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RE-CONSTRUCTING THE WORK OF THE ONTARIO RENTAL HOUSING TRIBUNAL: First Steps to a Fairer Process

KATHERINE LAIRD*

RéSUMÉ
La performance du Tribunal du logement de l’Ontario (TLO) dans l’acquittement de ses responsabilités légales en vertu de la loi relativement nouvelle de l’Ontario en matière de location résidentielle, la Loi de 1997 sur la protection des locataires (la « Loi »), a été critiquée dans chacun des deux derniers volumes de la Revue. Cet article prend comme point de départ l’analyse détaillée de ces articles et va plus loin pour suggérer un autre processus pour la résolution des différends entre locataires et locataires en Ontario, une attention particulière étant portée aux instances d’expulsion.

Les propositions mises de l’avant se veulent pratiques et relativement faciles à mettre en œuvre dans le cadre décisionnel actuel, parfois sans modification législative. Les réformes recommandées visent essentiellement les questions de procédure. Cela dit, des organismes ontariens de défense des droits des locataires recherchent actuellement de nombreuses modifications importantes de nature législative. Deux de ces réformes sont comprises dans le présent article, car elles sont nécessaires pour appuyer les réformes de procédure qui constituent mon principal centre d’intérêt.

Enfin, on reconnaît que même la mise en œuvre intégrale des réformes recommandées dans le présent article ne réglerait pas de nombreuses autres questions concernant l’ampleur de la protection législative offerte aux locataires par la Loi sur la protection des locataires. Toutefois, les nouvelles mesures suggérées constitueraient une première étape vers la constitution d’un processus plus équitable et plus accessible de règlement des cas d’expulsion. En outre, ces mesures favoriseraient un bon équilibre entre les droits et la protection des locataires et des locataires aux termes de la loi.

Cet article commence par une discussion du rôle et de la fonction clés que joue le Tribunal du logement de l’Ontario pour examiner ensuite certaines des critiques dont le Tribunal a fait l’objet depuis qu’il a commencé ses activités en juin 1997. Il aborde ensuite les facteurs socio-économiques qui caractérisent le marché résidentiel et les locataires en Ontario aujourd’hui. J’ai examiné la manière dont ces facteurs devraient

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transparaître dans les pratiques du Tribunal et dans le cadre législatif du règlement des différends. Enfin, j’aborde la manière dont le Tribunal pourrait se réorienter pour fournir un processus équitable aux locataires intimés contre lesquels des requêtes d’expulsion sont formées, avec et sans modifications législatives. Je conclus en établissant les mesures fondamentales d’un processus reconstitué de règlement des différends entre locataires et locataires.

INTRODUCTION

The performance of the Ontario Rental Housing Tribunal (ORHT) in fulfilling its statutory responsibilities under Ontario’s residential tenancies legislation, the Tenant Protection Act, 1997 (the Act) has been critiqued in each of the last two volumes of this Journal. This article takes as its starting point the thorough analysis in these articles, and goes further to suggest an alternative process for the resolution of disputes between landlords and tenants in Ontario, with particular focus on eviction proceedings.

The proposals are intended to be practical and relatively easy to implement in the current adjudicative framework, in some instances without legislative amendments. The focus of the recommended reforms is on procedural issues, but there are many important substantive statutory amendments that are currently being sought by advocacy organizations representing tenants in Ontario. Two of these substantive reforms are included in this article because they are necessary to support the procedural reforms that are my primary focus.

Finally, it is acknowledged that even full implementation of the reforms recommended in this article would leave unresolved many other issues concerning the scope of the legislative protection offered to tenants under the Tenant Protection Act. However, the suggested measures would be a first step in constructing a fairer and more accessible application resolution process in eviction proceedings, and would go some distance in establishing a proper balance between the rights and protections afforded tenants and landlords under the legislation.

This article begins with a discussion of the key role and function of the Ontario Rental Housing Tribunal, and then reviews some of the criticisms that have been directed at the Tribunal since it began operations in June 1998. The article next considers the economic and social factors that characterize the residential rental market in Ontario today and the tenant population. I discuss how these factors should be reflected in

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3. A comprehensive description of an interim package of amendments currently being proposed by the Advocacy Centre for Tenants Ontario and the Legal Clinics’ Housing Issues Committee, for inclusion in upcoming omnibus legislation, is set out in a submission to the Minister of Housing dated March 4, 2002. A summary of those recommended amendments is attached as an appendix to this article.
The Work of the Ontario Rental Housing Tribunal

Tribunal practice and in the legislative framework for dispute resolution. A further discussion on how the Tribunal might be re-oriented to provide a fairer process for tenant respondents to eviction applications, both with and without statutory amendments, is provided. The conclusion sets out the basic steps of a redesigned process for resolving landlord and tenant disputes.

WHAT BUSINESS IS THE ONTARIO RENTAL HOUSING TRIBUNAL IN?

As part of the renewed emphasis on administrative and cost efficiency championed by the Ontario government since 1996, each Ministry and agency has been asked to answer the question “what business is the Ministry/agency in?” The answer to this question has become pivotal to the process of setting goals and evaluating achievements through the annual business planning exercise now required of all Ministries and agencies. Although it is problematic to re-characterize a fundamental public service, the administration of justice, as a business, a closer look at what an agency like the ORHT actually does can be a useful starting point for measuring the agency’s accountability to the communities using its services. A key first stage in any performance appraisal of a government agency must be to identify the nature and needs of the communities served by the agency. The agency’s performance must be measured against its actual delivery of services to its user communities.

In the submission to Management Board of Cabinet that resulted in the decision of the Ontario government to establish a residential tenancies tribunal, the new agency’s business function was described as both regulatory and adjudicative. More specifically, the tribunal’s function was “to protect the public interest by encouraging a greater supply of well-maintained residential rental accommodation; and protect tenants from unjustified rent increases, unfair evictions, etc.”

The ORHT itself describes its business on its website as “the resolution of disputes between landlords and tenants”. In this statement, the Tribunal identifies its two user communities – landlords and tenants – but when it comes to defining the services provided to those communities, its statistics paint a sharper picture than its words. From June 1998 to December 2001, landlord applications have comprised 91% of all applications brought before the Tribunal and 94% of landlord applications were for eviction. Eviction applications comprised 86% of the total number of applications filed with the Tribunal. According to the Tribunal’s last Annual Report (1999-2000), evictions for arrears of rent comprised 76% of the total filed applications in 1998/1999 and 72.63% in 1999/2000. Clearly, the primary work of the Tribunal is to process and resolve applications for eviction, the overwhelming majority of which are based on alleged arrears of rent. This is the key business of the Tribunal.

4. KPMG Operational Review (9 December 1999) at 18.
6. This statistic is taken from the last ORHT Annual Report 1999/2000 at 7.
How does the Tribunal process and resolve these applications, and with what result? In 58% of eviction applications since 1998, an eviction order was issued on a default basis, without the tenant respondent having presented their position at a mediation session or hearing. Under the Act, a tenant has only five calendar (not business) days to respond by written dispute to an eviction application delivered by the landlord. In over half of all eviction applications, the tenant fails to file the required written dispute with the Tribunal within the statutory five day period and a default order terminating the tenancy is issued. The ORHT Annual Report for 1999/2000 reports that default orders were issued on average within one or two days of the filing deadline.

Unfortunately, for the other 42% of eviction applications, available statistics record the process for resolution but not the result. This is because ORHT, unlike the Ontario Labour Relations Board or the Ontario Human Rights Commission, does not track outcomes for its mediation and adjudication processes and does not make publicly available a full set of decisions. The statistics available through the Tribunal do not allow us to accurately determine how many mediation sessions and how many hearings resulted in an agreement or order that the tenant would vacate the rental unit. There is no full public database of ORHT decisions that would allow independent research to analyse outcomes.

We do know that relatively few applications overall are resolved through mediation. An operational review of the Tribunal by KPMG Consulting recorded only 7.4% of applications were resolved through mediation in the first year of operation. A review of ORHT statistics between 1998 and the end of 2001 indicates that less than 9% of all applications are settled at mediation, but the ORHT Annual Report for 1999/2000, states that 20% of applications are successfully mediated. Inquiries to the Tribunal did not produce an explanation for this discrepancy, but even a settlement rate of 20% is strikingly low. By way of contrast, consider the 88% settlement rate at the Ontario Labour Relations Board and 70-80% settlement rate at the Human Rights Board of Inquiry in Ontario, which is achieved on top of a settlement rate before the Human Rights Commission of 51%.

7. S. 177(2). Note that where the notice is delivered by the landlord before a weekend, the tenant will be unable to obtain legal advice for two or even three days of the response period.
10. The norm in Ontario is for adjudicative tribunals to make all decisions available, often both on their own website (e.g., the Office of the Information and Privacy Commissioner; the Workplace Safety and Insurance Appeals Tribunal) and through internal publications and/or commercial publications and databases (e.g., Pay Equity Hearings Tribunal; Human Rights Board of Inquiry; the Ontario Labour Relations Board).
11. KPMG Operational Review at 16. But see page 31 of the same report the statement that mediation was only attempted in 24% of cases filed, and was successful in 54% of those files.
13. See for example, the Ontario Labour Relations Board 1999/2000 Annual Report, Table 3.
Particularly given the relatively small sums of money at issue, the low rate of settlement is surprising and can have more than one explanation. It suggests that the Tribunal does not give priority to its mediation process as a means of resolving applications. The low rate also suggests a problem in the design and resourcing of the mediation process, or the absence of shared basis for settlement between the parties, or both. This issue will be discussed further later in this article, particularly with reference to the impact of decontrolled rents on new tenancies.\textsuperscript{15} It is not suggested that mediation will always produce a fairer or better result than adjudication, particularly where, as in landlord and tenant disputes, there is a power imbalance between the parties. However, if we examine the settlement rate in the context of the overall application resolution process at the ORHT, it is apparent that, for tenant respondents to eviction applications, the alternative to mediation is, in the majority of cases, not a hearing on the merits but a default eviction order issued when the tenant fails to file a written dispute within the statutory five day response period.

Although there is no information available, through the Tribunal or otherwise, to establish the percentage of mediations that result in an agreement to vacate a rental unit, an independent study of ORHT orders for the year 2000 estimated that 74\% of all eviction applications resulted in orders (default or hearing orders) requiring the tenant to vacate his or her rental unit.\textsuperscript{16} This estimated rate of success for eviction applications that are resolved by order is in addition to whatever percentage of applications resulted in mediated agreements to vacate.

The study confirms what was already apparent from the default rate alone: not only is the primary work of the Tribunal to process and decide eviction applications, but more specifically, the Tribunal's work product in the vast majority of cases is an eviction order, either by default or after a hearing. Of the Tribunal's two user groups, one group - landlords - is primarily the applicant before the Tribunal and is successful in the overwhelming majority of cases. The other user group - tenants - appears before the Tribunal primarily as an unsuccessful respondent to an eviction application.

This picture of the tenant user group as the predominant loser in ORHT proceedings highlights the importance that the Tribunal should place on ensuring that its process is clearly and demonstrably fair to tenants. The Ontario Ombudsman made this point in an address to Tribunal adjudicators and staff in September 2000. Clare Lewis told the Tribunal that he was aware of "growing concerns by tenant groups" that the legislation does not establish an appropriate balance, and he emphasized the importance of "visibly exercising impartiality and fairness".\textsuperscript{17}

\textsuperscript{15} S. 124.
\textsuperscript{16} Study of year 2000 case records for 58,652 ORHT files conducted by Centre for Equality Rights in Accommodation. This figure was calculated based on the number of files in which a final date was recorded in the order.
\textsuperscript{17} C. Lewis, "Customer Service and Organizational Change" (22 September 2000) at 3, 6.
THE NEED FOR REFORM: CRITICISM OF THE ONTARIO RENTAL HOUSING TRIBUNAL

Senior staff at the ORHT have publicly acknowledged that the ORHT is regularly criticized by both landlords and tenants, relying on this two-sided pressure as an indication that the Tribunal is achieving the right balance in serving its two user communities. Of course criticism from both user groups could also be an indication that neither group is getting the quality of administration, mediation, and adjudication services that it seeks. This article will focus primarily on criticisms of the Tribunal in its service to tenant parties and, in particular, tenant respondents to eviction applications.

The ORHT has on several occasions been the subject of unfavourable media attention suggesting that the Tribunal may not be treating tenants fairly. Given an estimated 26% increase in the number of eviction applications since the Tribunal began operation, and also the rising visibility of homelessness on the streets of large and small urban centers, it is not surprising that the ORHT’s treatment of tenants would be subject to critical scrutiny. The press is not alone in suggesting that the ORHT may not have achieved an appropriate balance in resolving disputes between landlords and tenants, particularly in eviction applications.

Notably, the Ontario Ombudsman, Clare Lewis, in the speech referred to above, raised several issues about the fairness of the eviction process. Mr. Lewis questioned whether the ORHT was sacrificing fairness in its quest for speedy and efficient processing of eviction applications. Using two instances within his own personal experience as examples, he suggested that the very speed of the eviction process could be unfair to tenants who may misunderstand their legal position. He noted that tenants could be forced out of their homes when more time might have allowed them to remedy the triggering circumstances or make arrangements for new accommodation.

The comments from the Ombudsman make an interesting contrast to the assessment that is contained in the report prepared for the Tribunal by KPMG Consulting in December 1999, referred to above. The KPMG report criticized inefficiencies in the application resolution process and recommended a number of steps to tighten up the speed with which applications are processed to a final resolution including:

- Making telephone calls to landlords in eviction applications to ensure that all information is filed to allow issuance of default orders immediately upon failure to file tenant Dispute within 5 day period;

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18. See, for example, an article in the Ottawa Citizen dated January 30, 2002, in which the Tribunal's regional manager for Eastern Ontario stated: “We must be doing something right if we are being criticized from both sides”.


20. This number is taken from Tribunal data compiled by the City of Toronto in Report Card on Homelessness, 2000 at 16, and Report Card on Homelessness, 2001 at 15. The City of Toronto has done extensive analysis of ORHT applications and orders.

21. KPMG, supra note 4 at 30.
• Allowing administrative staff, not appointed adjudicators, to sign default eviction orders;22
• Expanding the use of oral decisions at the close of the hearing;23
• Training adjudicators to recognize the “cost implications of writing more than what is necessary to convey the reason for a decision”.24

A primary goal set by KPMG for ORHT was the achievement of a consistent 70% rate of default orders in eviction applications.25 The report noted that the default rate had varied across the province from 49% to 70%.26 The recommendation to strive for a higher consistent default rate was presented as part of an overall effort to achieve a leaner, faster process. A number of KPMG recommendations, including the first two above, supported the 70% goal.

In criticizing the Tribunal’s failure to achieve a higher, more consistent default rate in eviction applications, and in recommending further efficiencies in processing applications, the KPMG report did not appear to consider whether there were any access to justice issues at stake from the perspective of tenant respondents.27 The goal of a higher default rate is in striking contrast to the accepted principles of adjudicative fairness that are premised on the importance of achieving a balanced result based on a full and fair consideration of both sides in a dispute. To that end, the accessibility of the adjudicative process was identified as the first key principle of administrative justice in a report prepared by the Society of Ontario Adjudicators and Regulators, an organization comprised of members of all of Ontario’s agencies, boards and tribunals.28 Arguably, the achievement of the recommended default order rate of 70% would represent a failure in the application resolution process to the extent that a significant number of the non-participating tenant respondents might have been able to achieve a better or fairer result through mediation or adjudication. A better result for a tenant respondent might be a reasonable period of time to pay off arrears, or an agreement to repair damaged property or refrain from making excessive noise, while preserving the tenancy.

The Tribunal and the Ontario government have taken steps to tighten the application resolution process as recommended by the KPMG report. In its 1999/2000 Annual Report, the Tribunal noted that it had focussed its efforts on improving the overall efficiency of its default order process.29 Most visibly, the legislation was amended to provide that

22. Ibid. at 31.
23. Ibid. at 37.
24. Ibid. at 35.
25. Ibid. at 49.
26. Ibid. at 30.
27. Tenant advocates were relieved that the KPMG report did not recommend that hearing time be reduced. The Report stated that the average length of a landlord hearing was between 15-20 minutes.
default orders could be signed by staff and this is now the practice. Efforts to achieve a consistent default rate of 70% have met with mixed success. The average rate for default orders rose, in the year following the Report, from 59% in 1999 to 61% in 2000, according to Tribunal statistics, but then dropped to 58% in 2001. There continue to be variations in the rate across the province.

The concerns raised by the KPMG Report, and reflected in the comments of the Ombudsman, are reinforced in the article by Paul Rapsey, referred to above. In “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”, Rapsey relied on a thorough review of the available jurisprudence to argue that the Tribunal has failed to exercise its full jurisdiction in several key areas affecting the rights of tenants under the legislation.

Rapsey highlighted the following issues:

- the failure of the Tribunal to find that it had jurisdiction to award damages in favour of tenants based on breach of the landlord’s statutory or contractual obligations;
- the failure of the Tribunal to find that it had authority to restore to possession tenants who had been wrongfully evicted and the failure to establish guidelines, rules, and forms to facilitate emergency tenant applications in these circumstances;
- a reluctance on the part of adjudicators to exercise their discretion to grant tenant respondents relief against forfeiture to the extent that had previously been experienced in the courts.

The first two issues have been partly addressed in recent amendments to the legislation clarifying the Tribunal’s jurisdiction. Section 34(1), paragraph 4.1 now specifically provides that compensation and out-of-pocket expenses can be awarded in favour of a tenant where a landlord has failed to maintain the rental unit in a good state of repair as required by section 24(1). Section 35(1)(a.1) has also been added to the legislation to clarify that the Tribunal may order compensation and out-of-pocket expenses where a landlord has breached the rights set out in section 32(1), paragraphs 3 to 10. Absent from these amendments, however, is express authority to award aggravated damages for recklessly unlawful conduct and related emotional stress. Rapsey takes the position that such authority is contained in the residual clauses of both section 34(1) paragraph 5 and section 35(1)(c), but given the apparent reluctance of the Tribunal to adopt that interpretation, clear statutory language

30. S. 192 (1.1)
32. Rapsey, supra note 2.
33. Rapsey examined over 1000 decisions of the ORHT during its first two years of operation.
34. The Divisional Court has noted on several occasions in obiter dicta that the residual clauses may provide the Tribunal the authority to award such damages; see, for example, MacKay v. Sanghera, [2001] O.J. No. 2600, online: QL (Div. Ct.) (D. Lane, Then and Chapnik JJ.), and Crooks v. Levine, [2001] O.J. No. 2781, online: QL (Div. Ct.) (Rutherford J.).
35. One possibility would be to legislate a limited authority to make such awards up to a maximum, such as is
On Rapsey’s second point, the addition of section 35(3) now clarifies that the Tribunal can order the landlord to allow a tenant back into their rental unit where the locks have been altered, provided that the unit has remained vacant. However, the amendments did not provide a statutory remedy for the situation in which a tenant is evicted by the Sheriff on the basis of a Tribunal order obtained through misrepresentation. Further, there are still no specific rules, guidelines, forms or pamphlets to assist tenants in making an expedited application for an order to regain entry and possession.

This absence of an articulated fast-track process to facilitate emergency tenant applications, and the absence of supporting pamphlets and plain language materials explaining the process, has been seen by tenant advocates as a serious indicator of a lack of balance in the service which the ORHT provides to its two user groups. The availability of plain language information in brochures, pamphlets and guidelines has been identified as an important element of a fair and transparent administrative justice system by the Society of Ontario Adjudicators and Regulators.36

The final issue that Rapsey raises – the ORHT’s apparent failure to fully exercise its discretion under section 84 of the Act to provide relief from eviction – remains outstanding. Although the Chair recently assured representatives of the Legal Aid Ontario Tenant Duty Counsel Program that adjudicators were increasingly exercising this discretion, the claim is hard to verify. A survey of legal clinics across Ontario in February and March 2002 indicated that there continues to be widespread dissatisfaction with the manner in which the Tribunal is exercising, or not exercising, its discretion to grant relief from eviction.38

This is an issue that has also been raised by housing rights organizations. For example, the Centre for Equality Rights in Accommodation (CERA), in a final report to the City of Toronto in respect of a city-funded eviction prevention project, contrasted the ORHT’s seemingly routine issuance of eviction orders for arrears of rent with the much slower, more measured approach of lending institutions when a mortgage or other financing payment is missed.39 CERA submitted that, just as foreclosure and repossession are remedies of last resort for financial institutions, the ORHT should exercise its discretion to relieve against eviction in appropriate arrears cases so that

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37. Meeting on November 28, 2001. The Tenant Duty Counsel Program is funded by Legal Aid Ontario and managed by the Advocacy Centre for Tenants Ontario, in conjunction with local community legal clinics across Ontario.
38. This survey was conducted by the Advocacy Centre for Tenants Ontario. Thirty-six legal clinics across the province responded and 75% of responding clinics identified the reluctance of the Tribunal to exercise s.84 discretion as one of the top three highest priorities for ORHT reform.
The question of whether or not the Tribunal considers and exercises its s.84 discretion appropriately is difficult to assess given the absence of a public database of decisions. Of approximately 90,000 non-default decisions issued by the Tribunal to December 2001, only 289 were available on Quicklaw as of June 12, 2002. Further, the posted decisions are not necessarily consistent with the body of caselaw developed by the Tribunal. The decisions sent by the Tribunal to Quicklaw are simply chosen by individual adjudicators as “significant or interesting” in their own view. It is not possible to assess whether the posted decisions represent current adjudicative wisdom at the ORHT.

A recent ORHT publication, issued in February 2002, provides a summary of “Selected Decisions” from June 17th 1998 to June 30th 1999. It is disappointing that the Tribunal would issue this publication over 2½ years after release of the most recent included decision. Moreover, the forty-two decision summaries included represent a minuscule portion of the more than 90,000 non-default decisions issued to date by the Tribunal. If a member of the public wants a copy of the full text of any of the decisions summarized in this publication, it must be purchased from the Tribunal. The practice is to charge a photocopying fee, now at $1.00 per page, for any such request. This should be contrasted with the practice of other tribunals, such as the Office of the Information and Privacy Commissioner and the Workplace Safety and Insurance Appeals Tribunal, that make decisions available free of cost through a fully searchable database on their own websites.

The Tribunal has also been criticized for not tracking and publishing statistical information on the outcome of applications. The failure on the part of the Tribunal to record and make available data on the number of annual evictions, was commented upon critically by the City of Toronto in its Report Card on Homelessness, 2001.

Finally, in canvassing criticism of ORHT to date, Elinor Mahoney’s article in volume 16 of this Journal should be considered. The Journal article cites a number of fairness issues with respect to the legislation and the practice of the Tribunal. The most significant procedural issue, only recently addressed by the Tribunal, was the misleading nature of the Notice of Hearing form.

41. Figure taken from ORHT Workload Report, June 17, 1998 to December 31, 2001.
42. See the description of the ‘scope’ of the database published by QuickLaw.
43. Supra note 8. Some tribunals, including the Ontario Labour Relations Board, do track and report application dispositions.
45. Mahoney, supra note 2.
The Notice of Hearing form is used by landlords seeking an eviction order from the Tribunal. The landlord obtains a completed Notice of Hearing form from the Tribunal, and is responsible, under section 175 of the Act, for delivering the form to the affected tenant. From the day that the Tribunal opened its doors in June 1998 until recent amendments in March 2002, the Notice of Hearing issued over the counter was a notably confusing and even misleading document. The Notice informed the tenant of the date and place of hearing in bold in a large box at the top of the form, and then below that, less prominently, informed the tenant that a hearing would only take place only if the tenant filed a written dispute within five days. If a tenant assumed from the Notice of Hearing that a hearing would take place on the date indicated, and did not understand the requirement to file a dispute, he or she would arrive for the scheduled hearing, as indicated on the form, only to learn that a default order had already been signed terminating the tenancy.

In fact, the more common scenario is that a tenant who does not understand the need for a written dispute, and intends to oppose eviction at the hearing, will receive a default eviction order in the mail a few days before the expected hearing date. Many tenants who receive default orders file an application to have the order set aside. Between June 1998 and the end of December 2001, tenants filed 16,113 set-aside applications before the Tribunal to ask that default orders be overturned. A set-aside application will only be successful if the tenant can establish that they were “not reasonably able to participate in the proceeding”.

Simple failure to understand the Notice of Hearing has not generally been accepted as a valid basis for setting aside an eviction order. Mahoney noted that the misleading nature of the Notice of Hearing form had inevitably contributed to a 58% rate of default orders in eviction applications. An even more significant factor in producing the high default rate is undoubtedly the very limited time period for filing a written dispute. The five-day dispute period for a tenant facing an eviction application is much shorter than other comparable procedural deadlines under Ontario legislation. For example, the Rules of the Small Claims Court provide that a defendant who wishes to dispute a plaintiff’s claim has twenty days from the date of personal service, and forty days after service by mail, to file a defence.

46. The new Notice of Hearing, issued as this article was being written, is a considerable improvement over the previous version. However, it is unacceptable that it took the Tribunal almost four years to properly amend a form that was identified as inadequate by tenant advocates in the Tribunal’s first months of operation.

47. S. 192(4).

48. There is ORHT jurisprudence to the contrary. See OHC v. Abdulle (21 February 2000), File No. SWL-14009-SA-1 (ORHT). However interviews with legal clinic lawyers and Tenant Duty Counsel indicates that failure to understand the process is not often accepted as a sufficient basis for setting aside an order. For this perspective, see Ontario Housing Corporation v. Girard (29 June 1999), File No. 07638-SA (ORHT).

49. O.Reg. 258/98, as am. by O.Reg.295/00; O.Reg.461/01, Rules 9.01(1), 11.01(1).

50. The Small Claims Court clerk can issue a default judgement for a liquidated amount but any
Significantly, although the response time in a Small Claims Court proceeding is considerably more generous than the position of a tenant facing an eviction proceeding under the Tenant Protection Act, the consequences of failure to respond will rarely be as significant as losing one’s housing.

The current Notice of Hearing is still confusing by virtue of its name alone. It should be called a “Notice of Application for Eviction”, and should clearly state that a written dispute must be filed within five days if a tenant wants to remain in their housing and oppose eviction. A tenant will look in vain for information in ORHT pamphlets and brochures, available through its website, that explains the need to file a dispute within five days. In fact, some of the information provided by the Tribunal through its website has been misleading or incorrect. Mahoney cites the information included in the “Frequently Asked Questions” section. The answer to the question “What is the process for evicting a tenant?” states that “A tenant will always have an opportunity to present arguments against the eviction at a hearing”, making no mention of the need for a written dispute.

The “Frequently Asked Questions” section was removed from the ORHT website in October 2001 and has not been re-posted in revised form. However, a careful review of the brochures and pamphlets section reveals that the need to file a dispute is noted but the short time frame of five days is not. By way of contrast, one finds that all the time frames for landlord applications are set out in the informational pamphlets dealing with eviction procedure.

This absence of helpful materials to guide tenants facing eviction, when considered together with the confusing Notice of Hearing, and the extremely limited five-day response time, casts the 58% rate for default for tenant respondents in a disturbing light.

In summary, it should be apparent that there is a pattern to the criticism that has been levelled against the ORHT with respect to its service to tenant users. Tribunal process is criticized as inaccessible and difficult to navigate for unsophisticated tenants. Its very efficiency is criticized because it most consistently benefits landlord applicants at the expense of tenant respondents. The resolution process is characterized by what might be viewed as an alarming rate of non-participation by tenant respondents. There are insufficient supports in place for tenants who do attempt to defend an eviction application. There is a lack of helpful brochures and easy-to-use procedures to assist tenants who want to dispute an eviction application or who need to make an emergency application to regain possession of their housing. Further, the Tribunal has been criticized for not making available statistics on eviction rates and a full database of its decisions, both of which are necessary for genuine public accountability. Finally, there is a perception that the Tribunal does not appropriately exercise its discretion to refuse to grant an eviction order in proper circumstances.

damages claims must go to an assessment hearing to determine the amount.
The Work of the Ontario Rental Housing Tribunal

THE CONTEXT: THE AFFORDABLE HOUSING MARKET AND THE TENANT POPULATION IN ONTARIO IN 2002

Any proposal for reform of the application resolution process for landlord and tenants in Ontario must take into account the current rental housing market and the characteristics of the tenant population served by ORHT. A good starting point is the rate of vacancies for rental accommodation.

The overall vacancy rate in Ontario’s rental housing market51 has been less than 2% since 2000. A rental vacancy rate of less than 3% indicates an unhealthy rental market where tenants do not have a reasonable degree of choice.52 Ontario’s rental vacancy rate has been never risen above 3% in more than a decade. In larger urban centres (Toronto, Ottawa) and some smaller cities in southern Ontario (Barrie, Brampton, Kitchener), the vacancy rate has been at or below 1% since 1999.53 The result is that tenants are competing for an inadequate number of rental units, creating inevitable pressure on rents in a market in which there are no legislative rent controls affecting tenants entering into a new tenancy agreement.

Even as the overall vacancy rate has fallen, the number of affordable rental units has dropped disproportionately. Statistics available for Toronto establish that units renting for less than $800 made up two-thirds of all units in 1996, but only one-third of the total in 200054 and only one-quarter in 2001.55

The lack of affordable rental units is reflected in the percentage of tenant household income that is being absorbed by housing costs. At 1996 rent levels, 44% of tenant households across the province were spending 30% or more of their household income on shelter costs.56 At this level of expenditure on housing, tenants have little or no financial flexibility if they experience an unexpected drop in income and are vulnerable to eviction. Statistics available for the City of Toronto show that almost 24% of renter households were paying 50% or more of their income for rent in 1996.57

In the last decade, increases in income for renter households have not kept up with rising rents.58 Ontario’s average rent is rising faster than the cost of inflation. In Toronto, the

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51. The rental housing market that is included in Canada Mortgage and Housing Corporation surveys is privately owned apartment buildings with three units or more.
52. N. Dunphy & L. Lapointe, Where’s Home: A Picture of Housing Needs in Ontario (Toronto: Ontario Non-Profit Housing Association and the Co-operative Housing Federation of Canada, 1999) at 16. Also see for example the discussion in a paper by M. Shapcott, Rental Housing Supply in Ontario: Anatomy of a Crisis (Toronto: University of Toronto Centre for Urban and Community Studies, 2002).
53. Where’s Home, supra note 52.
55. Figure calculated from CMHC Rental Market Report for October 2001 for the Toronto CMA at 8.
57. Where’s Home? at 22 and Table 4.4.3. Also see Toronto Report Card on Homelessness, 2000 at 12.
58. Increases in tenant household income has also not kept pace with increases in income in homeowner households. Between 1984 and 1999, the gap between the median income of Ontario tenants and homeowners grew by 22%: J.D. Hulchanski, A Tale of Two Canadas: Homeowners Getting Richer,
average rent for all units increased by 29% from 1995 to 2001 – outpacing the cost of inflation by more than double. Across Ontario, the average rent for all rental units surveyed annually by Canada Mortgage and Housing Corporation (CMHC) increased by 22.5% from 1995 to 2001, while the percentage change in Ontario’s Consumer Price Index (CPI) from 1995 to 2001 was 12.8%.59

Conversely, during the same period, the income of tenants on social assistance (other than seniors and persons with disabilities) plummeted: benefits rates were cut by 21.6% in 1995 and have not been increased since.60 Moderate wage gains were made in these years: the average wage gain between 1995 and 2000 was 9% across Ontario.61

In 1999, the median after-tax income for Ontario renter households, of all sizes, was $23,215.62 If the average cost of a two-bedroom apartment in Ontario in 1999 ($785) is deducted from the median income, the renter household would have only $13,795 left for all other expenses over the course of the year. This amounts to $287.50 a week for food, clothing transportation and all other expenses. In Toronto, where 44% of all Ontario tenant households reside,63 the median after-tax income of tenant households in 1999 was higher, at $27,039,64 but the average rent for a two-bedroom apartment in Toronto was also higher – $916 per month in 1999, according to CMHC statistics.65 CMHC statistics for the one-year period ending in October 2001, establish that the highest average monthly rents across the country were in Toronto ($1027), Ottawa ($914) and Vancouver ($919).66

Not surprisingly, the number of homeless persons in Ontario has risen visibly over the last decade. Although there are no reliable numbers for the Province, the City of Toronto has compiled statistical information through its shelter system. The City reports that the number of people using emergency shelters increased by 40% from 22,000 in 1988 to nearly 30,000 in 1999.67 Families are the fastest growing group of shelter users. Families using Toronto shelters in 1999 reported that eviction was the reason for having to stay at the shelter in 18% of cases.68 The majority of families using the shelter system in Toronto are refugees or new arrivals from elsewhere in Canada who are unable to find affordable housing.69

Renters Getting Poorer (Toronto: Centre for Urban and Community Studies, 2001).

59. CMHC, Ontario Vacancy rates and rents, October 1995 to October 2001; Statistics Canada, Consumer Price Index, Table 326-0002.


62. Hulchanski, supra note 58.

63. Ibid.

64. Ibid.


68. Ibid.

69. Interview with Sybil Longley, Executive Director of Woodgreen Red Door Shelter which operates
The rising use of shelters by evicted families is reflected in the findings of a study by the Centre for Urban and Community Studies of the Toronto Children’s Aid Society (CAS) admissions. Based on a survey of family services workers, who were asked about the factors leading to the admission of a child into CAS care, the study found that, in one in five cases, the family’s housing situation was a factor that resulted in the temporary placement of a child into care. The number of children admitted to care where housing was a factor was found to have increased by approximately 60% between 1992 and 2000, from 290 children in 1992 to almost 450 children in 2000. The study concluded that the cost of the admission of these 450 children into CAS care was approximately $18 million.70

Finally, in considering the characteristics of ORHT’s tenant users, research by Michael Ornstein at York University71 indicates that groups identified by a prohibited ground of discrimination under the Ontario Human Rights Code are disproportionately economically disadvantaged among the renting population. Persons on social assistance, single mothers, unattached women (particularly elderly women), youth under the age of 20, refugees, visible minorities, non-citizens, immigrants, and persons with disabilities are all over-represented in the population of low-income tenants.72 Across Ontario, female lone parents are the most likely of these groups to be paying 30% or more of their income on rent. The proportion of female lone parents paying more than 30% in rent ranges from 52% in rural and small urban centers to 91% in larger cities.73

Based on this research, we can safely conclude that low-income members of groups identified with a prohibited ground of discrimination form a significant proportion of the population served by ORHT.74 The Ombudsman raised this issue as well in the following passage of his address to the Tribunal in September 2000:

> There are potential severe consequences to the application of the Tenant Protection Act, and it is important that when dealing with tenants, you be aware of education, language, culture, power imbalance, and vulnerability.75

70. F. Chau, L. Hulchanski, & Schatia, One in Five ... Housing as a Factor in the Admission of Children to Care (Toronto: Centre for Urban and Community Studies, 2001).


72. Ornstein defines low income for the purpose of this research as persons who would have to pay more than 30% of their income to rent an appropriately sized apartment rented at the 30th percentile – meaning 70% of apartments of the same size were rented for more.

73. Ornstein, Access to Rental Accommodation at 17.

74. Although Ornstein’s research also indicates that low-income tenants may be no more likely to default in rent payments than other tenants, this tentative finding, based on pre-1996 data, may no longer hold true given the growing affordability gap in Ontario and the estimated 26% increase in eviction applications since the establishment of ORHT.

75. Supra note 17 at 7.
The idea that an adjudicative agency should, in its service delivery, consider and accommodate the needs of parties who are disadvantaged, is not novel. The Society of Ontario Adjudicators and Regulators developed a Service Equity policy in 1995. The primary recommendation in the policy was that adjudicative bodies should be: "accessible to all persons who may require adjudicative services"; "sensitive to the needs and barriers faced by disadvantaged consumers of the agency" and "accountable for fulfilling the fundamental goals of accessibility and equity".76

Most basically, the Tribunal should consider the social and economic context in which it does its business. We have already seen that the Tribunal’s primary business is to process eviction applications for rent arrears. We have now also reviewed the economic and social facts that characterize the rental housing market and characterize the experiences of tenants who are respondents in arrears applications. It is clear that one of the Tribunal’s two user groups is economically disadvantaged as compared to the other user group, and that members of the disadvantaged group become party to a Tribunal proceeding, overwhelmingly, as respondents to an arrears application, at a point of financial crisis. These are all circumstances which the Tribunal should consider in the design of its application resolution process, in the supports available to parties, including members of disadvantaged groups, and in the exercise of its statutory discretion.

REVISING THE PRIMARY GOAL OF THE TRIBUNAL’S APPLICATION RESOLUTION PROCESS

In its last published annual report, for 1999/2000, the ORHT echoed the KPMG Report in its emphasis on the efficiency of processing of applications. The text of the section on “Application Resolution” reads, in its entirety, as follows:

The Tribunal has been successful in resolving applications quickly. On average the Tribunal maintains only one month’s receipts as open files. We were even more efficient this past fiscal year. We focused on the files that had no disputes and issued default orders as quickly as possible. Our statistics indicate that over all, we were able to issue default orders within one to two days after the dispute deadline. In addition, we issued most orders within 21 days after the dispute deadline. In addition, we issued more orders within 21 days of the application being filed, and even more complex orders were issued within 23 to 25 days.77

Clearly the efficiency and timeliness of the process is the key performance measure for the Tribunal. Leaving aside the question of whether this is an appropriate emphasis in an administrative justice process, it is clear that, as a practical matter, this is a performance goal that benefits landlord applicants and that works against the interests of tenant respondents in the overwhelming majority of cases.


As we have seen, the Ombudsman did not hesitate to caution the Tribunal against achieving procedural efficiency at the cost of impartiality and fairness for both parties. Based on this cautionary approach, it is proposed that the Tribunal re-vision its goal for eviction applications, away from resolving applications quickly and issuing default orders as quickly as possible and towards the achievement of negotiated settlements. A valid primary goal for the ORHT application resolution process would be the achievement of mutually-satisfactory settlements in the majority of eviction applications.

This goal would be consistent with the orientation of most public dispute resolution regimes in Ontario. Achieving higher rates of dispute settlement (as opposed to resolution by default) is an articulated goal of other rights tribunals, including the Ontario Human Rights Commission and Board of Inquiry, the Pay Equity Commission and Hearings Tribunal, the Workplace Safety Insurance Appeals Tribunal, the Grievance Settlement Board, the Labour Relations Board and the Financial Services Commission.

Although mediation must be used carefully where, as in landlord and tenant disputes, there are power imbalances between the parties, it can offer the parties advantages over adjudication, including more predictability and a result that is more fine-tuned to the actual needs of the parties. Moreover, currently the alternative resolution process to mediation in the majority of eviction applications is a default order without any participation by tenant respondents.

The available information on the depth of the debt at issue in most eviction applications suggests that a high settlement rate should not be unrealistic. Typically, only one month of rent arrears is claimed when an eviction for arrears application is commenced and 50% of eviction orders are for arrears of less than $800.

The establishment of a properly funded provincial rent bank to assist tenants to bridge a period of financial difficulty, would complement a reorientation towards negotiated settlements, and would allow thousands of additional tenancies to be saved in arrears cases. A provincial fund could build on the experience of the City of Toronto in operating a limited rent bank over the last several years.

However, it must be recognized that there are two significant impediments to achieving a high settlement rate in eviction cases. The first is the apparent reluctance of the Tribunal to actively exercise its discretion, under section 84(1) of the Act, to refuse to evict “unless satisfied, having regard to all the circumstances, that it would be unfair” to the landlord to refuse. Landlords would be more willing to enter into settlement agreements if they could expect that the Tribunal would, in every case, exercise its

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78. The term “rights tribunal” was coined by Ron Ellis, Arbitrator and former Chair of the Workplace Health and Safety Tribunal, in an address to the Canadian Bar Association on November 21, 2001. Ellis headed his list of “rights tribunals” with ORHT.


discretion by balancing the seriousness of the tenant’s alleged breach against the severity of the remedy sought, namely eviction. This approach would be consistent with the jurisprudence \footnote{1} established under the previous legislation, the \textit{Landlord and Tenant Act}.\footnote{2} Moreover, this change would be easy to achieve, with or without the procedural changes recommended here: all that is needed is adjudicator training with respect to the scope of their discretion. The Tribunal Chair has indicated that he has already taken some steps in this direction.\footnote{3}

The second, more intractable impediment to negotiated settlements is vacancy decontrol. The phrase “vacancy decontrol” refers to the provision in the current legislation\footnote{4} that provides for “decontrol” of rent levels at each vacancy of the rental unit. Simply put, landlords have the right to raise the rent on a vacant unit to whatever the market will bear. Thus, although it is anticipated that a high settlement rate could be achieved in arrears cases where a tenant is able to repay the debt over a reasonable period of time, if the landlord is seeking a significant rent increase for a vacant unit in a tight rental market, it may be that no amount of skilled negotiation on behalf of the tenant will achieve a win/win result that would allow the tenant to stay in the unit and the landlord to be repaid. This is discussed further below.

\textbf{RECONSTRUCTING THE APPLICATION RESOLUTION PROCESS IN EVICTION PROCEEDINGS TO MEET THE GOAL}

It is proposed that the changes described below could be made in the application resolution process to enable ORHT to move towards the primary goal of dispute settlement in most eviction cases. None of these recommended changes can be considered particularly novel; they represent the common process established by many Ontario tribunals in rules adopted pursuant to the \textit{Statutory Powers Procedure Act}.\footnote{5} As is noted below, several of the recommendations could be implemented, in whole or in part, without legislative amendments.

1. **Commence the Application Resolution process with a mediation/prehearing conference in every eviction application.**

It is recommended that the application resolution process be altered to establish a mediation and prehearing conference as the first appearance before the Tribunal in every eviction proceeding.

\textit{81.} See for example \textit{Re Peel Non-Profit Housing and McNamara} (1991), 2 O.R. (3d) 414 (Div. Ct); \textit{Re Rexdale Investments Ltd. And Gibson}, [1967] 1 O.R. 251 (CA).\textit{.}

\textit{82.} R.S.O. 1990, c.L.7, Part IV.

\textit{83.} In discussion with the Chair, November 28, 2001.

\textit{84.} S. 124.

\textit{85.} R.S.O. 1990, c.S.22, s. 25.1 See, for example, the Rules of Practice of the Pay Equity Hearings Tribunal or the Human Rights Board of Inquiry, both of which establish a mediation and prehearing stage before the parties can proceed to a hearing.
The focus of the mediation component of the session would be to actively assist the parties in achieving a mutually satisfactory resolution that is consistent with the public interest in minimizing unnecessary evictions in cases where a tenant can remedy the circumstances giving rise to the application. If one or both of the parties did not wish to engage in settlement discussions, or if the settlement discussions were unsuccessful, the mediation/prehearing officer would move to the prehearing stage immediately.

The focus of the prehearing conference would be to ensure that both parties understand the hearing process; to require mutual disclosure; to deal with any evidentiary or other preliminary issues; and to set a hearing date. It is recommended that the mediation/prehearing officer have the authority to make procedural rulings to facilitate an efficient hearing process.

In no case would an application be set down for a hearing on the same day as the mediation, as is currently the case. This change alone would create incentives to settle, because the parties could, through negotiating an agreement, avoid a return appearance for a hearing. It is recommended that the mediation/prehearing officer have the authority to issue a consent order if the parties arrive at a settlement through mediation.

This recommendation could be implemented without legislative amendment, to a limited extent. The intent of the recommendation, when taken together with the other recommendations below, is to have all applications go to mediation/prehearing before a default order could be issued. As an interim measure, the current process could be adapted to provide for a mediation/prehearing stage prior to the hearing in all eviction cases in which a dispute is filed by a tenant respondent. Under the current legislation, the mediation/prehearing officer would not have the authority to issue orders deciding preliminary or procedural matters.

2. **Require the Tribunal to assume responsibility for delivery of the notices for the mediation/prehearing conference and for the hearing in eviction applications.**

It is recommended that the Tribunal be required to deliver a copy of the notice of mediation/prehearing conference by mail to the responding party. This would be consistent with section 6 of the *Statutory Powers Procedure Act (SPPA)* which requires tribunals to serve parties with a notice of the initial appearance date. Currently, section 175(2) of the *Tenant Protection Act* suspends the application of section 6 of the *SPPA*

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86. Currently the legislation provides that the Tribunal “may attempt to mediate a settlement of any matter...” provided that parties consent to the mediation: section 181(1).

87. There was a similar recommendation in the KPMG report that mediation be held on a “routine” basis before the scheduled hearing date. Currently, mediation before the ORHT is not generally pre-scheduled but is rather offered to the parties on their scheduled hearing date while they are waiting for their case to be called. This process rushes any settlement discussions that do take place, and undercuts the potential for a negotiated resolution. The report itself notes that a higher success rate at mediation would likely be achieved if the hearing was scheduled for a later date.

88. Section 192(1) of the Act, authorizes the Tribunal to issue a default order without a hearing in eviction applications where the tenant has not filed a dispute within the five day period under section 177.
to the ORHT. Under section 175(1) of the Act, responsibility for service of an eviction application is currently placed on the landlord applicant, not on the Tribunal.

This change in process is necessary to ensure that tenant respondents to eviction applications actually receive notice of the eviction application and understand that there is an opportunity to have their dispute mediated and adjudicated. Although there is no research data available to demonstrate that landlords do not always properly serve tenant respondents, the high rate of default suggests that a percentage of tenants do not receive the notice at all, or only at the end of the five day notice period. This conclusion is consistent with anecdotal evidence from legal clinics and tenant duty counsel across the province.

Although these recommendations include elimination of the requirement to file a written dispute within a five day period, even with this change, placing responsibility for service on the Tribunal will remain important. Under the recommended new procedure, outlined below, failure to attend the mediation/prehearing conference will result in a default eviction order. Requiring the Tribunal to assume responsibility for delivering notice to respondents is the best way to ensure that effective delivery takes place. Equally important, having the notice sent by the Tribunal itself would have the effect of reinforcing the message to respondents that there is an opportunity to present their position to a neutral adjudicative body.

Making the ORHT responsible for service of the notices would not be particularly onerous, in eviction cases or in other types of applications.89 The applicant would receive their copy of the notice of the mediation/prehearing conference when they attend at the ORHT to file their application as required by section 172. The Tribunal would mail the notice of the mediation/prehearing conference to the responding party. As is outlined below, it is recommended that notice of hearing be given to both parties by the mediation/prehearing officer at the close of the session if the application is not settled.90

This recommendation could be implemented without legislative amendment, as an adjunct to the current process of delivery by the landlord applicant. In fact, the Tribunal is already moving in this direction to a limited extent. Recent amendments to ORHT rules now make the Tribunal responsible for delivery of the notice of hearing in review applications.91

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89. As with other tribunals, an applicant before the ORHT would be responsible for providing the Tribunal with an address for delivery for the responding party. In 93% of the cases, the applicant is the landlord who can readily provide the Tribunal with an address for the tenant. In tenant applications, the tenant could readily provide the Tribunal with the address at which rental payments are made or an address noted in a written tenancy agreement.

90. There is precedent for this approach. Both the Pay Equity Hearings Tribunal and the Human Rights Board of Inquiry set hearing dates with the parties at the conclusion of their mediation and prehearing conferences.

91. ORHT Rules of Practice, Rule 27, effective February 4, 2002.
3. **Remove the requirement that a written dispute be filed within a five day period to avoid a default order.**

It is recommended that the new process provide that the mediation/prehearing conference would be held on the scheduled date in the notice unless a responding party filed a written notice stating that the application is **not** disputed. A straightforward approach would be to attach a tear-off portion (perhaps called a “Notice of Non-Dispute”) to the initial notice of the mediation/prehearing conference. A respondent could then return the tear-off notice to the ORHT stating that they will not be opposing the application and understand that an order will be issued against them upon receipt of the returned form. The default mechanism would in this way be reversed so that the process assumes that an application is disputed unless a contrary notice is received from the named party.

This revised process would be consistent with principles of fairness in administrative justice in encouraging a decision based on a balanced consideration of both sides of the dispute, rather than by default. The process would still allow truly undisputed applications to be processed without delay. Further, an incentive could be built into the process to encourage early identification of non-disputed applications: a respondent could be allowed to avoid paying the costs of the application if a “notice of non-dispute” was filed within a prescribed period.

This recommendation would require legislative amendments including the removal of both the requirement in section 177 to file a written dispute within five days, and the authority in section 192 to issue a default order if an application is not disputed within that period.

4. **Require completion of a written dispute form in eviction applications only at the conclusion of the mediation/prehearing conference if the case will be proceeding to a hearing.**

It is recommended that tenant respondents be required to complete a written dispute form at the conclusion of the mediation/prehearing where an eviction application will be proceeding to a hearing. The purpose of the dispute would be to confirm that the tenant is disputing the application and asking that the matter be scheduled for a hearing. The Tribunal could prepare a standard form for completion by the tenant which would allow the tenant to check off the grounds for dispute (*e.g.*, miscalculation of arrears owing).

As indicated above, a hearing date would be set at the close of the prehearing. The parties would be given a Notice of Hearing by the mediation/prehearing officer before leaving the ORHT offices.

This recommendation would also require legislative amendments, including to sections 177 and 192.
5. Default orders to be issued where the respondent does not attend the mediation/prehearing conference or attends but does not complete a dispute form at conclusion of conference.

It is recommended that the mediation/prehearing officer have the authority to issue a default order in any application in which the responding party does not appear for the mediation/prehearing conference or does not complete a dispute form at its conclusion in the event that a settlement is not achieved.

This would be in addition to the authority to issue consent orders and orders on preliminary and procedural matters.

This recommendation would also require the legislative amendments to establish appropriate order-making authority in mediation/prehearing officers.

OTHER OVERDUE REFORMS

6. Establish a full database of Tribunal decisions available on its website.

The fact that there is no full database of Tribunal decisions available to the public has already been discussed. Only 289 of the Tribunal’s 90,000 plus hearing decisions were available through Quicklaw as of June 12, 2002. It is important to emphasize that this is both a highly unusual circumstance and a worrying one. It is a basic principle of the rule of law that the law must be knowable. Many Canadian tribunals, such as the Ontario Workplace Safety and Insurance Appeals Tribunal, the Office of the Information and Privacy Commissioner Ontario, the Canadian Human Rights Tribunal and the British Columbia Human Rights Tribunal, go to great lengths to make all their decisions fully available and searchable on their own websites. Across the country, labour tribunals typically make all decisions available through commercial publishers and commercial online research services. Smaller Ontario tribunals, such as the Pay Equity Hearings Tribunal, publish all decisions in an internal publication, in addition to making decisions available through commercial publications and online research services.

It should be acknowledged that thousands of ORHT decisions do not contain legal reasons that can readily be relied upon as persuasive in subsequent litigation. These decisions might possibly be excluded from a database of reasons, although it should be noted that, in the case of the Ontario Labour Relations Board, even ‘boiler plate’ decisions, such as certification orders, are included in the database of approximately 55,000 decisions available through Quicklaw. Public accountability demands that even orders without persuasive precedent value be available to the public on a searchable basis to allow scrutiny of adjudicative trends (e.g., how often is relief against forfeiture being exercised?) and an outcomes-based analysis (e.g., how often are applications on specific grounds successful?).

But even apart from the need for a database to support both litigation and research use, there is another reason supporting full public availability of Tribunal decisions.

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92. Pay Equity Reports.
An adjudicative body is responsible for developing a coherent body of jurisprudence. The Code of Professional and Ethical Responsibilities published by the Society of Ontario Adjudicators and Regulators underlines this in the following passage under the heading “Decision-Making Responsibilities”:

An adjudicator should not ignore relevant tribunal decisions on a question at issue before them. Where previous decisions are relevant and are not followed, the decision must explain the reasons for the departure clearly and respectfully. Due weight must be given to previous tribunal jurisprudence and the need for a degree of consistency in the interpretation of the law.

A tribunal that does not compile a fully searchable and public collection of all substantive decisions is not only not accountable to the public through scrutiny of its decision-making, but cannot be accountable to itself in developing a coherent and internally consistent body of interpretation of its own statute. Such a tribunal is free to be capricious in its interpretation of its statute. At the very least, the ORHT is vulnerable to criticism that it is inconsistent in its jurisprudence and it has no basis upon which to answer that criticism.

This recommendation would require funding, not legislative amendments.

7. **Removal of the provision for vacancy decontrol.**

The impact of vacancy decontrol on the procedural reforms which are put forward here, makes it necessary to reiterate the point articulated above. The primary goal of achieving a significant settlement rate through mediation will be undercut by the lure of unregulated rent increases unless this provision is removed from the legislation.

Perhaps this point was best stated by the Ombudsman in addressing the Tribunal:

> I have heard reports of landlords using the Act to evict for the real purpose of raising rents – even when mistakes have been made by the tenant that could and would be quickly corrected. Single mothers are particularly vulnerable, and some critics believe that they are targeted for eviction at first opportunity by some landlords who know they can attract a higher paying tenant without much opposition.

The vacancy decontrol provision in the *Tenant Protection Act* creates incentives for eviction and disincentives to settle. Prior to the introduction of vacancy decontrol, when there was no right to raise rents freely upon vacancy, legal clinics acting in arrears cases, could more often negotiate an acceptable repayment schedule. The experience of Tenant Duty Counsel under the previous legislation was that, when a

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93. In the context of social assistance, in *Marlow v. The Director, Income Maintenance Branch, Ministry of Community and Social Services* (26 November 1999), Court File No. 97-DV-161 (Div. Ct.), the Divisional Court specifically stated, with respect to the Social Assistance Review Board:

> “Although the Board is not bound by its own decisions, it is fundamental in public decision-making that like cases should receive like treatment.”


95. *Supra* note 17 at 6.
tentant was otherwise living up to the terms of the tenancy agreement, a landlord would often withdraw an eviction application on grounds such as property damage, if the breach could readily be corrected. Before vacancy decontrol was introduced, there was a shared basis for negotiating mutually satisfactory settlements.

Repeal of the vacancy decontrol provision would rebalance the competing interests of landlords and tenants at the mediation table, and support a renewed interest in settlement options on the part of landlords.

8. Consideration of discretion to refuse to evict in every case.

Although it is impossible, in the absence of a database of decisions, to know with certainty the extent to which the Tribunal is exercising its discretion to refuse to evict in appropriate circumstances, a survey of Ontario legal clinics in early 2001, referred to above, confirmed a significant degree of dissatisfaction with the manner in which the Tribunal exercises its discretion to refuse to grant an eviction order. The Tribunal seems to proceed on the basis that a landlord is entitled to an eviction order if he or she can prove that the tenant has breached an obligation under the Act, almost regardless of the seriousness of the breach.

Notably, the Ombudsman in his address to the Tribunal, also reminded adjudicators of their discretion to refuse to evict, noting that the current legislation “permits easier eviction, but it does not always require it when default occurs”.  

Given the gravity of the penalty, ORHT mediators and adjudicators should, as a matter of course, inquire into the ability of the tenant to remedy the breach at issue within a reasonable period of time. If a mediation conference were scheduled in every case, as is recommended, options for resolution, including re-payment schedules, could be canvassed thoroughly in advance of the hearing. In unresolved disputes that proceed to a hearing, adjudicators should, in every case, weigh the seriousness of the breach against the severity of an eviction order and consider if the landlord can be made whole without ordering the tenant out of their housing. This recommendation would not require legislative amendments, only a more consistent exercise of the discretion that is in the current legislation and supported by jurisprudence under the previous legislation.

CONCLUSION

This paper has considered the role of the Ontario Rental Housing Tribunal and the critiques of its service in the context of the social and economic facts that characterize Ontario’s residential rental market and its tenant population. I have put forward a proposal for procedural and legislative reform that is consistent with the accepted practice of other tribunals and is in conformity with the Statutory Powers Procedure Act. I have indicated where these reforms require legislative amendments, including

96. Supra note 28.
97. Supra note 17 at 6.
a substantive amendment in the case of the provision in the legislation for vacancy rent decontrol.

It is acknowledged that some of the features of the current system which are challenged in this paper – notably the failure to place responsibility for delivery of the hearing notice on the Tribunal and the failure to establish a central database of decisions – were features of landlord and tenant dispute adjudication in the court system under the previous legislation. This does not make them acceptable features of adjudication before an administrative tribunal. When jurisdiction is transferred from the courts to a administrative tribunal, the expectation of the public is that the new tribunal will be more accessible, and that its processes will easier to use and less confusing.

The experience of landlords before the Tribunal may be consistent with the goal of a more accessible, easier to use process. The added requirement of written disputes, the new efficiencies in the processing of eviction applications, the informational material available on the website for landlords, the ability of non-adjudicator staff to sign default orders – these and other innovations introduced by the Tribunal have facilitated a speedier process for landlord applicants. But creating efficiency for one of two user groups – the advantaged user group in this case – does not create a fair and balanced process. It is incumbent on adjudicative tribunals to consider the social context in which its decisions are made and to adapt its processes and the exercise of its discretion to recognize barriers that affect a disadvantaged party disproportionately.

Once again, the words of the Ombudsman to the Tribunal are instructive:

Please keep in mind also the concern about homelessness in this and other cities which is growing to the degree that people sleep on the window ledges of our office.

The homeless are not all shiftless bums. Many people are one pay-cheque away from the street, and with a little understanding and support need not be there. Landlords aren’t obligated to carry and answer for society’s woes, but should not be able to take advantage when better remedies are available and are within your power.

Housing is a fundamental need for a healthy society. In particular, many of our children, our mentally ill and our seniors are poor and vulnerable. Healthy societies cannot be maintained with children being reared in Kingston road motels.

Your agency is in a unique position as a linchpin of our current society. If that pin should become inflexible, then I fear for the stability of our social vehicle.98

In a civil society, the quality of our justice can only be assessed by considering that which is delivered to the least advantaged among us. The Ontario Rental Housing Tribunal handles significantly more applications annually than any other tribunal in Ontario. The information available with respect to the characteristics of the tenant population in Ontario demonstrates that tenant respondents to these applications are disproportionately economically disadvantaged, and disproportionately made up of

98. Supra note 17 at 7-8.
single mothers, new immigrants, elderly single women, youth and other groups identified under human rights legislation. The quality of justice that is delivered to vulnerable people, who may lose their housing as a result of a Tribunal application, is a reflection on our society as a whole.
Appendix A

Proposed Interim Amendments to the Tenant Protection Act (TPA)

Advocacy Centre for Tenants Ontario
March 2001

Security of tenure
Recommendation:
The Act should be amended to protect family members and related persons who ordinarily reside in a rental unit – and may well be tenants under the TPA – but are not recognized as tenants in the tenancy agreement or the tenancy application.

In circumstances where the tenant initially named on the lease or tenancy application is no longer residing in the unit, the remaining tenants should be able to have the absent or deceased tenant removed from the lease and the continuing tenancy interest in the unit established exclusively in their names at their request. The remaining family members and related persons should be able to remain as tenants whether or not the vacating tenant provided the landlord with a Notice of Termination.

Additional services
Recommendation:
The Act should be amended to allow a tenant – by giving 60-days notice to their landlord – to opt out of being charged in their rent for a parking space they no longer require.

Maximum rent
Recommendation:
The Act should be amended to immediately end maximum rent increases.

Municipal taxes and rent reductions
Recommendation:
If a tenant has continued to pay more than the lawful rent set following a rent reduction for a decrease in municipal taxes under section 136, the Act should explicitly allow the tenant to recover any overpayment to the landlord by deducting this amount from a rent payment. This remedy should be available to the tenant for a period of two years after a notice of rent reduction is issued under section 136.

Mandatory consideration of relief from eviction
Recommendation:
Adjudicators at the Ontario Rental Housing Tribunal must be required to consider the exercise of discretion under section 84 in every eviction application whether or not the tenant respondent expressly requests discretionary relief.

Setting aside default orders
Recommendation:
The Act should be amended to provide that Tribunal members, in deciding whether or not to grant an application to set aside a default order, may consider merits of the tenant's dispute and whether there are circumstances supporting the exercise of discretion relief.
Recommendation:  
The time limit of 10 days for applying for a set aside motion should be counted from the day the default order is received, not from the day the default order is issued.

Sheriff’s fees for restoring a tenant to possession after wrongful eviction  
Recommendation:  
The Tribunal should have the authority to order the Sheriff to waive the fees for enforcing an order under subsection 35(3) of the Act.

Evicted tenant’s property  
Recommendation:  
The Act should be amended to increase the time required for the landlord to make an evicted tenant’s property available for retrieval after the enforcement of an eviction order from 48 hours to 14 days. In addition, the time period that a landlord is prohibited from selling, retaining or disposing of an evicted tenant’s property should be increased from 48 hours to 14 days.

Recommendation:  
Tenants should be able to apply under section 32 to the Tribunal for an order determining that a landlord has sold, removed or disposed of property in violation of the requirements under section 42.

Mobile homes  
Recommendation:  
The time period that a landlord is prohibited from selling, retaining or disposing of the mobile home of a tenant who has vacated should be increased from 60 days to six months from when notice is given. In addition, the time period for the tenant who has vacated to make a claim for a mobile home should be extended from six months to one year.

Serving the Notice of Hearing  
Recommendation:  
The responsibility for serving all parties to an application should rest with the Ontario Rental Housing Tribunal – not the applicant.

Filing a dispute  
Recommendation:  
The deadline for filing a dispute upon receiving a Notice of Hearing should be extended from five calendar days to 10 calendar days.

Retroactivity period for arrears claims  
Recommendation:  
The Act should be amended to limit arrears claims against tenants by landlords to two years and to extend to two years the application period for tenants contesting the lawfulness of a rent increase or the lawfulness of the rent charged. In addition, the Act should be amended to extend to two years the period for which tenants and former tenants can apply to be reimbursed for money collected illegally.
Rent increases for extraordinary costs
Recommendation:
Eliminate applications for above-guideline increases in rent for extraordinary increases in the cost for utilities.

Discount rents
Recommendation:
Discounted rents should be eliminated.

Termination of tenancy
Recommendation:
Agreements between landlords and tenants to terminate tenancies must be writing.

Voiding eviction orders
Recommendation:
Tenants must be allowed to void eviction orders by paying for their arrears and any other ordered costs at any time prior to the eviction order being executed or enforced.