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Paul Stuart Rapsey

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STANDARD OF REVIEW FROM DECISIONS OF THE ONTARIO RENTAL HOUSING TRIBUNAL

PAUL STUART RAPSEY*

RÉSUMÉ

L'article aborde essentiellement la question de la norme d'examen applicable aux appels de décisions rendues par le Tribunal du logement de l'Ontario en vertu de la *Loi de 1997 sur la protection des locataires* interjetés auprès de la Cour divisionnaire de l'Ontario. Il y a un volume considérable de décisions contradictoires portant sur la jurisprudence d'appel sur la question. L'auteur conclut qu'une norme de bien-fondé devrait s'appliquer aux décisions du Tribunal. En outre, il examine brièvement la norme d'examen appliquée dans les procédures de révision du Tribunal et dans les demandes d'examen judiciaire auprès de la Cour divisionnaire. Pour ce qui est des examens effectués par le Tribunal, l'auteur conclut que le Tribunal a adopté une démarche inutilement restrictive.

INTRODUCTION

The issue of what the appropriate standard of review by the courts from decisions of administrative tribunals should be is an extremely complex one. It has been the subject of much litigation. As a result, there is a large body of jurisprudence. However, that jurisprudence is not always consistent or easily reconcilable. Moreover, the context of one decision is often overlooked and a *ratio* that is not suited to other contexts is often adopted without serious analysis. Moreover, the issue has been clouded by the courts struggling with changing views of public policy. Policy considerations do not generally lead to sound legal analysis and they often can further obscure the jurisprudential thinking on an issue.¹

This paper attempts to digest the jurisprudence and to formulate a principle and conclusion that is or should be applicable to the Ontario Rental Housing Tribunal [ORHT or the Tribunal]. The Tribunal was established by the *Tenant Protection Act, 1997*² [TPA]. It operates under the auspices of that *Act* and the *Statutory Powers Procedure Act*³ [SPPA].

* Paul Stuart Rapsey, B.A., LL. B., is a research lawyer who has been specializing for more than a decade in residential tenancy law. He has had several articles published in law journals and has written a large body of resource material in housing and other areas of law. This article expresses the personal view of the author.

1. This is not intended to underplay the importance or relevance of public policy considerations *per se*.
2. S.O. 1997, c. 24, ss. 157-59.
3. R.S.O. 1990, c. S.22.

JURISDICTION OF THE ONTARIO RENTAL HOUSING TRIBUNAL

I have addressed in detail the scope of ORHT's jurisdiction previously in this publication.⁴ The Tribunal is a creature of statute. It only has the authority expressly given to it by statute. Under the *TPA*, it is given exclusive jurisdiction to determine all questions of fact and law in residential tenancy matters arising under its express statutory authority.⁵ The issue of what constitutes its "exclusive jurisdiction" is extremely complex and even perplexing;⁶ however, I have suggested⁷ that by reason of its combined powers under the *TPA* and the *SPPA*, the Tribunal has the same authority the superior courts had under the former Part IV of the *Landlord and Tenant Act*⁸ [*LTA*].

THE STANDARD OF COURT REVIEW OF ADMINISTRATIVE TRIBUNAL DECISIONS

There are two types of court review of decisions of administrative tribunals; namely, judicial review and appeal. The jurisprudence on the standard of review has arisen historically in the context of judicial review applications rather than appeals. The Supreme Court of Canada's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review for a decision from an administrative tribunal.⁹ The Supreme Court has stated that in conducting a review it is always important to have a clear understanding of the amount of deference, if any, that should be afforded to the decision of the administrative body.¹⁰

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4. P.S. Rapsey, "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" (2000) 15 *J. L. & Social Pol'y* 163.
 5. *TPA* s. 157(2) and s. 162.
 6. In *501606 Ontario Limited v. Manbauhar and Waldman* (29 July 1998; Feldman), File No. TSL-00469 (ORHT), the adjudicator stated that s. 157 simply begged the question of whether something was within the Tribunal's jurisdiction. In *Swire v. Walleye Trailer Park Limited; Cunningham v. Walleye Trailer Park Limited* (31 July 2001), Court File Nos. 229/00 and 230/00 (Ont. Div. Ct.) (Maloney J.), an appeal from a decision of the Small Claims Court, a single judge of the Divisional Court held that only the ORHT could determine residential tenancy matters, even though the *TPA* in this case clearly did not give the Tribunal the authority over the question; whereas in *Crooks v. Levine*, [2001] O.J. No. 278, online: QL (Div. Ct.) (Rutherford J.) another judge of the Court reached the opposite conclusion: *i.e.*, the exclusive jurisdiction provision did not preclude the Small Claims Court from hearing matters merely because a residential tenancy issue was involved.
 7. *Supra* note 5 at pp 166-69.
 8. R.S.O. 1990, c. L.7, Part IV, as rep. by the *Tenant Protection Act, 1997*, S.O. 1997, c. 24, s. 213(4). Part IV of the *LTA* previously dealt with residential tenancies.
 9. *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] S.C.J. No. 9, [*Moreau- Bérubé*] at para. 37. This was an appeal from a judicial review proceeding of a judicial council's decision. The decision by Arbour J. succinctly analyzes the developments in the law regarding the standard of review. See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 [*Pushpanathan*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*] and *Director of Investigation and Research, Competition Act v. Southam Inc. (No. 2)* [1997] 1 S.C.R. 748, (1996), 144 D.L.R. (4th) 1, 209 N.R. 20, 71 C.P.R. (3d) 417, [1996] S.C.J. No. 116, online: QL (S.C.C.) [*Southam Inc. (No. 2)*].
 10. *Ibid.* at para. 36.

This pragmatic and functional approach creates a spectrum of levels of deference that may be required: correctness, reasonableness *simpliciter*, and patent unreasonableness.¹¹ As Bastarache J. stated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*:¹²

Traditionally, the “correctness” standard and the “patent unreasonableness” standard were the only two approaches available to a reviewing court. But in [Southam] a “reasonableness *simpliciter*” standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a “spectrum” with a “more exacting end” and a “more deferential end”.

There are four main factors, each not conclusive in and of itself, that must be considered in determining the proper standard of review for a decision from an administrative tribunal:¹³

1. the nature of the problem under review, and whether it constitutes a question of law, fact or mixed law and fact;¹⁴
2. words within the tribunal’s enabling statute, most importantly, whether a privative clause¹⁵ is present or absent;¹⁶
3. the purpose of the tribunal’s enabling statute, and whether that purpose lends itself to less or more deference; and,
4. whether the tribunal has any particular expertise in reference to the question under review.

In determining the appropriate standard of review, the court’s focus must be on the particular provision being invoked and interpreted by a tribunal. Some provisions within the same legislation may require greater deference than others.¹⁷ Until fairly recently, the presence of a privative clause invoked a different sort of analysis by the courts, at least

11. The classic statement of the “patently unreasonable” standard is in Dickson J.’s judgment in the seminal *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 (S.C.C.): Was the Board’s interpretation so patently unreasonable that its construction could not be rationally supported by the relevant legislation and demanded intervention by the court upon review?

12. *Supra* note 10 at para. 27, referring to *Southam Inc. (No. 2)*, *supra* note 10 at para. 30.

13. See *Moreau-Bérubé*, *supra* note 10 at para. 39.

14. This is stated differently in *Moreau-Bérubé*, *supra* note 10, than it had been in *Southam Ltd. (No. 2)*, *supra* at note 10. In *Southam Inc. (No. 2)* at S.C.R. para. 32 the “nature of the problem” was simply whether the question was one of fact, mixed fact and law or law alone. The *Moreau-Bérubé* “nature of the problem” test suggests there is a further consideration, perhaps, for example whether the question is jurisdictional, constitutional, one of statutory interpretation, the exercise of discretion, or natural justice. I suggest the test in *Moreau-Bérubé* should be limited to judicial review, whereas the test in *Southam Inc. (No. 2)* is more appropriate to a statutory appeal.

15. A privative clause is a clause in a statute that purports to prevent the courts from reviewing decisions made by a particular tribunal.

16. It is not so much whether a privative clause is present in the statute, but whether, if it is there, it impacts on the type of review in question.

17. *Pushpanathan*, *supra* note 10 at N.R. 220.

with respect to statutory interpretation matters. Typically, the courts held that they could only intervene where there was a privative clause if the tribunal had exceeded or lost its jurisdiction. A tribunal decision would be subject to judicial review if it erred in interpreting a “jurisdictional” provision, or if it made a “patently unreasonable”¹⁸ error of law on a matter initially within its jurisdiction on the basis that a patently unreasonable interpretation would cause the tribunal to lose its jurisdiction.

The expertise of the tribunal has been described as the most important of all the factors that a court must consider in arriving at the appropriate standard of review. A tribunal whose members are required to have a particular expertise or highly specialized knowledge is likely to receive a high degree of deference from a reviewing court. Although there may perhaps be an argument that the ORHT has some expertise with respect to policy concerns, it is by nature an adjudicative rather than policy-making tribunal. It should not be viewed as a “specialized” tribunal entitled to broad judicial deference. Indeed the Supreme Court has held that a similar tribunal to the ORHT under a similar statute to the *TPA* was not an expert tribunal.¹⁹ The Court found that the former Ontario Residential Tenancies Commission was not a specialized tribunal and therefore was not entitled to broad curial deference. The reason for this conclusion was 1) there was no requirement that its members have legal training or occupational experience and 2) the process of selection of members was not based on any bipartite or tripartite principle.²⁰ The same finding should apply to the ORHT.

It appears clear that a tribunal’s interpretation of a provision limiting its own jurisdiction should be accorded little or no deference, and should normally be reviewed on the standard of correctness.²¹ The Ontario Court of Appeal has suggested that the correctness standard should apply to any statutory interpretation undertaken by a non-expert tribunal.²² Other errors of law, such as errors in the assessment of evidence,²³ may be subject to a more relaxed standard of review.²⁴ However, this possibility would only further reduce certainty and there is no sound reason why a

18. *Supra* note 12.

19. *Reference Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 748, 123 D.L.R. (3d) 554, 37 N.R. 158 (S.C.C.).

20. *Ibid.* at S.C.R. 748.

21. *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 168 N.R. 321 (S.C.C.).

22. *Wedekind v. Director of Income Maintenance Branch of the Ministry of Community and Social Services* (1993), 62 O.A.C. 70 (Div. Ct.), *aff’d* (1994), 21 O.R. (3d) 289 (C.A.), leave to appeal refused (1995), 23 O.R. (3d) ii (S.C.C.). See also *Matthews-Clarke v. Ontario (Director, Disability Support Program)* (12 February 2002), Court File No. 546/00 (Ont. Div. Ct.) (Farley, McCombs and Sedgwick JJ.); *Sampson v. Ontario (Director, Disability Support Program)* (12 February 2002), Court File No. 547/00 (Ont. Div. Ct.) (Farley, McCombs and Sedgwick JJ.). These were statutory appeals. None of these decisions analyze the standard of review generally and so they do not stand for anything other than that the tribunals had to be correct in interpreting the respective statutes. They do not suggest that there is another standard of review on different sorts of errors of law.

23. *E.g.*, consideration of irrelevant evidence, refusal to admit relevant evidence, decision based on no evidence *etc.*

24. The author has found no jurisprudence to support this proposition in the context of a statutory appeal on questions of law alone.

non-expert tribunal should be permitted to make any errors in law. It remains safe to say that issues involving the application or interpretation of the *Charter*²⁵ will always be reviewed on a standard of correctness.²⁶

It is more difficult to predict what standard the Divisional Court is likely to apply in reviewing errors involving natural justice. Such errors are consistently described in the jurisprudence as errors that cause a tribunal to exceed or lose its jurisdiction. It may be argued that once a tribunal is found to have exceeded its jurisdiction by breaching natural justice, the decision which it has made is void and the reviewing court must intervene, subject to its residual discretion to deny relief.²⁷

Currently, therefore, there seems to be one test regarding the standard of review which has evolved. This test is applicable whether or not that review is by way of statutory appeal or by way of judicial review. While the test²⁸ is the same, the result is not necessarily the same. For this reason I will address the standard applicable to appeals and the standard applicable to judicial review separately.

APPEALS FROM DECISIONS OF THE TRIBUNAL

Appeals from decisions of the Tribunal are to the Ontario Divisional Court. Appeals are as a matter of right; however they can be brought on questions of law alone.²⁹ What is a “question of law” is not always easily determinable.³⁰ An error of jurisdiction may be considered a species of error of law.³¹

25. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

26. *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* (1991), 81 D.L.R. (4th) 121 (S.C.C.); *Ontario (Attorney General) v. Pyke* (1998), 115 O.A.C. 162 (Div. Ct.) at 168.

27. In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at 661, Le Dain J. stated that the denial of a right to a fair hearing must always render a decision invalid.

28. Perhaps more appropriately, one should say that the factors to be considered in determining the standard of review are the same.

29. *TPA* s. 196(1). An appeal must be filed within 30 days after the order is served on the person who is appealing. An appeal is not limited to parties but may be brought by any person “affected by the order”.

30. E.g., in *Hung v. C.L.K. Enterprises Inc.*, [1999] O.J. No. 3559, online: QL (Div. Ct.), the Divisional Court characterized a particular exercise of discretion by the ORHT to grant relief from forfeiture as an error of law. This decision is at odds with the usual position of the appellate courts: see for example *Peel Non-Profit Housing v. McNamara* (1991), 2 O.R. (3d) 414 (Div. Ct.) in which the Court declined to interfere even though it would have reached a different conclusion from the trial judge concerning the exercise of discretion. In *Hung*, above, there was no evidence the Tribunal applied a wrong principle in granting the relief. The Court assessed the facts differently, that was all. In *Meredith v. Leboeuf Properties Inc.*, [2000] O.J. No. 209, online: QL (Div. Ct.), the Court applied the “question of law” determination very strictly. The tenant alleged the Tribunal erred in failing to exercise its mandatory authority to refuse the eviction under *TPA* ss. 84(2)(a) where the landlord was in serious breach of its obligations under the *Act*. The Divisional Court denied the appeal because it did not involve a question of law alone but included an assessment of the facts. In *Hasan v. Niagara Housing Authority* (5 February 2001), Court File No. 99-002412-DV (Ont. Div. Ct.), the Divisional Court held there was an error of law where the Tribunal reached an unreasonable conclusion based on the evidence before it.

31. *Quebec (Attorney General) v. Farrah*, [1978] 2 S.C.R. 638 per Pigeon J.

Although there is some disagreement, it seems that “a question of law” does not include “a question of mixed fact and law”.³² It certainly does not include “a question of fact alone”. Under the *LTA*, appeals were not restricted to questions of law.³³ However, rarely did the Divisional Court interfere with strictly factual determinations.

It seems therefore, the legislature did intend in some respects to limit resort to the appellate courts under the *TPA* from what had been the case under the *LTA*. The appeal right is also arguably made broader under the *TPA*.³⁴ The limiting of appeals to questions of law does not in itself mean the scope of review for those issues which are properly the subject of appeal under *TPA* s. 196 was intended to be narrow.

THE STANDARD OF APPELLATE REVIEW FROM DECISIONS OF ORHT

While there is one test for determining the standard of review, there is no set standard applicable to all tribunals in all situations or contexts. The analysis of the standard of review on statutory appeals, however, is subject to the same general common law principles as on judicial review.

The Divisional Court jurisprudence on the standard of review from ORHT decisions is diverse and leaves a lot to be desired in terms of legal analysis. In most cases there is no analysis at all. In some cases it is muddled. To date, the Court has established three distinct standards for ORHT appeals: correctness,³⁵ reasonableness *simpliciter*³⁶ and patent unreasonableness.³⁷ The decisions cover the whole spectrum of possible standards identified to date by the Supreme Court of Canada.

32. E.g., *Meredith v. Leboeuf Properties Inc.*, [2000] O.J. No. 209; online: QL (Div. Ct.).

33. *LTA*, s. 116.

34. Under the *LTA*, s. 116, an appeal was only from “final orders”. Under the *TPA*, s. 196, an appeal is not limited to final orders, although rarely will an appeal be entertained from interim or interlocutory orders: *Tenants of 22 Shalimar v. Lt. Greenwin* (23 August 1999) Court File No. 534/99 (Ont. Div. Ct.).

35. *Hung v. C.L.K. Enterprises Inc.*, [1999] O.J. No. 3559, on line: QL (Div. Ct.), *Belleau v. Victoria Park Community Homes* (8 February 2000), Court File No. 99-1867-DV (Ont. Div. Ct.) (O’Driscoll, McNeely and Matlow JJ.), *Dollimore v. Azuria Group Inc.*, [2001] O.J. No. 4408, online: QL (Div. Ct.) (McRae, Day and Caputo JJ.) and (at least arguably although it is not clearly stated in these terms) *4750, 4752, 4754 Dundas Street West (Tenants of) v. Wuebbolt*, [2001] O.J. No. 4001, online: QL (Div. Ct.) (Then, Cosgrove and Cameron JJ.).

36. *Paul Bunyan Trailer Camp Limited v. McCormick* (29 October 1999), Court File No. 1005/98 (Ont. Div. Ct.); *Burt Dozet Management Inc. v. Goharзад*, [2001] O.J. No. 550, online: QL (Div. Ct.) (Killeen, Pardu and Cavarzan JJ.) (on consent on this issue); and *MacKay v. Sanghera*, [2001] O.J. No. 2600, online: QL (Div. Ct.) (Lane, Then and Chapnik JJ.) (although Court also held that decision was correct). There is a possibility, from reading the decision in *Paul Bunyan Trailer Camp Limited v. McCormick*, *supra*, that the Court was focused on the notion that this was an issue of mixed fact and law and, therefore, that a lower standard should apply. However, if the question for consideration on appeal was one of mixed fact and law, then the Court had no jurisdiction to entertain the appeal at all.

37. *Smolcec v. Longhouse Village (Thunder Bay) Inc.* (2001). 32 Admin. L.R. (3d) 72, 143 O.A.C. 137 (Ont. Div. Ct.) (LaForme, Greer and Ferguson JJ.), leave to appeal to the Court of Appeal refused, 19 July 2001 (Catzman, Feldman, Sharpe JJ.A.).

In *Director of Investigation and Research, Competition Act v. Southam Inc. (No. 2)*³⁸ [*Southam Inc. (No. 2)*], Iacobucci J. held that appellate courts must have regard to 1) the nature of the problem, 2) to the applicable law properly interpreted in light of the purpose, and 3) to the expertise of the tribunal in question.³⁹ Iacobucci J. said the “nature of the problem” referred to whether the issue was one of law, fact or mixed fact and law. He determined that courts should show more deference to a tribunal on questions of fact or mixed fact and law than on questions of law alone.⁴⁰ Further, where the purpose of the legislation was to establish a tribunal with non-legal or not strictly legal expertise,⁴¹ the natural inference was that the purpose of the Act was better served by appellate deference to the tribunal’s decisions.

The Divisional Court in *Paul Bunyan Trailer Camp Limited v. McCormick*⁴² held that the Tribunal was an expert tribunal which should be accorded deference. As such it applied a “reasonableness” standard. The Court did not appear to examine in detail whether, in fact, the Tribunal was comprised of persons with expertise,⁴³ but rather merely stated that the Tribunal was established “presumably because the government of Ontario believed this task could be handled more effectively and efficiently by a panel of lay persons with expertise in this field” (at para. 21). If this was the sole basis for the Court’s finding, then I would suggest that it has taken the Supreme Court’s decision in *Southam Inc. [No. 2]*⁴⁴ out of context. The statement about expertise by Iacobucci J. was not saying that amateur tribunals should be accorded more deference. Given the context of the Supreme Court decision,⁴⁵ it appears that the point Iacobucci J. was making was that tribunals that may not have legal knowledge but have other proven specialized expertise⁴⁶ applicable to the legislation in question should be

38. *Supra* note 10. This is the leading decision with respect to the standard of review in an appeal from a decision of an administrative tribunal. Practically all Supreme Court of Canada cases have dealt with judicial review proceedings.

39. It can be assumed that for statutory appeals, there is no governing privative clause. Therefore the fourth factor identified earlier in this paper (and which is certainly relevant to judicial review), *i.e.*, whether there is a privative clause, need not be listed. However, that does not mean it need not be considered. The absence of a privative clause is one factor in favour of a less deferential standard of review in appeals.

40. Appeals from ORHT are on questions of law alone and this suggests that ORHT should be accorded the least deference under this factor.

41. The *TPA* demonstrates no purpose to have an expert tribunal of legal or non-legal specialized knowledge: *i.e.*, ORHT is not an “expert” tribunal in the sense that term is used by the Supreme Court.

42. *Supra* note 35.

43. There is absolutely no justification for holding the Tribunal to be an expert tribunal. Three of five Vice-Chairs are not lawyers. Of the full time Members, over 50% have no legal training. Very few have any demonstrable expertise in landlord and tenant law and of those, few, if any, appear to be knowledgeable about the common law of landlord and tenant. A handful have had administrative rent control experience. Indeed, when the Tribunal was first hiring adjudicators, it developed strict conflict of interest guidelines and looked for those without recent special experience in this field.

44. *Supra* note 10.

45. This was an appeal from a tribunal composed of economic, commercial and legal experts.

46. *E.g.*, economic, commercial, *etc.*

accorded deference. In *Southam (No. 2)*,⁴⁷ Iacobucci J. even suggested that a consideration of the “patent unreasonableness” standard does not usually factor into statutory appeals.⁴⁸

An important recent decision of the Divisional Court on the standard of review generally is *Coughlan v. WMC International Ltd.*⁴⁹ The decision dealt with the Ontario Securities Commission [OSC] and the right of appeal under the *Securities Act*.⁵⁰ The *Act* provided a broad right of appeal unimpeded by a privative clause which, as the Court noted,⁵¹ dictated against the standard of “patent unreasonableness”. Moreover, the appeal, unlike appeals from ORHT, was not limited to questions of law alone. The Court on appeal from the OSC could entertain three types of questions; namely, law, fact and mixed law and fact. This brought into play a possible application of a spectrum of standards depending on the nature of the issue under appeal. The Court also noted that the appeal provision in question, although broad, did not expressly give the Court the authority to substitute its opinion for that of the Tribunal.⁵² Moreover, as was noted by the Divisional Court, the tribunal in question was a:

highly specialized tribunal with expertise in the regulation of capital markets. The complexity of the securities markets and the extent to which the OSC must balance competing interests while at the same time protecting the public interest...⁵³

Even where a standard of patent unreasonableness would be suggested by the tribunal’s “highly specialized expertise”, the Divisional Court held that this must be re-evaluated in light of the particular issue before the tribunal “**and the court’s own relative expertise on that issue...**”⁵⁴

Applying this decision’s analysis of the applicable Supreme Court of Canada jurisprudence suggests strongly that the proper standard on appeal from ORHT under s. 196 of the *TPA* is one of “correctness”. In any event is most certainly not one of “patent unreasonableness” for the following reasons:

1. Subsections 196(1), (4) and (5) together provide a very broad right of appeal.
2. The court is given the power to substitute its decision for that of the Tribunal.⁵⁵

47. *Supra* note 10.

48. In *Southam Inc. (No. 2)*, *ibid.*, Justice Iacobucci stated that because the standard of patent unreasonableness was principally a test for determining whether a tribunal had exceeded its jurisdiction, it would rarely be the appropriate standard of review in statutory appeals. In any event, he considered all the factors and especially the highly specialized expertise of the tribunal in this case.

49. [2000] O.J. No. 5109, online: QL (Div. Ct.) (McRae, Somers, Molloy, JJ.).

50. R.S.O. 1990, c. S.5, s. 9.

51. *Coughlan v. WMC International Ltd.*, *supra* note 50 at para. 25.

52. *Coughlan v. WMC International Ltd.*, *supra* at note 50 at para 25.

53. *Ibid.* at para. 27. Emphasis added.

54. *Op. Sit.* at para. 28.

55. Although the term used is “replace” not “substitute”: s. 196(4)(a).

3. While *TPA* has a privative clause⁵⁶ applicable in judicial review applications, it is expressly made subject to the right of appeal by the opening phrase.⁵⁷ Therefore, it is not a clause governing appeals under s. 196.
4. There is no room for the application of a spectrum of standards to decisions of the ORHT as an appeal under s. 196 is limited to questions of law alone.⁵⁸
5. Even if it could be said the ORHT were a “specialized tribunal”,⁵⁹ it most certainly is not a “highly specialized tribunal” in the context of the OSC and similar expert tribunals.
6. Questions relating to tenancy contracts and the general law of landlord and tenant relationships are within the courts’ developed expertise.

Further, an appellate court from the trial decisions under the *LTA* exercised a standard of correctness with respect to issues of law.⁶⁰ There is no justification for finding that a non-expert tribunal should be accorded a greater degree of deference under the *TPA*. Indeed, if the standard is reasonableness alone, then appeal decisions affirming a Tribunal decision can only stand for the proposition that a Tribunal decision was reasonable. They would not mean that it was correct. Therefore, appeal decisions can have no binding precedential standing on the interpretation of the *TPA*. This view is supported by *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers’ Association*.⁶¹ Any adjudicator could make another equally reasonable but opposite determination on the same point of interpretation. While this may be acceptable in some areas of administrative law, it is not acceptable in something as important as housing. It would lead to chaos, uncertainty and, most definitely, to inequity. Rather than discourage litigation, it would promote it.

56. S. 195.

57. *TPA*, s. 195 states: “**Except where this Act provides otherwise**, an order of the Tribunal is final, binding and not subject to review except under section 21.2 of the *Statutory Powers Procedure Act*.” [Emphasis added.] Section 196 provides otherwise.

58. Some might argue that even different types of questions of law might be subject to a spectrum within the spectrum. However, the author can see no justification for this and finds no jurisprudence to support that argument in the context of a statutory appeal on a question of law alone.

59. The author strongly disputes this premise. See discussion of *Reference Re Residential Tenancies Act, 1979*, *supra* note 20.

60. This was not addressed head on; but is implied from the decisions: *e.g.*, *Re Coady-Mark and 938155 Ontario Ltd.* (24 July 1996), Hamilton File No. L4751/96 (Ont. Gen. Div.); *aff’d* (10 September 1997) File No. D752/96 (Ont. Div. Ct.) [unreported]; *Manufacturers Life Property Corp. v. Senkow* (1990), 75 O.R. (2d) 254 (Div. Ct.); *Nicholson v. Michalas* (1988), 64 O.R. (2d) 238 (Div. Ct.); *Re Kalezic and Maddix* (13 May 1987), #M147057/87 (Ont. Dist. Ct.); *aff’d* (17 June 1987) (Div. Ct.) [unreported]; *Greenwin Property Management v. McCormick* (1982), 36 O.R. (2d) 161 (Div. Ct.); *Ozmond v. Young* (1980), 28 O.R. (2d) 225 (Div. Ct.); *Re Hahn and Kramer* (1979), 23 O.R. (2d) 689 (Div. Ct.); *Re Oshawa Housing Authority and Maule* (12 March 1979), (Ont. Div. Ct.) [unreported]. Discretionary decisions, and decisions of fact were accorded more deference.

61. (2001), 56 O.R. (3d) 85 (C.A.) (Borins, Feldman, MacPherson JJ.A.). This was an appeal from a judicial review of a decision of an arbitrator. The Court of Appeal enunciated the issue under appeal as being the role of consistency in the decisions of arbitrators and administrative tribunals and the relationship of the courts to those decisions. The Court determined that only decisions of the reviewing courts determined on a “correctness” standard where binding precedents.

STANDARD OF REVIEW ON JUDICIAL REVIEW FROM ORHT

This is not intended to be an exhaustive discussion of judicial review.⁶² There are very few judicial review decisions from ORHT.⁶³ This is most likely because of the existence of a statutory right of appeal under s. 196 of the *TPA*. While the existence of an appeal right is not fatal to an application for judicial review,⁶⁴ judicial review is a discretionary remedy. The appeal right would in many situations weigh against the exercise of that discretion in favour of an applicant.

While there is no privative clause governing appeals under the *TPA*, there is a privative clause governing other types of court review. Section 195 states:

Except where this Act provides otherwise, an order of the Tribunal is final, binding and not subject to review except under section 21.2 of the *Statutory Powers Procedure Act*.⁶⁵

The wording of privative clauses varies, and different types of clauses have been interpreted differently. No matter how strict the language, however, the courts have refused to accept that any privative clause can entirely deprive them of supervisory jurisdiction over tribunal decisions. According to the latest decisions by the Supreme Court of Canada, the presence of a “full” privative clause indicates that the court ought to show deference to the tribunal’s decision, unless other factors strongly indicate the contrary.⁶⁶ By any means, s. 195 is not a “full” privative clause.⁶⁷ Regardless s. 195 does demonstrate an intention by the legislature that some deference on judicial review be given to the Tribunal, at least where the Tribunal is acting within its jurisdiction.

In *Metropolitan Toronto Housing Authority v. Godwin*,⁶⁸ the Divisional Court has held that the appropriate standard of review on judicial review was “correctness”⁶⁹ given

62. Nor is it intended to be an examination of when judicial review might be more appropriate than appeal.
63. The author is only aware of the following two proceedings: *Metropolitan Toronto Housing Authority v. Godwin* (2000), 50 O.R. (3d) 207 (Div. Ct.) (O’Driscoll J.), leave to appeal to the Court of Appeal granted 19 July 2001, (Catzman, Feldman, Sharpe JJ.A.); and *Santokie v. Toronto Housing Co.*, [2001] O.J. No. 30, online: QL (Div. Ct.) (O’Driscoll, Southey and O’Connor JJ.).
64. The *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, [JRPA] s. 2(1) expressly states that an application may be made despite the existence of a right of appeal.
65. Section 21.2 of the *SPPA* governs review by the Tribunal itself. I will address this issue briefly later in this paper.
66. A “full” privative clause is one that states that decisions of the tribunal are “final and conclusive from which no appeal lies and all forms of judicial review are excluded”: *Pasiecznyk v. Procrane* (1997), 216 N.R. 1 at 15 (S.C.C.).
67. An example of a “full” privative clause is found in the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, s. 86(3). This provides that “... the order or direction of the Appeals Tribunal or a panel thereof is final and conclusive and not open to question or review in any court upon any grounds and no proceeding by or before the Appeals Tribunal or a panel thereof shall be restrained by injunction, prohibition or other process or procedure in any court or be removable by application for judicial review, or otherwise, into any court.” There is no statutory right of appeal in this statute.
68. *Supra* note 64.
69. In the alternative, the Court held that the decision of the Tribunal to proceed to hear evidence on a

that this was a jurisdictional issue and involved a question of law.⁷⁰ Certainly on other questions, fact or mixed fact and law, the existence of a moderate privative clause might suggest the application of a reasonableness *simpliciter* standard even if ORHT is not an expert tribunal. Whereas appeals cannot be brought on factual questions or on questions of mixed fact and law, judicial review may involve these questions. Certainly, there is more scope for considering a broad spectrum of standards of review depending on the particular issue being considered by the court.

INTERNAL REVIEW OF ORHT DECISIONS

Internal review of ORHT decisions is authorized by the *SPPA*,⁷¹ the *TPA*⁷² and the ORHT Rules of Practice.⁷³ The *SPPA* s. 21.2(1) states:

A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

The ORHT will only review final orders. The *SPPA* makes no reference to any restriction on reviews of final orders. ORHT Rule 27.1, however, purports to restrict reviews to orders which “finally dispose of an application”. This Rule is more restrictive than the *SPPA* provision requires; however, since the ORHT could have declined to develop any Rule, presumably a restrictive Rule is authorized.⁷⁴

The power of review is discretionary. A request to review an order will not be allowed unless a Member of the Tribunal determines that the order may contain a “serious error” or that a serious error occurred in the proceedings.⁷⁵ A description of what is a serious error is contained in the Tribunal’s guideline entitled “Review of an Order”.⁷⁶ This guideline states:

Since a party cannot appeal an order to the Divisional Court, except on a point of law, it is important that the Tribunal review alleged errors of fact. However, the Tribunal may decline to review an order if the alleged error is trivial in amount or would not significantly change the result. This means that it is essential that the

representative basis was “patently unreasonable”.

70. That is, whether the *Act* authorized the Tribunal to hear representative evidence. Both the Tribunal and the tenant filed motions for leave to appeal to the Court of Appeal. Leave was granted. The matter appears to be on hold.

71. *SPPA* s. 21.2.

72. *E.g.*, *TPA*, ss. 170, 195.

73. ORHT Rule 27, “Review of Orders”.

74. In any event, rules may be waived: ORHT Rule 1.5. The Tribunal could entertain a review from an interim order in an appropriate situation: *e.g.*, see *Godwin v. Metropolitan Toronto Housing Authority* (4 February 2000; Braund), File No. TST-01206-I-RV2 (ORHT), rev’d on other grounds at (2000), 50 O.R. (3d) 207 (Div. Ct.) (O’Driscoll J.).

75. ORHT Rule 27.2.

76. The Tribunal’s Interpretation Guidelines are not binding on adjudicators: *TPA*, s. 164(3). The types of errors contemplated by the Guidelines are errors of jurisdiction, procedural errors, errors of fact and law and error in the application of discretion where the discretion was exercised unreasonably.

party requesting the review should specify not only what the error is, but how it would change the order if the Tribunal agrees it is an error. [Emphasis added.]

Yet this guideline is followed more in the breach than in the application. Indeed, the Tribunal rarely reviews factual determinations and has established a standard of review that is so deferential that review is often a pointless exercise.⁷⁷ As long as there has been no factual determination that was unsupported by evidence, the decision will not be interfered with in most cases.⁷⁸ One adjudicator has stated that, if the findings of fact are not unreasonable or capricious, they will not be interfered with.⁷⁹ Another has stated that a patently unreasonable interpretation of evidence or law is required before a review should interfere with a decision.⁸⁰

The Tribunal adjudicators have a considerable degree of discretion. There is, for example, discretion to grant relief from eviction; there is a degree of discretion in determining what remedy is appropriate in a given case and there is a discretion to impose conditions in an order. The Tribunal will not interfere with the “proper exercise of discretion” even if the review adjudicator might have exercised the discretion differently.⁸¹ The Tribunal will not even normally review a reasonable interpretation of the statute by an adjudicator even if it might not be correct.⁸²

Instead of being a broader right of review than an appeal, as suggested by the Tribunal Guidelines, in practice internal reviews by the ORHT offer very narrow review opportunities.

CONCLUSION

Only a correctness standard on appeal will offer the possibility for a degree of certainty which should be accorded to residential tenancy jurisprudence. The ORHT is not an expert lay tribunal in the sense that the Supreme Court of Canada has used that term. It has no greater expertise over residential tenancy disputes than do the courts. However, given the privative clause, which is applicable to judicial review, the best opportunity for review of a decision of the ORHT remains an appeal in most cases. This is unfortunate. Appeals are costly, procedurally complicated, slow to unfold and, of course, are limited to questions of law. However, despite conflicting jurisprudence, the standard of correctness is applicable in an appeal to errors of law by ORHT.

77. *E.g., Kingston & Frontenac Housing Corporation v. Kaloudas* (29 June 2001; Goodchild), File No. EAL-21668-RV (ORHT).

78. *Ibid.*

79. *Toronto Housing Company Inc. v. Hocek* (24 July 2001; McGavin), File No. TNL-25818-RV (ORHT).

80. *Torres v. Minto Management Limited* (29 June 2001; von Cramon), File No. EAT-02491-RV (ORHT).

81. *E.g., Metropolitan Toronto Housing Authority v. St. Louis* (9 June 1999; Timms), File No. TEL-02124-RV (ORHT). This standard of review is one applied by the courts on appeal.

82. ORHT Interpretation Guideline, “Review of an Order”. In *Fox v. Bond* (16 June 2000; Rogers), File No. TSL-19462-RV (ORHT), for example, an interpretation of s. 71 was held to be reasonable and therefore the review adjudicator would not interfere even though another interpretation was possible.

Therefore, where an appeal is warranted, the courts should give a more careful consideration to the decision of the Tribunal.

The power of ORHT to offer meaningful internal reviews could potentially limit the resort to the courts. However, the Tribunal has, to a significant degree, curtailed meaningful review.⁸³ The Tribunal applies a reasonable standard to review of its decisions even on questions of law.

Judicial review will rarely be the best way in which to proceed, although the possibility of getting to court quickly does exist.⁸⁴ It is a discretionary remedy and is as complicated procedurally as are appeals. It is also likely that, in judicial review, that a moderate degree of deference will be accorded to decisions of ORHT, at least on questions not involving the Tribunal's jurisdiction.

83. This is not to say there are no examples of good internal review decisions by ORHT. Good decisions are usually found in egregious cases, where there has been a glaring breach of natural justice, or a blatant error of law, including error of jurisdiction.

84. *Judicial Review Procedure Act*, s. 6(2) *supra* note 65.

