Successor Landlords: An Examination of the Extent of a Successor Landlord's Liabilities and Obligations to Residential Tenants in Ontario

Paul Stuart Rapsey

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/jlsp

Citation Information
https://digitalcommons.osgoode.yorku.ca/jlsp/vol11/iss1/11

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.
SUCCESSOR LANDLORDS: AN EXAMINATION OF THE EXTENT OF A SUCCESSOR LANDLORD'S LIABILITIES AND OBLIGATIONS TO RESIDENTIAL TENANTS IN ONTARIO

PAUL STUART RAPSEY*

RÉSUMÉ
Ce commentaire de cas porte sur une décision récente de la Cour divisionnaire de l'Ontario. Il soulève une question de compétence qui a longtemps fait l'objet de propositions de réforme du droit par les défenseurs des locataires. On y traite de l'étendue des pouvoirs du registraire local (1) à émettre des ordonnances ou à statuer sur des questions en vertu de la quatrième partie de la Loi sur la location immobilière lorsqu'un locataire se présente pour contester une requête d'un propriétaire et (2) de condamner aux dépens un locataire ou tout locataire qui ne se présente pas à une comparution. La Cour divisionnaire a maintenu que le registraire n'a pas une telle compétence mais que de telles ordonnances ne sont pas nulles ab initio. L'auteur suggère que de telles ordonnances devraient être déclarées nulles, non seulement évitables, et que toute autre conclusion jette le discrédit sur l'administration de la justice.

INTRODUCTION
Landlords are in the business of renting property. This is true whether the premises in question are residential or commercial. When landlords are the owners of the property they naturally wish the best return for their investment. Property passes from one owner to the next for a variety of reasons. This paper addresses issues relating to successor landlords in the context of residential

* The author graduated from the University of Toronto Law School in 1985. He is currently a research lawyer for the Ontario Legal Aid Plan, Clinic Resource Office (Toronto). In 1987-8 he was a law clerk for the Ontario Supreme Court. From 1988 he has worked as a lawyer both in private practice and for the Ontario Legal Aid clinic system. The views expressed in this article are those of the author in his personal capacity.
tenancies governed by Part IV of the *Landlord and Tenant Act*\(^1\) (hereinafter the *LTA*) in Ontario.

Frequently, residential tenants have paid security deposits to the original owner/landlord.\(^2\) Many purchasers will satisfy themselves as to the existence of security deposits and the obligations with respect to interest owing to tenants. The parties to the sale will account for this at closing.

However, many purchasers of residential property do not do this. On closing, the new owner may not be credited for the deposit retained by the vendor-landlord. Residential tenants find themselves being refused interest payments on deposits which they had paid to previous owners or landlords by successor landlords. They are told to sue their original landlord who has long since disappeared or, not infrequently, gone bankrupt. Moreover, when they move out, the successor landlord will demand that the tenant pay rent a second time for the last month of the tenancy. They will not credit the tenant for the rent deposit for the last month's rent paid to the previous landlord.

Similar issues arise with respect to the liability of successor landlords for disrepair of rental premises which has arisen under previous ownership. Purchasers will usually acquire a building for a market price which corresponds directly or indirectly with the depreciated value of the building in combination with the current real estate and income earning value of the property. Disrepair of the premises is one item that is factored into the price.

This paper primarily addresses the issue of a successor landlord's liability to account for pre-paid rent which a tenant has paid to a previous landlord. I apply the same analysis to the separate issue of a successor landlord's obligation to account for any abatement of rent which has accrued under a previous owner.

**THE LEGISLATION**

I suggest that two of the principle intentions of the *LTA* reforms which introduced Part IV into the scheme of landlord and tenant law were a concern over archaic laws and legal principles pertaining to 1) repairs and maintenance and 2) security deposits. When considering the liabilities of successors in title, one

---

1. R.S.O. 1990, c. L-7 [hereinafter the *LTA*].
2. While it is not a mandatory requirement that residential tenant pay a security deposit, a landlord of residential premises is permitted to request a security deposit for the last month's rent: *LTA*, s.82. The security deposit may only be in the amount of one month's rent and it is an offence for the landlord to charge a greater amount as a deposit: *LTA*, s.122. The landlord must pay annually 6% interest on the deposit.
Successor Landlords

must keep these remedial goals in mind. Unfortunately, the courts will too often fall back on ancient doctrines of land law that no longer have a place in our society without regard to the significant reforms in the past thirty-five years and without regard to the reasons for that reform.

Two definitions are important for the purpose of this paper. Section 1 of the LTA defines "landlord" for the purpose of the LTA and section 79 defines the term "security deposit" for the purpose of Part IV of the LTA.

The remedial nature of the LTA has been accepted by the courts in numerous decisions. For example, in Re Baker and Hayward, Wilson J.A. held that "one of the reasons for the revision of the Act in 1969 was to rectify the imbalance deemed to exist in favour of landlords". She held that the language of the statute would have to be very clear and unambiguous to effect a hardship upon a tenant.

---

3. In D.H.L. Lamont, Residential Tenancies, 3rd ed. (Toronto: Carswell, 1978), the author acknowledges that the landlord and tenant law amendments (Part IV) which came into force on January 1, 1970 "were quite revolutionary." (at 2). This is readily apparent from a review of three successive reports of the Ontario Law Reform Commission [hereinafter the OLRC]. The first report was the Interim Report of the Ontario Law Reform Commission on Landlord and Tenant Law Applicable to Residential Tenancies, (Toronto: Dept. of the Attorney General, 1968) [hereinafter the Interim Report]. The OLRC issued the Interim Report "[i]n view of the urgency of the problems respecting residential tenancies...". (at 5). The Interim Report addressed matters that needed immediate redress pending further study and review. One of the issues addressed was security deposits. The central issue of concern was the issue of maintenance and repairs.

4. For example, Finlayson J.A., in what can only be described as a contemptuous tone, described Part IV of the LTA as a "paternalistic statute": McBride v. Comfort Living Housing Co-operative Inc. (1992), 7 O.R. (3d) 394 (C.A.). Fortunately, Justice Finlayson's view is not shared by other judges of the Court of Appeal. Recently, we have seen several very enlightened decisions concerning Part IV of the LTA: e.g. Re Rent Review Hearings Board and Prajs (1993), 16 O.R. (3d) 97 (C.A.)

5. LTA, s.1: "landlord" includes a person who is lessor, owner, the person giving or permitting the occupation of the premises in question, and these persons' heirs and assigns and legal representatives...

6. LTA, s. 79: "security deposit" means money or any property right paid or given by a tenant of residential premises to a landlord or the landlord's agent or to anyone on the landlord's behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition;


8. Ibid. at 699.

9. Ibid., Op. cit., at 701. See also: Re Kasprzycki and Abel (1986), 55 O.R. (2d) 536 (Dist. Ct.) in which the court held that the LTA was "in large measure, created for the protection of tenants." (at 542).
More particularly, in *Re Boyd and Earl & Jennie Lohn Ltd.*,
the court dealt specifically with the issue of security deposits. Referring to the definition of "security deposit" in what is now s.79, Potts J. stated:

This section first appeared in the Act through 1968-69 (Ont.), c. 58, s. 3, as part of the entire remedial package introducing Part IV—the residential tenancies provisions in the Act...

[The definition of "security deposit" in s.79] was the end product of the Ontario Law Reform Commission’s efforts. As a definition section it is far-reaching and all-embracing, taking into consideration obligations and liabilities which a tenant may owe to his landlord...

Justice Potts held that the trial judge had erred by reading the reference to security deposits for last month’s rent in what is now s.82 as limiting the very broad definition of "security deposit" in what is now s.79. Potts J. addressed the interpretation of Part IV of the *LTA.* He stated:

The present sections dealing with security deposits were part of the remedial package. The only security deposit that is allowed is one month's rent, on which the landlord must pay interest....

... In my view, [s.82] was enacted to prevent undue hardship to those tenants who required housing accommodation but could not afford to come forward with large amounts of money in advance. At the same time it provides landlords with a specific sum as security against unpaid rent....

Accordingly, the provisions in the Act should be interpreted broadly and given the construction which gives effect to the governing intentions or objects of the Act as described above....

... In [s.82(1)], the security is an advance payment of the last month’s rent. It is not collateral given to ensure the later payment of that debt, nor is it returned to the tenant as the usual forms of collateral would be....

---


11. At issue was whether the requirement of eight pro-rated cheques for the balance of one year’s rent was an attempt to contract out of the security deposit provisions of the *LTA*.


14. The opposite result was reached in *Re Veltrusy Enterprises and Gallant* (1980), 28 O.R. (2d) 349 (Co. Ct.) [hereinafter *Re Veltrusy*]. The facts were very similar. The decision in *Re Veltrusy* was set aside on appeal to the Court of Appeal for different reasons, *Re Gallant and Veltrusy Enterprises* (1981), 32 O.R. (2d) 716 (C.A.). It seems that both cases were applications for a declaration under the rules. The Court of Appeal had held that the County Court had no jurisdiction under the old rules to hear an application to
The Ontario Law Reform Commission’s *Interim Report*\(^{15}\) (hereinafter OLRC *Interim Report*) found that security deposits requested by landlords were the second most serious cause of tenant concern.\(^{16}\) Deposits were a feature of many leasing arrangements and usually coincided with a shortage of rental accommodation. Deposits were justified by landlords to secure their investment in the property against damage by tenants.\(^{17}\)

Tenants were concerned about the financial burden of having to outlay monies at the commencement of the rental term. They felt interest on any deposit paid to the landlord should be payable by the landlord. The OLRC reported that “[b]y far the most serious complaint, however, relates to the difficulties encountered in obtaining repayment of the deposit on the termination of the tenancy”.\(^{18}\)

The OLRC specifically addressed itself to the issue of successor landlords and overcoming the effect of the then recent decision of the Ontario High Court in *Re Dollar Land Corporation Ltd. and Soloman*.\(^{19}\) The OLRC felt it should be incumbent on a successor landlord to satisfy itself on closing as to the state of deposits.\(^{20}\) As a result of the OLRC *Interim Report*, what is now s.82 of the *LTA* was enacted.\(^{21}\)

---

\(^{15}\) *Interim Report*, supra., note 3.

\(^{16}\) The first was repairs.

\(^{17}\) *Interim Report.*, supra, note 3 at 21.

\(^{18}\) *Ibid.* at 22.

\(^{19}\) [1963] 2 O.R. 269 (H.C.J.) [hereinafter Re Dollar]. In this decision, the court held that a tenant who had pre-paid rent to the previous owner, was liable to pay that rent a second time to the new landlord. The tenant’s remedy was to sue the former landlord. We discuss this case below.

\(^{20}\) The OLRC was recommending a trust account system for deposits. The specific recommendation in this report did not mention trust accounts. It did make it clear that deposits were to be treated as security for rent only.

\(^{21}\) *LTA*, s.84(1)

A landlord shall not require or receive a security deposit from a tenant under a tenancy agreement entered into or renewed on or after the 1st day of January, 1970 other than for a rent period not exceeding one month, which payment shall be applied in payment of rent for the last rent period under the tenancy agreement. S.O. 1968-69; now R.S.O. 1990, c. L-7, s. 82.
In 1972, a second report of the OLRC reviewed the amendments which had then been in place for two years.\textsuperscript{22} It considered complaints by landlords concerning the outlawing of damage deposits. It concluded that they were "... not persuaded that a case has been made for a restoration of former practices and the abuses attendant upon them."\textsuperscript{23}

In 1976, a third OLRC report\textsuperscript{24} found that the problems of security deposits for residential tenancies had been adequately addressed. It did not recommend the regulating of security deposits for commercial tenancies. It determined that commercial tenants were better able to protect their interests than were residential tenants.\textsuperscript{25}

What is now subsection 82(1) was again modified in June 1987.\textsuperscript{26} This was when amendments were made to extend the protection of Part IV of the \textit{LTA} to roomers and boarders.\textsuperscript{27}

\textbf{COVENANTS}
In order to fully comprehend the scope of a successor landlords liability it is critical to understand something about the law of covenants and how this law has been dramatically amended with respect to residential tenancies in Ontario.

This is an archaic area of the law. It is often incomprehensible. At common law, depending on the nature of the covenant a successor landlord may or may not be bound. The OLRC dealt with this issue most extensively in its third report


\textsuperscript{23} \textit{Interim Report}, supra., note 3 at 16. The OLRC did recommend that the wording of the section be changed. The phrase "for the last period under the tenancy agreement" appeared to restrict the application of the rent deposit to the period when the lease would normally terminate. It did not address the situation where the tenancy is terminated prematurely but validly. Accordingly, the OLRC recommended that the section be amended to make it clear that the deposit could be applied to the last rent period immediately preceding the termination of the tenancy. (at 17). It also felt that a system for regulating the deposits would be administratively cumbersome. The section was amended by S.O. 1972, c. 123. The phrase "under the tenancy agreement" was replaced by "immediately preceding the termination of the tenancy".


\textsuperscript{25} \textit{Ibid.} at 207.

\textsuperscript{26} S.O. 1987, c. 23.

\textsuperscript{27} The amendment relating to deposits provides that the deposit cannot exceed the amount of rent for one rent period and in any event not more than the amount of one month's rent. Before this the section permitted the taking of a deposit up to the amount of one month's rent even when the rental period was less than one month.
Successor Landlords

It found that the rules concerning covenants were "purely arbitrary, and ... quite illogical...".

The OLRC had dealt with the issue of covenants in the previous two reports as well. In the first report, the OLRC noted that very few covenants are implied in favour of tenants. In particular, the OLRC examined the independence of lease covenants. In the first report, the OLRC reported that: "...[c]oncepts rooted in an agricultural economy of a by-gone day provide little logical relevancy for today's landlord and tenant realities." Since the common-law in combination with the existing statute law resulted in an imbalance of rights in favour of landlord's, the OLRC recommended that covenants in leases be made dependent on each other rather than independent of each other as there were at common law.

The OLRC also dealt with the issue of covenant's binding successors in title. It recommended that the anachronistic distinction between covenants in esse and covenants in posse be abolished for residential tenancies. In response to these recommendations, the Legislature enacted what are now s.87 and s.88 of the LTA.

If, as Re Boyd and Earl & Jennie Lohn Ltd. suggests, the security deposit is prepayment of rent and not a collateral agreement, then an agreement to pay a security deposit must be a covenant that runs with the land.

---

30. Ibid. at 56.
31. Ibid. at 57.
32. Ibid. at 58. This was done by what is now s.87 of the LTA. Covenants in residential tenancy agreements are now "interdependent".
33. Ibid. at 59. The OLRC reported:
   "One of the ancient rules, as enunciated in Spencer's Case, (1583). 5 Co. Rep. 16a, which has remained part of the law of landlord and tenant is that an express covenant which touches and concerns the subject matter of the lease runs with the land and is binding on successors in title whether or not these "assignees" are named, so long as the covenant refers to something already in existence (in esse). An example is a covenant to repair an existing wall. Where, however, the covenant refers to something not in existence (in posse) at the time of the lease, the covenant does not bind the assignees unless the original lessee covenanted for himself and his assignees.
   ... [T]his anachronism should be done away with by appropriate legislation. thus covenant 'in posse' should be treated in the same way as covenents 'in esse'."
34. S.O. 1968-69, c. 58.
35. Supra, note 10.
In *Active Builders Ltd. v. Royal Trust Corp. of Canada and Bulawsky*, the Court of Queen's Bench, on an appeal from the Rentalsman, held that a security deposit was a covenant which ran with the land. Therefore, in that case, the purchaser under a power of sale was required to account for a security deposit paid to a previous owner. However, the Manitoba legislation expressly states:

Covenants concerning things relating to the rented premises, including covenants relating to the payment by the tenant of a security deposit and refund thereof by the landlord, run with the land whether or not the things are in existence at the time of the demise.

The provision is comparable to s.88 of the *LTA* with the noted exception that security deposits are expressly referred to. We suggest that this was out of an abundance of caution. This is supported by a recent Ontario decision in *Re Spencer Properties Ltd. and Zrebiec*.

**Residential Tenancies Act**

The third OLRC report, (1976), was the catalyst for further reform, although the OLRC felt that many of the problems for residential tenants with respect to

---


38. [1993] O.J. No. 2944 (O.C.J.) [unreported] [hereinafter *Re Spencer Properties*]. The court held that s.82(1) creates an implied covenant. The case involved the sale of the premises under power of sale by a mortgagee to a purchaser for value. The court held that pursuant to s.88, covenants pertaining to the premises run with the land. This included the payment of a security deposit. The mortgagee was an assignee of the reversion and bound by that covenant. Similarly, the present landlord, as purchaser, was also the assignee of the reversion and bound by that covenant.
successor landlord obligations had been remedied. This further report ultimately led to the enactment of the Residential Tenancies Act, (hereinafter the RTA). This legislation would have replaced Part IV of the LTA and the existing legislation pertaining to rent review with a much more comprehensive law. The part which was to have replaced Part IV of the LTA was never proclaimed into force.

An examination of this legislation with respect to the treatment of security deposits and the position of assignees is useful.

Section 9 dealt with security deposits. It did not substantially change the LTA provision. However, s.14 and s.15 addressed the effect of a change of landlord and the assignment of the tenancy. Section 14 stated:

39. The third report concluded that the running of covenants and the position of assignees needed to be addressed. The specific recommendation dealt with residential and non-residential tenancies. With some exceptions, the OLRC concluded that "... the assignee of the beneficial interests of a landlord or a tenant should, automatically upon the assignment, have all the benefits and be subject to all the obligations, of the landlord or the tenant ... as are implied by law or expressed in the tenancy agreement, in the same manner as if he were the original landlord." (at 28). The exceptions referred to by the OLRC permitted some contracting out in non-residential tenancies. However the OLRC was express in stating that it "would not, however, be possible to avoid any mandatory obligations imposed for example under Part IV of LTA by providing that such obligations would not run in favour of, or against, assignees." (at 32). The OLRC determined the need to be rid of the uncertainties inherent in the requirement that covenants have reference to the subject matter of the tenancy agreement or "touch and concern" the land. (at 29). The OLRC acknowledged that some problems pertaining to covenants had already been remedied for residential tenancies by the enacting of what is now s.88 of the LTA. (at 31).

40. S.O. 1979, c.78 [hereinafter the RTA].
42. Supra, note 40. Unfortunately, the Supreme Court of Canada ruled in Reference Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, that certain powers given to the new Residential Tenancies Commission usurped the powers of the federally appointed judges pursuant to s.96 of the British North America Act [now the Constitution Act, 1867]. The Court concluded that it was not within the legislative authority of Ontario to give the Commission the power to make eviction orders or compliance orders. As such, the legislation was invalid in that limited respect.

43. It did make it clear that a rent deposit could only be required at the commencement of the tenancy. This seems self-evident as has been clarified by the caselaw: McKelvie v. Luchi (1983), 1 T.L.L.R. 108 (Ont. Dist. Ct.). See also: Re 673078 Ontario Limited and Mandowsky (29 July 1987), #211/87 (Ont. Dist. Ct.) in which the Court held that the new owner could not require a security deposit where none had been required under the original tenancy agreement. While the parties may contract for the payment of such a deposit, to require it at a later date without the consent of the tenant would be an attempt to unilaterally change the terms of the agreement. This would be repugnant to a basic principle of contract law that a contract is a mutual agreement entered into freely.
Where there has been a change of landlord, all benefits and obligations arising under this Act, and any additional benefits and obligations arising under a written tenancy agreement, bind the new landlord.

Section 15 similarly addressed the benefits and obligations in situations where there has been an assignment of the tenancy agreement by the tenant. Section 22 stated more particularly:

Where there has been a change of landlord,

(a) the new landlord is liable to a tenant for any breach of the landlord's obligations under the tenancy agreement or this Act, where the breach relates to the period after the change of landlord, whether or not the breach began before the change of landlord;

(b) the former landlord is liable to a tenant for any breach of the landlord's obligations under the tenancy agreement or this Act, where the breach relates to a period before the change of landlord;

The RTA was in many ways not a new law, but rather a simplification and clarification of existing law. The OLRC in the 1976 report had however hoped to limit a successor landlord's liability in some instances. This limitation would have been a change in the existing law as amended by Part IV of the LTA.

44. This principle of interpretation has been recently acknowledged by the Divisional Court in Re Feeney and Noble, [1994] O.J. No. 550 (O.C.J.) [unreported], aff’d (1994), 19 O.R. (3d) 762 (Div. Ct.) and is consistent with the Interpretation Act, R.S.O. 1990, c. I-11, as am., s.17 and s.18 [hereinafter IA].

45. The exceptions referred to by the OLRC permitted some contracting out in non-residential tenancies. However the OLRC was express in stating that it "would not, however, be possible to avoid any mandatory obligations imposed for example under Part IV of LTA by providing that such obligations would not run in favour of, or against, assignees." (at 32). The OLRC further stated:

"Finally, it will be noted that the recommendations concerning the running of covenants are intended to apply to the assignment of beneficial interests in a written tenancy agreement. ... In the case of parol tenancy agreements only 'covenants' which are implied by law, either at common law (such as a tenant's covenant to pay rent) or by statute (such as the landlord's covenant to repair residential premises) would be enforceable by or against the assignees of the landlord or the tenant. To permit any
USE OF LEGISLATIVE HISTORY
While the use of legislative history may be suspect with respect to the application of a statute it may be relevant to a determination of the purpose of the legislation.46

Legislative history has been examined in several landlord and tenant cases.47 This would seem to be justified by virtue of s.120 of the LTA which permits a more liberal use of evidence than in other proceedings.48

The Supreme Court of Canada has also recently referred to Hansard in a non-constitutional case: Canada (A.G.) v. Mossop.49 The use of legislative history in residential tenancy proceedings makes sense. The legislation is generally accepted to be remedial. It was the subject of a massive and well-publicized law reform study which had a direct correlation to the enactment of Part IV of the LTA.

More recently, the Supreme Court of Canada has raised questions, without deciding the issue, concerning the use of legislative debates in non-constitutional proceedings: R. v. Heywood.50 It is clear that the Court was concerned with "debates" in the legislature and not legislative history in its broadest sense. The Court reaffirmed that such debates are admissible in the context of constitutional cases and Charter cases. However the purpose for which they may be used is not for the interpretation of the enactments themselves, at 108, but to appreciate their constitutional validity.51


47. For example, Re Quann and Pajelle Investments Ltd. (1975), 7 O.R. (2d) 769 (Co. Ct.), one of the earlier, more thorough and more enlightened examinations of the scope of the Part IV amendments; and more recently in Re Foster and Lewkowicz (1993), 14 O.R. (3d) 339 (O.C.J.).

48. This includes the admission of hearsay evidence and any relevant oral or documentary evidence.

49. (1993), 149 N.R. 1 (S.C.C.). However, that case dealt with human rights legislation and was therefore quasi-constitutional in scope.

50. (1995), 174 N.R. 81 (S.C.C.), at 107-9. This was a criminal proceeding. The Court was concerned with the definition of the word "loiter" in the Criminal Code, s.179(1)(b). The Attorney General wished to introduce legislative debates to argue that the term included the concept of malevolent intent.

51. Nevertheless, the court states that "legislative history" (i.e., not simply "legislative de-
The Supreme Court in *R. v. Heywood*\(^{52}\) specifies two reasons why legislative debates are not a reliable source:

1. The intent of particular members of the legislature is not the same as the corporate intent of the legislature.

2. The political nature of debates in the legislature brings into question their reliability.

With respect to the first, that may be true of debates by general members. However, statements by the sponsoring Minister upon the introduction of the legislation are more reliable. Statements in Committee of the Whole concerning a particular clause immediately before a vote may also be reliable as an indicator of intention. One has to look at the source and context of the statement in order to assess reliability.\(^{53}\)

**JURISPRUDENCE**

**Pre-paid rent and deposits**

One would think that an examination of the statutory provisions themselves would be sufficient to resolve this issue. That is not so. The case law on the issue under consideration relies most often on old land law jurisprudence. It tends to ignore the remedial approach to the legislation. It also tends to ignore the legislation itself.\(^{54}\)

The first two cases cited below are decisions of the County Court and the High Court respectively. They were both before the Part IV *LTA* amendments of 1970. These and other old cases are often cited by courts which fail to consider the period or circumstances in which these decisions were made or the impact of the significant residential tenancy amendments to land law.

In *Cavell v. Canada Dry Ginger Ale Ltd.*,\(^{55}\) the Court stated that "rent paid ... before it is due" is done at the tenant's risk in the case of change of ownership.\(^{56}\)

---

\(^{52}\) *Supra*, note 50 at 109.

\(^{53}\) The Supreme Court of Canada notes that the Supreme Court has itself relied on legislative history for the very purpose of determining legislative intent in statutory construction. (at 109). In the end, the Supreme Court decides to leave the issue undetermined.

\(^{54}\) There are some notable exceptions which we discuss below.

\(^{55}\) [1945] O.W.N. 799 (Co. Ct.) [hereinafter *Cavell*].

\(^{56}\) However, the decision is somewhat obscure. It distinguishes, without explanation, be-
When the Court speaks of "payment in advance" it seems to be referring to the payment of rent by agreement of the parties on the first of the month for the current month. It is unfortunate for clarity's sake that the Court then speaks of "payment of rent ... before it is due". It seems from the context that this must refer to "prepaid rent" and not "advance rent". There does not seem to be any reason why the one should be at the tenant's risk and the other not.  

*Re Dollar Land Corporation Ltd. and Solomon* was given special consideration by the OLRC in its first report and the amendments were intended to render this decision inapplicable to residential tenancies. This decision held that a deposit on account of rent and other obligations of the tenant was personal in nature between the immediate landlord and tenant. The court stated that covenants could only bind assignees of the landlord if they touched the rented premises in the sense of affecting the landlord and tenant relationship. The court in *Re Dollar* reviewed ancient English case law concerning covenants. In particular, the case of *The Mayor & Corporation of Congleton v. Pattison* held that a covenant would bind an assignee if it "affected the nature, quality or value of the thing demised, independently of collateral circumstances...". The court in *Re Dollar* concluded that these were collateral circumstances. Further, the lease referred to "the lessor herein". Even though "landlord" included "assigns", the lease indicated an intention to confine the application of the covenant to the immediate parties. I would suggest that this case, even if

---

57. Presumably, "advance rent" is not at the tenant’s risk because it would be by agreement in the lease and a prospective purchaser should be put on guard. Where a security deposit requirement is also contained in a lease, then certainly the prospective purchaser should be on the same notice. For this reason, we suggest that when the Court speaks of prepaid rent here, it is referring to situations where the tenant prepays the rent on his or her own initiative and not by agreement of the parties. This is supported by the decision in *Re Boyd, supra*, note 10.


59. Unfortunately, the courts have neglected to consider the issue of legislative history or intention in enacting Part IV of the *LTA*.

60. *Supra*, note 19 at 273.

61. (1808), 10 East 130 at 135.

62. The court found this particularly relevant. While *Re Dollar, supra*, note 19, may have been correct because of the wording of the lease restricting the interpretation of the term "landlord" to the "landlord herein", s.80 prohibits any contracting out of the provisions of Part IV. The term "landlord" for the purpose of Part IV cannot be limited in the manner it was by the lease in *Re Dollar, supra*. 
correct at the time, has been rendered inapplicable by the landlord and tenant residential tenancy amendments.

A decision which is frequently relied upon by judges to support the continuation of the old law under Part IV is *Chiappino v. Bishop*.63 This decision, in a terse judgment, applies the outdated reasoning of the above two decisions. The Court held that there was no basis in law for finding that a successor landlord should have to credit a tenant for a security deposit paid to a previous landlord when the deposit was not paid over to the new landlord.64 This interpretation flies in the face of the remedial nature of the legislation. It also ignores the very type of hardship to tenants with respect to security deposits that the OLRC hoped to address in the new legislation.

Recently, the decision in *Chiappino v. Bishop* was expressly disapproved of by the Ontario Court (General Division) in *Re Spencer Properties Ltd. and Zrebiec*.65 It was also recently distinguished66 in *Re Royal Trust Corp. and Roche*.67

*Re Spencer Properties Ltd. and Zrebiec*68 involved a purchaser of the premises from a mortgagee under a power of sale. The Court held that the present landlord should have satisfied itself as to the existence of rent deposits before it purchased the premises. The principle of *caveat emptor* was applied to this situation.69

63. (1988), 49 R.P.R. 218 (Ont. Dist. Ct.).

64. The judge, Matlow J., goes so far as to effectively state that the law had not changed since the decision in *Re Dollar, supra*, note 19. (at 219). *Re Dollar, supra*, including the ancient cases considered by that court, was the only case considered by this 1988 judgment. The result of the decision was that the tenant had to pay rent for the last month of the tenancy a second time.

65. *Supra*, note 38. The Court held that the old law as stated in *Cavell, supra* note 55, and in *Re Dollar, supra*, note 19, has no application to the statutory scheme under Part IV. These cases did not deal with a situation where there was a statutory obligation concerning rent deposits.

66. On nebulous grounds more indicative of disagreement with that decision.

67. [1994] O.J. No. 2462 (O.C.J.) [unreported]. *Re Royal Trust Corp. and Roche* involved a mortgagee who had gone into possession. The tenant was in arrears and the mortgagee brought an application for arrears and termination of the tenancy. The issue in the decision was whether the mortgagee/landlord had to account for a deposit of $2500 which had been paid to the mortgagor/landlord. It seems that the deposit in this case was for more than one month's rent although the reasons do not address that point.

68. *Supra*, note 38.

69. I suggest that this decision fully examines the issues and correctly evaluates the assumption of risk by a purchaser of residential rental property.
Successor Landlords

On the other hand, in *Re Max Diamond and Jukie*[^70] the Court reached a similar result as in *Chiappino v. Bishop*. However this case did not deal with a prepaid security deposit under Part IV. The tenant had paid the previous landlord the equivalent of 6 months’ rent. The mortgagee subsequently took possession and demanded rent for the same period. The Court, at the urging of the applicant/mortgagee, felt constrained to rely on *Danforth Discount Ltd. v. Humphrey Motors Ltd.*[^71] and the decision of *DeNichols v. Saunders.*[^72] Like the decisions in *Cavell*[^73] and *Re Dollar*,[^74] these pre-Part IV cases stand for the proposition that where rent is pre-paid to a previous landlord, the successor landlord is not bound.[^75]

Although this section refers to security deposits only on sale of the property it does appear to recognize that mortgagees are liable to credit tenants with security deposits paid pursuant to s.82 of the *LTA*. Where the premises is not sold, s.27 does not apply and tenants are not subject to the priority list. I suggest that s.27 *MA* does not affect the legal effect of s.82 of the *LTA* on successor landlords who are mortgagees in possession. On the contrary, the amendment supports a conclusion that successor landlords are bound by s.82 of the *LTA*. The amendment does not give greater rights to tenants in mortgagee situations. I suggest the purpose of the amendment was to restrict the rights of those tenants with respect to security deposits in the limited context of s.27 of the *MA*.

**Repairs – Abatement**

As mentioned above, a major concern of the OLRC in its *Interim Report*[^76] was the responsibility for maintenance and repairs with respect to residential prem-

[^70]: (6 July 1992), #92-LT-36468 (O.C.J.) [hereinafter *Re Max Diamond*].

[^71]: [1965] 20 O.R. 765 (C.A.). *Danforth Discount* was a commercial tenancy case. Moreover, it was prior to the extensive law reform in the late 1960’s.

[^72]: (1870), LR 5CP 589.

[^73]: *Supra*, note 55.

[^74]: *Supra*, note 19.

[^75]: The tenant in *Re Max Diamond, supra*, note 70, was unrepresented and did not argue against these out-dated precedents. The tenant was liable to pay the rent. The judge accurately noted that for this tenant on social assistance it was a “most unfortunate situation”. We would suggest that it was not only unfortunate, it was inequitable. It appears directly contrary to the whole scheme of residential tenancy reform that has taken place since 1965. Moreover, this was a mortgagee in possession situation. The Court made no reference to s.27 of the *Mortgages Act, R.S.O. 1990, c. M.40*, as am. [hereinafter *MA*]. Section 27 provides that money from the sale of a property by a mortgagee shall be applied toward certain purposes in priority. One of these applications is towards security deposits.

[^76]: *Supra*, note 3. The OLRC reported to the Attorney General for Ontario that the urgency
ises. Integral to this was the need for a summary process to address these concerns.

The OLRC reported:85

Historically, the law of landlord and tenant was developed in an agricultural setting based on extended tenancies. The justification for relieving the landlord from liability for harm sustained by the tenant and his guests and from an implied obligation to repair had at least an arguable validity. The growth of modern cities and the inevitable changes it has wrought in the way people order their lives requires a re-evaluation of the efficacy of the traditional common law rules regarding fitness and repair.

It is an economic fact that the modern residential tenant is less likely to be able to bear the cost of undertaking repairs. In the typical urban apartment tenancy, which is usually of quite a short duration, the landlord is generally considered to be the person having the major interest in the condition of the leased premises. It is the landlord who receives not only the rent, but also the benefit which results from improvements to the property, including repairs. It is the landlord, therefore, who ought to bear the primary responsibility to repair. He should be required to provide premises which are fit for human habitation and are in a good state of repair and he should be primarily responsible for keeping them in that condition.

While it seems that the courts may be preparing to cast off the old restrictive land law concepts with respect to security deposits, the courts have a very difficult time accepting that a successor landlord should be liable for disrepair

of the problems in the area of residential tenancies required priority treatment. In particular, the problem of repairs was the source of much concern. (at 35).

85. Ibid. at 35. The OLRC pointed out the following:

one of the consequences of the law as it then existed was that the landlord was not "responsible for damages suffered by the tenant because of the defective condition of the premises", (at 36);

the "protection of vital human interests are not recognized" by the existing law and the "existing arbitrary legal rules must yield to a re-examination of the law, based upon a realistic assessment of values and needs", (at 42);

the physical and psychological effects of housing which is below reasonable standards of fitness have become increasingly well known, (at 42);

the landlord is the principal beneficiary, through his/her property interest, of repairs effected, (at 42); and

the landlord and tenant relationship is not one where tenants have a real freedom to contract, (at 43).
Successor Landlords

that had accrued under previous ownership.\textsuperscript{78} \textit{Re Spencer Properties Ltd. and Zrebiec.}\textsuperscript{79} was distinguished in \textit{Re 981673 Ontario Ltd. and Jessome}\textsuperscript{80} \textit{Jessome} dealt with the liability of a mortgagee in possession to account for an entitlement to an abatement of rent which had accrued under the mortgagor as landlord. The court held that the mortgagee was only liable from the date it went into possession. Cases dealing with security deposits were distinguishable in the eyes of that court.\textsuperscript{81}

Surely s.94 obligations\textsuperscript{82} form a material covenant and run with the land under s.88 of the \textit{LTA}.\textsuperscript{83} There can be no doubt that these obligations are "related to the rented premises".\textsuperscript{84} Certainly with respect to a purchaser, the principle of \textit{caveat emptor}, as applied in \textit{Re Spencer Properties Ltd. and Zrebiec}\textsuperscript{85} is applicable. In the case of successor landlords who are mortgagees in possession, the mortgagee should be liable for the disrepair due to its failure to protect its investment in the property.\textsuperscript{86}

\textbf{CONCLUSION}

Part IV of the \textit{LTA} is a dramatic departure from the common law of landlord and tenant. Courts still seem to have a very difficult time understanding that. The remedial nature of the legislation is critical to an understanding and interpretation of the legislative provisions regarding residential tenancies.

One must ask whether an agreement concerning a security deposit is one that should bind a successor landlord. Often security deposits are addressed in a written tenancy agreement. Frequently, however, they are not. The third report of the OLRC addressed the issue of written and parol tenancy agreements. The

\textsuperscript{78} However, it is generally accepted that a successor landlord has the obligation to repair and maintain premises from the date of ownership despite the fact that the disrepair was the fault of a previous owner.

\textsuperscript{79} \textit{Supra}, note 38.


\textsuperscript{81} No reasons were given for that finding.

\textsuperscript{82} The obligation of a landlord to repair and maintain residential premises.


\textsuperscript{84} \textit{LTA}, s.88.

\textsuperscript{85} \textit{Supra}, note 38.

\textsuperscript{86} Most mortgages give the mortgagee the right to re-entry if the mortgagor is not taking proper care of the investment.
third report has no impact on the interpretation of Part IV of the LTA, s.82 since no amendments to that Part or that section arose from the report. It is, nevertheless, informative.

Certainly where the security deposit is expressly addressed in a written tenancy agreement there is no justification for not holding a successor bound to account for the deposit. It is not so simple in oral or implied tenancies. However, the OLRC found that where a covenant was implied by common law or by statute, it should also be binding on the successor in title.

A security deposit in a non-written tenancy agreement is not directly implied into the agreement. Certainly, however, the statute provides strong signposts to would-be-successors in title that such a covenant may exist. The statute puts them on guard. The remedy for a successor in title who has been misled by a vendor is to sue the vendor. Where the error is that of the successor in title's solicitors, then the solicitors may be sued.\(^8\) There is no good reason why the tenant should be the party who assumes the risk.

The security deposit provision was remedial in nature. The deposit provision is permissive but it is strictly limited. It is not collateral for the performance of a future obligation.\(^8\) Rather, where taken, it "shall be applied" as rent for the last month of the tenancy whether terminated at the end of term or earlier.

Therefore, the statute is mandatory with respect to the application of the deposit once taken by the landlord. The statute cannot predict that the landlord who takes a deposit will be the same one at that indefinite future date when the mandatory part of the provision kicks in. If it "shall be applied" then it is only logical that the landlord at that future date is the one who shall apply it. Similarly, it makes practical sense that it should be the landlord at that future date who must account for the deposit if it is to be returned to the tenant.

A legal security deposit under Part IV is the prepayment of rent. Rent is certainly something which touches the land or the subject matter of the tenancy agreement. The taking of this deposit is expressly provided for in the remedial legislation. One must presume the legislature did not intend to expose tenants to the risk of having to pay rent twice for the same period since the amendment was intended to relieve the hardship of deposits requested by landlords.

Indeed, prior to the enactment of Part IV, the OLRC expressed in its *Interim Report* that it should be incumbent on landlords to satisfy themselves on closing as to the state of deposits. Further, the OLRC expressly stated that the result in

\(^{87}\) *Siket v. Milezec*, [1993] O.J. No. 3161 (O.C.J.) [unreported].

\(^{88}\) *Re Boyd*, supra, note 10.
Successor Landlords

Re Dollar Land Corporation Ltd. and Soloman was to be avoided. It is reasonable to presume that the legislature took these considerations into account when it enacted Part IV.

Moreover, the definition of “landlord” is very broad. It expressly includes “assignees”. Therefore, where it makes sense, the term “landlord” should be read to include an assignee of the original landlord. For example, the Court of Appeal read the term “tenant” to include a “subtenant” in Re Baker and Hayward. It did so because this was consistent with the remedial purpose of the legislation.

Section 88 also states expressly that all covenants relating to the rented premises run with the land. Such covenants are binding on successors in title.

Perhaps the courts’ failure to appreciate the scope of the LTA amendments is understandable. Landlord and tenant applications are intended to be summary in nature. The parties are frequently unrepresented. If they are represented, their agents or lawyers frequently have not had the luxury to do extensive research concerning the legislative history or case law. The court is often unfamiliar with or unsympathetic to residential tenancy principles. The result is, unfortunately, bad law.

I suggest that there can be no doubt that a security deposit, where given, forms a covenant. This covenant runs with the land and is binding on successor landlords. This can be the only legitimate conclusion from a thorough but plain reading of the statute. Moreover, if a court were to give due consideration to the purpose and intent of the amendments and the legislative history behind the changes, I suggest it cannot judicially reach any other conclusion.

Finally, no court has been directed to look at s.62 of the LTA in considering the issue of security deposits or pre-paid rent generally. This section is not contained

89. Supra, note 8.


91. Too often, from reading decisions in landlord and tenant proceedings, one can only conclude the court has not taken the time to read the statute or the provisions in question. This is all the more troubling when so many of the parties, whether landlords or tenants, are unsophisticated and unrepresented. For example, the courts will frequently, and all too glibly, state that Part IV is an “exhaustive code of procedure”. It takes a simple reading of Part IV to determine that it is anything but exhaustive. There is not one procedural provision pertaining to applications under s.94 or s.89 or the LTA. There are no court forms provided in the LTA or the regulations pertaining to these applications. While s.113 applications do have minimal procedural provisions pertaining to them, and are provided with court forms, I doubt there is one serious practitioner who would state that these provisions are exhaustive.

92. Especially s.1, “landlord”; see also: s. 62, s.82, and s.88.

in Part IV of the LTA and so the remedial arguments and arguments concerning the inapplicability of the older case law do not apply to the same degree.\textsuperscript{94} However, with the enactment of Part IV, security deposits are no longer collateral agreements. These are now the prepayment of rent and expressly governed by s.62. While s.62 itself is not new, its application to security deposits for last month's rent has changed because of the enactment of the Part IV provisions respecting such deposits.

For all of the above reasons, independently and collectively, I suggest that holding the tenant liable to a successor landlord for pre-paid rent and especially for pre-paid rent by way of a last month's rent security deposit, is simply not a sustainable result. I would apply the same rationale to the issue of accrued abatements.

\textsuperscript{94} IA, supra, note 44. Section 10 is still applicable.