet the definition of "tenant", landlords sought to evict them as "unauthorized occupants". Landlords argued that despite having lived for years in their units, the remaining spouses were not tenants and not entitled to security of tenure.

In the context of co-tenants who were spouses, tenant advocates were particularly concerned about a narrow interpretation of the definition of tenant that would disproportionately exclude women.[35] Most parents who stay at home to care for children are women, and most people who find themselves parenting alone are women.[36] Because women are more likely to stay at home to raise the children than men, their incomes tend to be lower, and the higher-earning husband is more likely to be the one writing the rent cheque, and therefore the "tenant" under the *RTA*.[37] Being more likely to take on the responsibility of caring for the children in the case of separation, women are also more likely than men to require continuity of home in order to care for the children. The threat that the original tenancy could not be relied upon by the remaining occupant therefore adversely affected women more than men.

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34. See for example *Finch Main Gardens (West) Limited v. Morales* (1 October 2001; Feldman), file no. TNL-30809 (ORHT); and *Torres v. Minto Management Limited* (5 June 2001; Wright), file no. EAT-02491 (ORHT).

35. The Legal Education and Action Fund intervened in the Torres appeal, urging an interpretation of the definition of tenant that would be consistent with the equality provision of the *Charter*.

36. Women comprise 94% of all stay-at-home parents, *supra*, at 97 and 110. In 1996, 83% of all one-parent families were headed by women, a figure that has remained relatively constant since the mid-1970s. Statistics Canada, *Women in Canada: A Gender-Based Statistical Report* (Ottawa: Ministry of Industry, 2000).

37. *Ibid.*

In a step forward for women, the *RTA* has amended through regulation the definition of tenant to include an occupant who was a spouse at the time the tenant vacated.[38] However, there are several reasons why this new provision does not go nearly far enough to protect tenants who landlords claim are merely occupants and therefore have no protections from rent increases or eviction: (1) the provision does not extend to family members other than spouses and (2) the provision does not extend to remaining spouses where the vacating tenant provided notice of termination or entered into an agreement to terminate with the landlord.

The second omission is particularly damaging to women whose abandoning spouses are abusive and therefore more likely to wish to harm the remaining spouse by terminating the tenancy as they leave, thereby jeopardizing the remaining spouse's home.[39] The *RTA* has failed to protect women remaining in these cases. Vacancy decontrol continues to motivate landlords to argue the tenancy is ended in these cases so that a new and higher rent may be charged to the remaining spouse who, for the reasons stated above, will most likely be a woman.

Improved Defences for Tenants Being Evicted

Mandatory Consideration of the Exercise of Discretion

Subsection 83(1) of the *RTA*, identical to subsection 84(1) of the *TPA*, provides the Board with discretion to refuse to grant an application, or to order that the enforcement of an eviction be postponed:

> 83(1) Upon an application for an order evicting a tenant, the Board may, despite any other provision of this Act or the tenancy agreement,
>
> (a) refuse to grant the application unless satisfied, having regard to all the circumstances that it would be unfair to refuse; or
>
> (b) order that the enforcement of the eviction order be postponed for a period of time.

The difference with the *RTA* legislation, however, is the addition of subsection 83(2), which makes it mandatory for the Board to consider exercising this discretion in every case:

> 83(2) If a hearing is held, the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection (1).

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38. *RTA*, O. Reg. 516/06, s. 3.

39. Women are eight times more likely than men to be victimized by their spouse. Thirty per cent of women have been assaulted by their spouse, resulting in physical injury in almost half of those cases: Robin Fitzgerald, *Family Violence in Canada: A Statistical Profile, 1999* (Ottawa: Minister of Industry, 2000) at 5, 12; and Marika Morris, *Violence against Women and Girls Fact Sheet* (Ottawa: Canadian Research Institutes for the Advancement of Women, updated March 2002).

At first blush, this is the greatest of the gains for tenants in the *RTA*. It now includes mandatory language that the Board shall not grant an eviction unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection 83(1). Upon closer scrutiny, however, the inclusion of s. 83(2) was not necessary; rather, it is a clarification of existing jurisprudence. The Courts under the *TPA* had already read this requirement into what was then s. 84.

Another reason to only cautiously label the inclusion of s. 83(2) as protection for tenants is that Board members appear to have been instructed to include in all their eviction orders a standard "boilerplate" reference to their consideration of s. 83(1). No meaningful reasons for not granting relief are provided in many cases.

A few Board decisions have neglected to include the standard reference to s. 83(1) so that the members appear to not have fulfilled the duty to consider exercising discretion. Given the Divisional Court's criticism in *Fisher v. Moir*[40] of the Tribunal's lack of reasons in that case, the absence of a reference in a Board decision to having considered s. 83(1) allows for the possibility of successful appeals by evicted tenants.[41] What may be more difficult to appeal are decisions where reasons refer only to a consideration of either s. 83(1)(a) or s. 83(1)(b), but not to both. In the eviction of a tenant whose disabled roommate caused damage, the Board member merely considered postponing the eviction when a refusal may have been appropriate given that only the innocent roommate remained.[42]

The *RTA* has also made clear the Board's responsibility to consider exercising discretion to set aside an eviction order obtained *ex parte* in certain circumstances: (1) pursuant to a landlord's claim that a tenant agreed or gave notice to terminate,[43] or (2) pursuant to a landlord's claim that a tenant breached a mediated settlement, thus triggering the termination.[44]

The Board shall set aside these *ex parte* orders if satisfied, "having regard to all the circumstances, that it would not be unfair".[45] Given that the Tribunal was not mandated to consider exercising discretion not to evict in set aside motions, and therefore

40. [2005] O.J. No. 4479 (QL), Court file no. D13/04 (Div. Ct.). See also *Luray Investments Ltd. v. Recine—Pynn* (1999) 126 O.A.C. 303; *Klein v. Cohen* (2001), O.J. No. 299 (QL) (Div, Ct.) (O'Driscol, Blair, MacKenzie).

41. The fact that s. 83(1) is not expressly referred to by the Board may, however, not be fatal. In *Partridge v. Borris-Brown*, 2005 CanLII 44172 (Div. Ct.) (Cunningham A.C.J.S.C., McLean and Hambly JJ.), the Divisional Court held that the Tribunal had implicitly considered the factors related to relief. This and other cases decided under the *TPA* may nonetheless be distinguished, given the express requirement to consider relief under *RTA* s. 83(2).

42. *Rankin v. Micah Homes Non-Profit Housing Corporation* 1 March 2007; (Homsi) file no. TNL-82857 (LTB). The decision is under appeal for several reasons, one of which is the failure of the Board to refer to s. 83(1)(a).

43. *RTA*, s. 77.

44. *Ibid.* s. 78.

45. *Ibid.* ss. 77(8)(b), 78(11)(b).

could not be relied upon to do so, this clarification in the *RTA* has indeed improved the lot of tenants facing eviction.

Having Landlord Breaches Adjudicated in Eviction Hearings

Under the *TPA*, tenants defending arrears applications before the Tribunal often raised disrepair or other breaches of responsibility by their landlords. Routinely, the Tribunal refused to hear evidence on "landlord breach" to set off arrears unless the tenants made their own applications for an abatement of rent. The exception was the situation where a tenant requested that the Tribunal not evict because of a landlord's serious breach of a responsibility such as the obligation to maintain the premises in a good state of repair.[46]

The *RTA* repeats the language of the *TPA* in the mandatory refusal of an application where a serious breach by the landlord has been found:

> 83(3) Without restricting the generality of subsection (1), the Board shall refuse to grant the application where satisfied that,
>
> (a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement.

In a series of appeals involving landlord applications to terminate in order to demolish, the Divisional Court recently interpreted the above section in the context of the *TPA*. The appeal court overturned the decision of the Tribunal, which had refused to terminate because of serious disrepair that had worsened gradually over decades of use. Repair of the old homes would have been at a great cost as compared to the projected demolitions. The Divisional Court distinguished between the disrepair being serious versus the landlord's breach being serious.[47] The landlord, the Government of Canada, has seemingly established a precedent that will encourage landlords to allow properties to fall into ruin in order to obtain evictions for demolition.

While the *RTA* has failed to address the landlord-friendly interpretation of serious breach, it has simplified the procedure by allowing tenants to raise disrepair or other issues as a defence to an arrears application without filing a separate application. With respect to evidence of serious disrepair being raised to defend applications to terminate for non-payment of rent, the *RTA* allows an adjudication of the landlord's serious breach at the same hearing:

> 82(1) At a hearing of an application by a landlord under section 69 for an order terminating a tenancy and evicting a tenant based on a notice of termination under section 59, the Board shall permit the tenant to raise any issue that could be the subject of an application made by the tenant under this Act.

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46. *TPA*, s. 84(2)(a).

47. *Puterbough v. Canada (Public Works & Government Services)*, [2007] O.J. No. 748 (QL), 2007 CarswellOnt 2222 (Div. Ct.) at 70, leave to appeal refused.

(2) If a tenant raises an issue under subsection (1), the Board may make any order in respect of the issue that it could have made had the tenant made an application under this Act.

The *RTA* provides the Board with the jurisdiction to make an order in respect of *any* issue a tenant raises that could be the subject of an application by the tenant even though the tenant never made an application, and is raising the issue only in the context of an eviction application.[48] This is a tremendous improvement of the system to ensure both fair and expeditious resolutions to landlord and tenant disputes. Under the *TPA*, a tenant could be evicted for arrears despite breaches by the landlord that, if allowed to be adjudicated, would have justified abatements to set off arrears. Under the *RTA*, landlord breaches will lead to an assessment of abatements in eviction hearings. An abatement could either reduce arrears to the point where the Board will be more inclined to exercise discretion not to evict, or an abatement might even eliminate arrears completely.

The new streamlined approach to dealing with tenant claims affecting eviction applications may result in rules requiring the tenant to file materials related to the serious breach prior to the hearing. So far, the only recourse for a landlord who is surprised by the tenant's evidence of serious breach is a request for an adjournment. Given that arrears may be accumulating, the landlord may be reluctant to delay obtaining an order, and risk proceeding without having prepared a defence. A prudent landlord will prepare for all hearings by inspecting and photographing the rental unit prior to filing their application.

Conclusion

The above review of seemingly tenant-friendly amendments demonstrates that some of them come with mixed blessings. The abolishment of the default eviction prevents evictions for tenants who were unable to file written disputes within five days of receiving eviction applications; however, the *RTA* does not provide a fair process for tenants who were unable to attend the eviction hearing.

With respect to Orders Prohibiting Rent Increases, the jury is still out. The sitting tenant can use the order only to prevent relatively minor rent increases. Given the weaknesses of an honour system for landlords on whom OPRIs would be imposed, we can expect rent increases on vacant units when they are rented to new tenants not informed of the OPRIs. We can expect, then, no significant checks on the depletion of affordable housing.

The *RTA*'s inclusion of a mandatory consideration of the exercise of discretion to refuse an eviction application is also anti-climactic. The jurisprudence under the *TPA* had mandated this despite its absence from that legislation, and it appears that the Board often merely plays lip service to its duty to consider refusing the termination.

48. *RTA*, s. 82.

On the other hand, the deeming of termination dates for tenants who gave improper notice is particularly helpful to tenants who might have been responsible for rent indefinitely in a rental market where the landlord is unable to mitigate. As well, the tenant's ability to raise significant breaches by the landlord will assist in defending applications to evict for arrears. The Board may find that the arrears are set off by the landlord's breach, or at least that the breach justifies the exercise of discretion not to evict.

Tenant and landlord advocates will no doubt be arguing different interpretations of the *RTA* provisions discussed in this paper, but it might be generally concluded that those provisions have done little to correct the unbalanced scale on which tenants' homes are precariously perched—not in the context of continued vacancy decontrol and newly expedited evictions for certain classes of tenants.[49]

49. *Ibid.* s. 63(1)(a), applications based on alleged willful damage; s. 63(1)(b), applications based on a use inconsistent with residential premises likely to cause excessive undue damage; and s. 65, applications based on substantial interference in small buildings where the landlord also lives.