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Landlord and Tenant Relations -- Rent-Withholding in Ontario: A Case-Study and Suggestions for Legislation

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LANDLORD AND TENANT RELATIONS—RENT-WITHHOLDING IN ONTARIO: A CASE-STUDY AND SUGGESTIONS FOR LEGISLATION.—The use of rent strikes by aggrieved tenants is not a recent phenomenon. Charles Parnell M.P. was convicted in Ireland in 1881 of conspiring with others in the Irish National Land League to withhold rent from landlords “to the great damage of the said owners, and to the evil example of others in like case offending”.¹ In contemporary Canada the multiple-unit urban apartment building has taken the place of the farm as the locus of tenant discontent, but the law has shielded the modern landlord from the rent withholding device as effectively as the absentee landlord in Ireland was protected from the likes of Parnell.

Frequent resort to protest activity by relatively powerless groups in North America, such as Negroes, the poor and tenants, has been an important recent challenge to law as an instrument of social control and peaceful conflict-resolution. The response of some American states has been to enact legislation to regulate the withholding of rents by tenants and to encourage the orderly resolution of the dispute with the help of mediation by government officials. This comment will present a case-study of a rent strike in a new apartment building in Toronto which, it is claimed, arose out of a situation typical of many elsewhere in urban Canada, where the unprecedented rate of urbanization has resulted in a seller's market for persons dealing in land.² Recent amendments to the Ontario Landlord and Tenant Act³ will be considered insofar as they deal, or neglect to deal, with the problems raised. The legislative attempts to regulate the problem will be evaluated.

Rent-withholding: A Case-study

In a recent case involving a rent strike in a large apartment building in Toronto, Judge McDonagh said *obiter* that rent withholding in Ontario was unlawful. The learned judge said:

. . . Until the Landlord and Tenant Act is amended then it is the law of this province and it is expected as Canadian citizens we will all obey

agreements under active consideration since 1966. See Law Com. No. 24, Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893 (London, H.M.S.O., 24th July, 1969). It is understood that the Quebec Civil Code Revision Office is also working on the subject. Current American thinking is reflected in several provisions in Article 2 of the UCC (most notably s. 2-302), ss 5.108 and 6.111 of the Uniform Consumer Credit Code and, most recently, Part 3, s. 3.302 of the Draft National Consumer Act, *supra*, footnote 48.

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¹ *R. v. Charles Parnell, M.P., and others* (1881), 14 Cox C.C. 508 (Q.B. Ir.).

² See L. Stone, *Urban Development in Canada* (1967); Report of the Task Force on Housing and Urban Development (“The Hellyer Report”), (1969).

³ R.S.O., 1960, c. 206, as am. by S.O., 1968-69, c. 58.

that law regardless of how we like it. So long as it is on the statute books it is law and there is no authority that I know of that gives a group of tenants the right to do under the law what these tenants have done by the formation of their Association and the refusal to comply with the contracts which they signed. Once you are over 21 and you sign a contract you are bound by it. Once you are bound by the terms of your lease I say you have the right to go to the Court to seek damages. If the landlord has breached the lease you haven't any right to take the law into your own hands.⁴

This case brought to culmination ten months of struggle between the landlord and tenants. At all stages the tenants possessed superiority of numbers alone. The judgment quoted finally crushed the attempts of the tenants to force the landlord to accept as his responsibility the upkeep of certain basic facilities and services. The history of the dispute will be traced:⁵

33 Eastmount Avenue is an apartment building and townhouse complex that overlooks the Don Valley just north of Bloor Street in Toronto. It was opened for occupancy on May 1st, 1968. The building contains 210 units with rents ranging from \$140.00 per month for a bachelor apartment, \$160.00 for a one-bedroom, \$260.00 for a townhouse to \$360.00 for a penthouse.

When the tenants moved in they found that there were no working elevators. The furniture for upper apartments had as a result to be lifted on a construction hoist or carried upstairs. In addition there were no storage lockers, no laundry room, an unusable garage, no parking lot, no landscaping, no pool, no sauna, and completely unfinished corridors and lobby. In some individual apartments the door to the corridor had no lock, the doors within the apartment had not been hung and the floors and walls had not been completely finished. Throughout the summer, tenants continued to move into the building. Each of them was told the same story: the building would be completed within one month.

Four months later, little progress had been made. Two tenants circulated a petition saying that the tenants were not satisfied with the condition of the building and warning that if all common areas were not finished by November 1st they would withhold their November rent. During October work on the building continued slowly. The tenants' dissatisfaction was fanned when a fire in the penthouse did serious damage because the defective elevators prevented firemen from reaching the top floor.

On November 1st approximately thirty-three⁶ tenants withheld their rent. The landlord responded with a letter demanding pay-

⁴In the *Matter of Vivene Developments Ltd. v. Jack K. Tsuji*, unreported. Transcript, County Court Reporters, Toronto, March, 1969.

⁵The research for this study was conducted through interviews with the tenants, the leaders of the tenants association and city officials, by Miss Ruth Ann Irving.

⁶About 140 of the 210 units were rented at this time.

ment. Conditions did not improve. Matters came to a head over the weekend of November 17th when the heat failed for one day and the garbage chute was blocked up as far as the twelfth floor. The tenants were unable to contact the lessor company or the building manager. On November 18th the leaders of the rent strike sent a telegram to the director of the lessor company (hereinafter the landlord) asking him to attend a meeting on November 19th. When the strike leaders returned home from work on Monday, November 18th they found the bailiff's locks on their doors. They immediately summoned their fellow tenants and explained the situation to them. An impromptu tenants' meeting developed in the lobby. The ringleaders were inundated with offers of food, clothing and lodging. The tenants were found to be in support of their leaders. The lockout provided an immediate cause around which to unite against the landlord.

The next day, November 19th, the tenants held a meeting with full press coverage. The meeting was attended by Toronto's Mayor Dennison, two controllers, an alderman, a member of the provincial Legislature, and a representative of the Canadian Union of Public Employees, all of whom publicly expressed support for the tenants. The tenants formed an association, elected an executive and levied a membership fee. The purpose of the association, as stated in its constitution, was to bargain collectively with the landlord.

On November 20th inspectors from the City Department of Buildings inspected the building and found numerous building code violations. The matter was further aired when the Toronto City Council met to request information from the Commissioner of Buildings as to the standards that ought to be required as a condition precedent to occupancy of new apartment buildings. Nine days later the Commissioner of Buildings reported⁷ that requirements listed in the building standards by-law respecting safety and health were enforceable but should be considered separately from other questions which the Commissioner considered desirable in the interests of tenants but which could not be enforced by present civic by-laws.⁸ Some of these "desirable" items included laundry facilities, elevators in operating condition, and sufficient locker space. He further was of the opinion that all work on the apartment should be completed prior to occupancy and that all equipment installed in the apartment should be in operating condition prior to occupancy. Despite this incipient interest in the situation by City Council, no further action on the matter was

⁷ Report of Commissioner Wellwood, Department of Buildings, to the Board of Control, submitted November 29th, 1968.

⁸ See City of Toronto Act, S.O., 1936, c. 84, as am.; City of Toronto By-Law, No. 73-1968.

taken by them and the recommendations of the Commissioner of Buildings have been ignored.

During the same week the tenants commenced an action seeking an injunction to prevent the landlord from locking out any more tenants. The two parties reached a settlement before the case was heard. The landlord agreed to negotiate with the Tenants' Association and to allow the excluded tenants to reoccupy their apartments. The tenants agreed to pay their rent.

This concluded the first stage of the dispute between the landlord and tenants. The landlord, induced by pressure from rent withholding, publicity, the threat of legal action, and the Department of Buildings had agreed to negotiate. After this, however, he became progressively less co-operative.

At the first meeting of the Landlord's and Tenants' Negotiating Committee the landlord turned down a demand by the tenants for rebates on their rents during the time that the building was incomplete. The landlord agreed verbally, however, to the following items: to recognize the Association as an official bargaining agent; to allow any tenants to break their leases if they wished; to join the Urban Development Institute⁹ or adopt its code of ethics, and to give a definite date for completion of the building and grounds. At a second meeting one week later the landlord agreed to negotiate a new form of lease and to deal with complaints about the building and grounds by December 12th. On December 5th the tenants submitted a list of eighty complaints about individual apartments and asked for a completion date of December 20th.¹⁰

By January 1969, eight months after they had moved in, the tenants were still faced with unsatisfactory conditions. The pressure of the rent strike reinforced by political pressure had brought the landlord to the position where he seemed willing to accede to the tenants' demands. However, no action was taken on the tenants' list of complaints. Work on the building proceeded very slowly. The landlord missed two Negotiating Committee meetings in January. At the third he refused to hire a security guard to provide protection against an increasing number of thefts unless each unit's rent was increased by \$30.00 per month. He also went back on his agreement to negotiate a new lease. The tenants considered methods of sustaining their pressure and of consolidating their initial success.

⁹ The Urban Development Institute is an association of apartment building owners.

¹⁰ Typical complaints included water in the basement, handles lacking on kitchen cupboards, drafts from around balcony doors, drafts from around windows, radiator leaks, unfinished floors and toilets not flushing. General complaints included lack of hot water, insufficient heat, and cracks on the walls.

A second rent strike was called for February 1st. The Tenants' Association informed the landlord that they would withhold their rent until meaningful negotiation could take place on the issues of property management of the building, compensation for the hazards and inconveniences they had suffered while the building was unfinished, a new lease, the removal of clauses waiving their legal rights, interest on security deposits and procedures for its return, the right to sub-let, a covenant by the landlord to maintain the building in good repair, the requirement that the landlord be responsible for damage caused by his own negligence and a provision that the landlord ask permission before entering apartments.¹¹

The Tenants' Association withheld their cheques as planned and sent a letter to the landlord telling him that they had collected the seventy-eight¹² cheques and were keeping them in a security box until he was willing to negotiate. A title search reveals that on February 1st the landlord took out a second mortgage of \$375,000.00 on which the interest was \$4,500 per month. He already had a first mortgage of \$2,250,000.00 on which the interest was \$15,929.55 per month. Being deprived of approximately \$15,000.00 of his monthly rent roll must have been hurting his financial position.

The two sides had reached an impasse. Despite his economic loss, the landlord immediately signalled his intention to stand firm by sending three notices to the tenants informing them of their overdue rent. The tenants attempted to apply further pressure by picketing the Eastmount building as well as a newly opened apartment building elsewhere in Toronto which was owned by the same landlord. The notices advertising this building were withdrawn from the press, but the landlord maintained his position. City politicians sympathetic to the tenants attempted to break the deadlock through negotiations with the landlord. However, his interest in negotiating had flagged. Instead he instituted a suit against the executive of the Tenants' Association seeking an injunction to prevent them from counselling others to break their contracts, from organizing a so-called rent strike and from interfering between the plaintiff and his mortgagor.¹³ He claimed \$100,000.00 in damages. After an appearance had been entered on behalf of

¹¹ Many of these provisions are now mandatory under Part IV of the Landlord and Tenant Act, as amended, *supra*, footnote 3.

¹² Many of the other tenants who felt it was wrong to withhold their rent assisted the Tenants' Association by (1) being members, (2) making money donations, (3) doing organizing tasks. Others, although sympathetic to the strike, feared retaliatory evictions. Still others felt that the physical condition of the building had improved sufficiently or were not particularly interested in changes in the lease.

¹³ The President of the Tenants' Association had informed the mortgage company of the rent strike.

the tenants the case was dropped.

Faced with little improvement in the condition of the building, the tenants did not relent. Approximately the same group withheld their March rent. This time the landlord initiated eviction proceedings¹⁴ against twenty-six of the tenants. Again he was willing to stop short of eviction, indicating that he would drop the action if each tenant paid his rent and \$30.00 in costs and if the executive of the Association moved out. The tenants agreed to pay their rent if the landlord would negotiate a new lease.

The landlord finally decided to press for the eviction of the tenants. At the end of a day's hearing during which Judge McDonagh made clear his view that the landlord's action would be upheld, the tenants eventually accepted a settlement to pay their rent within five days in return for the right to remain in the building. After almost a year's battle, the law provided the landlord with the necessary reinforcement to make his position virtually invulnerable.

Rent Withholding: The Law

The facts of the Eastmount case show a clear injustice wrought upon tenants by a landlord taking advantage of his economic power in a city where the supply of residential accommodation is scarce. It is equally clear, as the remarks of the court indicated, that the tenants could, at the time, claim little help from the law. The Canadian common law provides that in the absence of express agreement or where the premises were furnished, a landlord may keep his premises in whatever condition he desires.¹⁵ There is no implied warranty that the premises are fit for any particular purpose or that the landlord will put them in repair at the commencement of or during the term.¹⁶ Even in the case of furnished premises, although a condition is implied that the premises would be fit for habitation when let,¹⁷ no such obligation to keep them in that condition is implied.¹⁸ In addition, covenants in a lease are held to be independent, thus permitting a landlord to require rent even in the cases where he had breached a written agreement to repair.¹⁹ The American doctrine of constructive eviction has not been adopted in Canada.²⁰ The administrative enforcement of

¹⁴ Landlord and Tenant Act, *supra*, footnote 3, Part III.

¹⁵ Except for Quebec. See J. Durnford, *The Landlord's Obligation to Repair and the Recourse of the Tenant* (1966), 44 Can. Bar Rev. 477.

¹⁶ *Smith v. Galin*, [1956] O.W.N. 432.

¹⁷ *Smith v. Marrable* (1843), 11 M. & W. 6.

¹⁸ *Cross v. Piggott*, [1922] 2 W.W.R. 662 (Man. K.B.).

¹⁹ *Johnston v. Givens*, [1941] 4 D.L.R. 634 (Ont. C.A.).

²⁰ See *Dyett v. Pendleton* (1826), 8 Co. 727 (N.Y.); A. Casner, 1 American Law of Property (ed. 1952), sec. 3.51. Some American courts have held certain kinds of conditions dangerous to life constituted a common law partial eviction. But, see *Gombo v. Martise* (1964), 41 Misc.

building, housing and health codes has helped to redress the balance toward the tenant, but these laws are aimed at poor or slum housing and they do not provide the tenant with his own right to initiate proceedings.²¹

Following most of the recommendations proposed by the recent report of the Ontario Law Reform Commission on Landlord and Tenant Law,²² the Ontario Legislature passed an Act effective January 1970 to amend the Landlord and Tenant Act.²³ The Act radically alters the balance of obligations between landlord and tenant in "residential premises".²⁴ Two provisions would in particular aid tenants in a position similar to those in 33 Eastmount:

Section 95(1) places the obligation on the landlord both to provide and maintain rented premises in a good state of repair and fit for habitation during the tenancy and to comply with any legal safety, health and housing standards, notwithstanding any state of non-repair known to the tenant prior to the tenancy agreement.²⁵ Section 88 provides that "the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements". These sections may not be waived by agreement.²⁶

What then would be the legal position of tenants in the situation of those in the apartment described? Do the amendments to the Ontario Landlord and Tenant Act help tenants who are today frequently subjected to conditions similar to those endured by the Eastmount tenants? An authoritative answer will have to await the interpretation by the courts and a more comprehensive analysis than is within the scope of this comment.²⁷

The obligations under section 95 may be enforced under section 95(3) by summary application to a judge of the county or district in which the premises are situated and the judge may either (a) "terminate the tenancy subject to such relief against

2d 475, 246 N.Y.S. 2d 750, rev'd, 44 Misc. 2d 239, 253 N.Y.S. 2d 459. See generally, R. Schoshinski, Remedies of the Indigent Tenant, Proposals for Change (1966), 54 Geo. L.J. 519.

²¹ See e.g. City of Toronto Act, *supra*, footnote 8; City of Toronto By-Law No. 73-1968; Public Health Act, R.S.O., 1960, c. 321. For an account of these and other defects of housing codes see Note, Enforcement of Municipal Housing Codes (1965), 78 Harv. L. Rev. 801.

²² Ontario Law Reform Commission, Report on Landlord and Tenant Law Applicable to Residential Tenancies (1968).

²³ *Supra*, footnote 3.

²⁴ *Ibid.*, s. 1.

²⁵ Under section 95(2): "The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him." *Ibid.*

²⁶ *Ibid.*, s. 81(1).

²⁷ For an initial analysis see D. Lamont, The Landlord and Tenant Act Part IV (1970).

forfeiture as the judge sees fit", (b) "authorize any repair that has been or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off", or (c) "make such further or other order as the judge considers appropriate".

A tenant in premises that fail to reach a "good" state of repair may now seize the initiative and sue under this section either to terminate the lease or to have the court order the landlord to carry out the repairs. It is unclear what procedure should be followed if he wishes to make repairs himself. It would seem from section 95(3)(b) that he might (probably where urgent repair is necessary) conduct the repairs himself, then apply for the judge's authorization to recover the costs by suing the landlord or by setting off the cost of the repairs against rent. The discretionary section (95(3)(c)) allows the judge to make an appropriate further order. Lamont suggests that such an order could relate to the extent of the repairs, the time by which they should be made, and possibly a reduction in rent while out of repair and until required repairs are effected.²⁸

No guidelines are provided, however, as to what might constitute a "good state of repair". In the Eastmount situation only defective heating would now be prohibited by the City of Toronto By-law.²⁹ Other defective items may or may not fall within the definition: for example, defective elevators, laundry rooms, lack of storage, incomplete garage, lack of a parking lot, landscaping, a pool, sauna and defective corridors and lobby. The cases defining "good tenable repair" are vague, simply referring to repair which, "having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it".³⁰

In view of the shortage of residential accommodation, the cost and nuisance involved in vacating premises (even those not in good repair), and in view of the likely difficulty to many tenants of initiating court action (with its expense, time and risk of failure), the withholding of rent while staying on the premises might seem the most effective way for a tenant—particularly for a group of tenants—to induce a landlord to repair. Before dealing with the merits of rent withholding, let us consider the actions open to the landlord in response to such action.

²⁸ Lamont, *op. cit.*, *ibid.*, p. 26.

²⁹ City of Toronto By-law No. 73-1968, s. 23, providing for 70° Fahrenheit in all habitable rooms, bathrooms and toilet rooms at all times.

³⁰ *Proudfoot v. Hart* (1890), 25 Q.B.D. 42, at p. 45 (C.A.) per Lopes L.J. See also *Gordon v. Goodwin* (1910), 20 O.L.R. 327 (C.A.) where Riddell J. stated that "there is no need for the tenement to answer every whim of a financial tenant, but common sense should be applied in determining whether it does fulfil the required conditions".

Under section 17(1), in every demise an agreement is implied (unless otherwise agreed) that if payment of rent reserved, or any part thereof, remains unpaid for fifteen days after it ought to have been paid, the landlord is entitled to enter and repossess. The new section 106(1) states that the landlord may gain repossession only under the authority of a writ of possession.³¹ Two remedies formerly open to the landlord are, under the new amendments, now denied him. First, section 85(1) takes away the landlord's right to distrain for default in payment of rent, whether a right of distress existed by statute, common law or contract. Second, section 94 prohibits the landlord (or tenant) from altering the locking system on any door giving entry to the rented premises, except by mutual consent.³² This remedy, used by the landlord in the Eastmount dispute, will no longer be permitted.

Two remedies would thus now be available to a landlord against tenants withholding rent. First, he could sue for the arrears of rent. The tenant would then have to plead in defence the landlord's breach of a "material covenant" under section 88 perhaps counterclaiming for damages.³³ Again we shall have to await future interpretation to discover what covenants are considered "material". Would every covenant be capable of being material? Does this include covenants for quiet enjoyment? Assuming the failure to keep in a "good" state of repair, does this imply the breach of material covenant? In the past even the failure to provide heat under a written agreement has been held not to invalidate a contract through a total failure of consideration.³⁴ The material covenant will probably lie somewhere between the total failure of consideration—which will justify rescission—and the breach of a provision which involves only "minor adjustments" and which will not justify rescission.³⁵ It remains to be seen where the line will be drawn.

The landlord's second course of action might be to sue for a writ of possession under the old Part III or the new section 105 of the Act. These sections are similar, and it is difficult to see the need for both of them.³⁶ In both, the landlord applies to the court for an

³¹ The writ of possession must be issued under the new section 105, where an application may be made for an order declaring a tenancy agreement terminated or under Part III where an application against an overholding tenant may be made under section 75. These will be considered below.

³² The maximum penalty for contravention of s. 94 is \$1,000.00. *Ibid.*, s. 107(1).

³³ See *Hart v. Rogers*, [1916] 1 K.B. 646, 85 L.J.K.B. 273.

³⁴ *Johnston v. Givens*, [1941] 4 D.L.R. 634. See also *Macartney v. Queen-Yonge Investments Ltd.*, [1961] O.R. 41, 25 D.L.R. (2d) 751.

³⁵ See Williston, *Contracts* (3rd ed., 1962), vol. 6, s. 829.

³⁶ Lamont makes the point that the advantage to the landlord of proceeding under section 105 is that he can combine with the application for an order terminating the tenancy, a claim for arrears of rent and com-

appointment for a hearing. Under Part III he applies by sworn affidavit whereas under section 105 he files an application stating the grounds under which the tenancy agreement is alleged to be terminated. Part III requires three days notice whereas section 105 requires fifteen days. Both proceedings allow equitable relief to be granted by the judge hearing the application. Under section 105(4) the judge may order a writ of possession "or such other relief as may be just in the circumstances". Under Part III the tenant must apply for relief to a judge of the Supreme Court under section 19 of the Act, which may be granted "on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court deems just".

It would seem that a tenant in arrears of rent would not have a valid defence to an action for eviction unless he could plead a breach of the landlord's material covenant under section 88 of the Act, and if the judge were then willing to allow equitable relief, such as permitting the tenant to remain on the premises and perhaps to set off all or part of his rent against repairs that the tenant may have carried out, or that he or the landlord may be ordered to carry out. In view of the fact that the tenant now has a legal remedy to compel repairs under section 95 of the Act, it is unlikely that the judge will exercise equitable relief in order to sanction the self helping tenant who remains on the premises but withholds his rent.

Finally, it is possible that the landlord might wish to proceed against the organizers of the rent strike, and to enjoin their conduct on the ground that it is a tortious conspiracy, or a tort of inducement to breach a contract or intimidation. For purposes of these torts a breach of contract may be as sufficient an unlawful act as would be ordinary criminal or otherwise tortious conduct. The most important authority for this principle is *Rookes v. Barnard*,³⁷ which also held that the tort was committed by the defendants notwithstanding the fact that the plaintiff employer was himself in breach of the same contract.³⁸ Because of section 88's establishment of dependent covenants it might be that tenants in Ontario will be justified in withholding their rent, thus avoiding liability for these torts. Again, however, it is dubious whether their breach of contract while remaining on the premises would be so justified. It is also possible that all of the participants in the rent strike might be guilty of criminal conspiracy. This depends upon whether their breach of contract will be considered an

pensation for the use and occupation of the premises. Under Part III a separate action is required for arrears of rent. *Op. cit.*, footnote 27, p. 21.

³⁷ [1964] A.C. 1129.

³⁸ See also *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, 22 D.L.R. (2d) 1.

“unlawful means” under section 408(2) of the Criminal Code.³⁹

Rent Withholding Legislation: American Approaches

During the past five years, various American states have enacted legislation to regulate collective tenant action and its weapon of the rent strike.⁴⁰ Three examples will be briefly outlined, in order to show different techniques which might be useful for future application to the Canadian situation.

Article 7-A of the New York Real Property Actions and Proceedings Law,⁴¹ enacted in 1965, constitutes the first of recent attempts to provide for regulated rent withholding. Its aim was to make rents available “for the purpose of remedying conditions dangerous to life, health and safety”.⁴² One-third of the tenants of a multiple dwelling may bring an action against their landlord if there exists over a five-day period “a lack of heat or of running water, or of light or of electricity or of adequate sewage disposal facilities” or if the building is infested by rodents or if some other condition dangerous to life, health and safety exists.⁴³

The tenants’ petition must specify the nature of the defects, the estimated cost of removing them,⁴⁴ and the rent due from each of the petitioning tenants.⁴⁵ The landlord may raise as a defence the fact that the condition complained of has been corrected, that he was refused entry to make repairs, or that the condition was caused by the tenant.⁴⁶ If the judgment is in favour of the tenants, the owner will have the opportunity to undertake repairs himself,⁴⁷ provided he demonstrates to the court that he is able to perform the work promptly, and is able to post security for such performance.⁴⁸ The court will make an order requiring the rents of all the tenants in the building to be deposited with the clerk of the court as they become due.⁴⁹ Should the owner remedy the

³⁹ S.C., 1953-54, c. 51, as am. Charles Parnell’s conduct was considered unlawful means, *supra*, footnote 1. Cf. *Wright, McDermott and Feeley v. The Queen*, [1964] 2 C.C.C. 201 (S.C.C.).

⁴⁰ Note, *Tenant Rent Strikes* (1967), 3 Col. J. of L. and Soc. Prob. 1-6; *Rent Strike Legislation—New York’s Solution to Landlord-Tenant Conflicts*, [1966] St. Johns L. Rev. 233; *Stang, Tenant Initiated Repairs: New York’s Article 7-A* (1967), 2 Harv. Civil Rights Civil Liberties L. Rev. 201; *Simmons, Passion and Prudence; Rent Withholding Under New York’s Spiegel Law* (1966), 15 Buffalo L. Rev. 572; *Frances Fox Piven and Richard A. Cloward, Rent Strike, The New Republic*, December 2nd, 1967; *Lipsky, Rent Strikes: Poor Man’s Weapon, Transaction*, February 1969; *Tenant Unions: Collective Bargaining and the Low Income Tenant*, *op. cit.*, *ibid.*

⁴¹ N.Y. Real Prop. Actions Law, s. 769 (Supp. 1966).

⁴² *Ibid.*

⁴³ *Ibid.*, s. 770.

⁴⁴ *Ibid.*, s. 772(1), (3).

⁴⁵ *Ibid.*, s. 773(4).

⁴⁶ *Ibid.*, s. 775.

⁴⁷ *Ibid.*, s. 777 (a) (“owner or any mortgagee or lienor of record or any other person having an interest in the property”).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, s. 771.

condition he may claim the money or a receiver may be appointed by the city to use the rent money to make repairs, paying over any surplus to the owner.⁵⁰

This legislation rests the initiative with the tenants. An organizer is in fact needed to inform the tenants of their rights, to allay their fears of eviction, to persuade one-third of them to sign the petition and to shepherd them through the legal process. Experience in New York has shown that the leaders of tenants' organizations become fully involved in the administrative tasks required of them, at the expense of their organizational and negotiating responsibilities. A lawyer is required to carry out the rather complicated notice provisions, to handle the court case and to block adjournments. The city may be required to appoint a receiver. Apparently, however, few people want this difficult task and few are capable of overseeing the complicated construction work. Often the rent rolls produce only enough money to provide heat and exterminate rats. The receiver will rarely have sufficient funds to carry out any structural repairs.⁵¹

The New York Multiple Dwelling Law, section 302-a, also enacted in 1965, provides a procedure which is easier for the tenant to handle. In a suit for non-payment of rent a tenant has a defence if he can show that the landlord has had notice of a "rent impairing" code violation for six months and that the repair has not yet been carried out.⁵² Lists of "rent impairing" violations are promulgated by the New York City Department of Buildings after hearings.⁵³ Where the Department has notified a landlord of a violation existing on his premises, and if the violation has existed for a period of six months⁵⁴ the tenant may withhold his rent. If then sued for rent, the tenant must deposit with the clerk of the court in which the action is proceeding the rent sought to be recovered. Such deposit of rent shall vitiate the right of the owner to terminate the lease for non-payment of rent.⁵⁵ Should the tenant succeed in his defence, he keeps his money. There is no provision that it shall be used for repairs.

The use of this procedure as a shield is an advantage to tenants who would have difficulty initiating action against their landlords. Any one tenant can take this action. The disadvantage

⁵⁰ *Ibid.*, s. 776.

⁵¹ See Note, Tenant Rent Strikes, *op. cit.*, footnote 40; Lipsky, *op. cit.*, footnote 40; Piven and Cloward, *op. cit.*, footnote 40.

⁵² N.Y. Multiple Dwelling Law (Supp. 1965).

⁵³ These range from defective faucets and inadequate lighting to structural defects and vermin. See *Matter of 10 W. 28th St. Corp. v. Moerdler* (1966), 62 Misc. 2d 109 (Sup. Ct.).

⁵⁴ N.Y. Multiple Dwelling Law, *supra*, footnote 52, s. 3a.

⁵⁵ *Ibid.*, s. 3c. The landlord's defences under s. 3b are similar to those under article 7-A of the New York Real Property Action Law, *supra*, footnote 41.

is that no provision is made to use the funds withheld for repairs, and the use of the rent withholding defence is contingent upon prior certification of the premises by the New York City Department of Buildings.⁵⁶

The Pennsylvania rent withholding statute, passed two years later, utilizes a third approach.⁵⁷ It provides that whenever the Department of Licences and Inspections or the Department of Public Safety or any Public Health Department certifies a dwelling as unfit for human habitation, the duty of any tenant to pay rent shall be suspended until the dwelling is certified as fit for human habitation. The inspector uses a special point scale worked out for rent withholding evaluation.⁵⁸ If the points add up to twenty the house is declared unfit and the tenant notified of that fact. The tenant obtains a rent withholding card at the Department office and pays his rent into an escrow account fund. If within six months after this time the house is certified as fit, the landlord may receive all the monies in the account. If at the end of the six months the dwelling is still certified as unfit, the money in escrow is paid to the tenant except that the funds may be used "for the purpose of making such dwelling fit for human habitation and for payment of utility services".

The statute establishes a simple procedure which the tenant can handle by himself, after a municipal department has certified the premises. The effect on the landlord is then immediate, since he will be deprived of his rent money, yet the statute allows the landlord a six-month period to make repairs before he loses his right to the rent money completely. Where necessary the city or the tenant could use the rent money to make repairs.

Conclusions

The new amendments to the Ontario Landlord and Tenant Act go a long way towards redressing the balance of obligations formerly heavily weighted in favour of the landlord. Other provinces still adhering to the old pattern would do well to observe the development of the Act as it is interpreted. Nevertheless, it would seem that a tenant not able or willing to initiate proceedings to compel the landlord to repair, under section 95 of the Act, or to terminate the tenancy agreement because of a breach of the landlord's obligation, would have little option but to continue to in-

⁵⁶ See Lipsky, *op. cit.*, footnote 40; Piven and Cloward, *op. cit.*, footnote 40; Note, Tenant Rent Strikes, *op. cit.*, footnote 40.

⁵⁷ Pa. Stat. Ann., tit. 35, ss 1700-01 (Supp. 1967), as amended Act of June 11th, 1968 (Act. 89), 1968 Pa. Leg. Serv. 152 (1968).

⁵⁸ For example, a defective roof is worth 5-10 points, a door which is not weathertight 1-2, insufficient refuse containers 1-5, inadequate water heating facilities 5-10, windows not openable 1-5, wiring defective 5-10. See Note, Rent Withholding in Pennsylvania (1968), 30 U. of Pitts. L. Rev. 149.

habit the premises and to pay rent, at the risk of facing eviction. Even if the tenant were prepared to sue for repairs, it is not at all sure whether many of the defects facing Eastmount tenants could be considered items not constituting a "good" state of repair.

It is defects such as these, however, that are most offensive to individuals caught in a seller's market for land that exists in most urban areas. As a result, groups of tenants are increasingly taking collective action, utilizing techniques that bring raw political and economic power into play.

Some American states have regulated the rent strike, thus forbidding self-help by tenants and controlling and encouraging the peaceful resolution of landlord and tenant disputes. These models for regulation have been tried and tested. As with labour unions and management, the regulation of tenants' unions would prove beneficial both to tenants and landlords. The proprietary analogy for "industrial peace" would certainly seem enhanced by the prospect.

It has been noted that few norms are more deeply embedded in our culture, as verbal abstractions, than those which are frequently cited as justifying judicial or administrative intervention: that the weak should be protected from the strong and that conflict should be settled peacefully.⁵⁹ The situation facing tenants similar to those in the Eastmount apartments calls for intervention for just those reasons.

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⁵⁹ Murray Edelman, *The Symbolic Uses of Politics* (1964).

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¹*E.g.*, *Regina v. Simpson*, [1964] 2 C.C.C. 316 (North Bay Juv. Ct.); *Re Regina v. Arbuckle*, [1967] 3 C.C.C. 380, (1967), 59 W.W.R. 605 (B.C.C.A.); *Regina v. Shoemaker*, [1966] 3 C.C.C. 79 (B.C.S.C.); *Rex v. H.* [1931] 2 W.W.R. 917 (Sask. K.B.); *Regina v. P.M.W.* (1955), 16 W.W.R. 650 (B.C. Juv. Ct.); *Re L.Y. No. 1* (1944), 82 C.C.C. 105 (Man. C.A.); *Re Rex v. D.P.P.* (1948), 92 C.C.C. 282 (Man. Q.B.); *Regina v. Sawchuk* (1967), 1 C.R.N.S. 139 (Man. Q.B.); *Regina v. Miller* (1961), 132 C.C.C. 349 (Sask. Q.B.); *Regina v. M.*, [1964] 2 C.C.C. 135 (Man. Q.B.); *Regina v. Liefso* (1965), 46 C.R. 103 (Ont. S.C.); *Regina v. Cline*, [1964] 2 C.C.C. 38 (B.C.S.C.); *Regina v. Pagee (No. 1)* (1963), 41 W.W.R. 159 (Man. Q.B.); *Regina v. Trodd*, [1966] 3 C.C.C. 367 (B.C. S.C.).