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DISABLING TENANTS' RIGHTS[©]

BY ELINOR MAHONEY*

When you work in a busy legal clinic, lurching from one crisis to another, it helps occasionally to step back and “look at the bigger picture.” I tell my law students that they must develop a vision beyond winning this case or that; a vision that will sustain them when things get rough. Knowing how their work connects to the overall historical struggle is a useful part of this. It can soften the blow of a temporary setback and strengthen the resolve to press onward.

Looking at the historical struggle for tenant rights used to be a pleasant exercise for me, probably because my twenty years as a tenant advocate coincided with a renaissance period for Ontario tenants. The introduction and strengthening of rent controls, the passage of strong laws to protect rental housing from conversion, demolition or luxury renovation, and the extension of tenant protection laws to roomers, boarders, and care home residents have been sweet victories for tenants and their allies in the clinic system.

Recent events in Parkdale, however, have made me realize just how limited these victories are and how easy it is to accept—on face value—the ability of a law to protect.

In July 1997, a boarding home operator decided to “temporarily relocate” her tenants to Aylmer, Ontario while she renovated her establishment in Toronto. Her tenants were “vulnerable adults”¹—poor, many with physical or psychiatric disabilities, some frail and elderly, some developmentally delayed or suffering from Alzheimer's—who relied on her for food, shelter and basic care. Some lived two to a room, some four to a room; they each paid \$600 per month and all we spoke to had paid their rent for July.

They were informed of the impending move by a letter given to them at breakfast, less than twenty-four hours before the bus to Aylmer was scheduled to depart. The letter did not indicate where they were going or if they had the option to stay at the boarding home in Toronto.

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¹ Ontario, Commission of Inquiry into Unregulated Accommodation: *A Community of Interests: The Report of the Commission of Inquiry into Unregulated Accommodation* (Toronto: The Commission, 1992) (Commissioner: E.S. Lightman).

They were asked to sign the letter immediately if they consented to the move. Most did sign, without seeking legal advice or talking to their social workers. The tenants were then given green garbage bags and told to pack up their possessions. As one tenant told me, "What choice do I have? I can't live here in a construction zone."²

When the landlady and I spoke by phone that afternoon, she suggested we meet at nine the following morning to discuss her plans. Instead, she rushed the residents through breakfast and had most of them on the chartered bus to Aylmer by 7:30 a.m.

Not all left with her. A few found refuge with family members or friends. One wandered onto the streets and was later admitted to the psychiatric ward of the nearby hospital (which had referred discharged patients to this boarding home until this incident).

Those who got on the bus endured a nine-hour bus ride (a trip that normally takes about two hours) while their beds and belongings were moved out of their Toronto dwelling. The residents' arrival in Aylmer took town officials, social services agencies, and local residents by surprise.

Despite a media hue and cry that lasted for two weeks, and a four-ministry investigation, most of the tenants are still in Aylmer and no charges have been or are likely to be made.

"Why not?" I have been asked repeatedly. "Don't tenants—even care home tenants—have security of tenure? Aren't they entitled to proper notice before they can be evicted for renovations? And don't renovations require building permits and advance municipal approval before a landlord can empty a building?"

Yes—to all these questions. The landlady, though, maintained she was not evicting but merely temporarily rehousing these tenants. So termination notice under the *Landlord and Tenant Act*³ was not required. Although she had talked about extensive renovations with the tenants and others, the only work actually carried out was minor fire retrofit repairs which required neither building permits nor vacant possession. In fact, although most furniture had been moved and the place initially appeared to be deserted, she had staff return to the building to provide those few tenants who remained in the boarding home with food and basic care.

A lot was left unexplained, though. Why she had made an offer to purchase the Aylmer property if she was returning to Toronto, and

² Interview with a male resident, 46 the Queensway, Toronto (10 July 1997).

³ R.S.O. 1990, c. L.7 [hereinafter LTA].

why she bothered to move thirty-three tenants in the first place if vacant possession was unnecessary, are just two of the questions not satisfactorily answered. Nevertheless, there did not appear to be sufficient grounds for charges.

Nor was litigation a viable option for the tenants. Their primary focus was to secure shelter, sustenance, and care. Few were willing to risk staying at their Parkdale residence to test their security of tenure rights. After all, their landlady/caregiver was getting on a bus to Aylmer. So they went too, or scrambled to find another place to live. Then it was time to get on with the daily struggle of their marginal existences. There seemed little reason to have faith in a legal system that was unable to stop the "transfer" to Aylmer.

What is clear is that the media coverage we generated and the resultant public pressure helped to protect the welfare of these vulnerable tenants both in Aylmer and Toronto. Social assistance workers visited the Aylmer residents to ensure their benefits would not be interrupted. Social agencies in Toronto scrambled to find beds in Habitat boarding homes for those wishing to leave Aylmer or those unhappy with their changed circumstances in Toronto. Other agencies in Aylmer interviewed tenants and attempted to set up programs to meet their needs.

But still people said, "There's gotta be a law against this sort of thing—how could a landlord get away with this, especially with such vulnerable tenants?"

To which I replied: "She's 'got away with it' precisely *because* her tenants were so vulnerable *and* because the Ontario government chooses to ignore the implications of that vulnerability."

What do I mean by vulnerable?⁴ Let's look at their situation.

All were poor and living apart from their families. Most had disabilities and received a maximum of \$940 per month from which they paid \$600 to share a room, receive three meals a day and to get some assistance with the activities of daily living. For example, some required help getting to the dining room, assistance in bathing and dispensing of their medication. Most did not handle their own money. In some cases, their landlady cashed their cheques and gave them an allowance after deducting their rent. Others had their finances controlled by the Public

⁴ The concept of "vulnerable adults" is developed by Lightman, *supra* note 1. Also, for a detailed analysis of the discriminatory treatment of boarding home tenants and the implication under human rights legislation as an analogous group defined as "vulnerable adults," see M. McCreary, "Little House of Horrors: Discrimination Against Boarding Home Tenants—Human Rights Legislation and the Charter" (1998) 13 J.L. & Soc. Pol'y [forthcoming].

Guardian and Trustee. At least one tenant did not know how to read.⁵ Clearly, these were "vulnerable" adults by any reasonable standard.⁶

A lawyer for the landlady claimed all tenants who went to Aylmer consented to the move.⁷ Yet it is easy to argue that the power imbalance between these tenants and their boarding home operator precluded genuine consent. As the *London Free Press* reasoned:

The owner's lawyer says all the proper channels were followed. That's not the story coming out of the residents. They had to pack their belongings in garbage bags with less than a day's notice . . . These people have been removed from their supports, from their medical attention, from their records. . . .

A lawyer for the landlord says everyone who was moved to Aylmer is free to return. But to what? A wrecked building with no utilities? And if they have already paid the sizable rent for July, they may not have the money to pay for alternative accommodation.⁸

These tenants found themselves in a tight situation with few resources, fewer options, and no time. Only a couple had the wherewithal to contact their social workers. And those agencies which were contacted had insufficient time to stall or stop the move.

Yet some accept that those who went to Aylmer made a free choice to do so. A police officer, who saw the bus depart, assured me: "They all went voluntarily. There was no sign of struggle."⁹ An administrator of a care home agency told the *London Free Press*:

There will always be a group of people, some of them physically disabled or mentally ill or the elderly who don't want to be in a specific program. They want to be in something that's very loosely controlled and they have the right to choose these things.¹⁰

These opinions are particularly disturbing, considering the well-publicized statements of some of the tenants showing confusion and fear. Those who say the tenants were free to choose ignore the

⁵ Interview with an elderly female resident, 46 the Queensway, Toronto (10 July 1997).

⁶ *Supra* note 1 at 18. Lightman provides criteria to assess what makes tenants "vulnerable" and in need of special protection. Tenants at 46 the Queensway closely matched this profile of vulnerability. In contrast, their landlady states: "These guys do what they want and they've got a voice and a mind of their own and they know where to go and they'll tell you where to go." See, "Tenants Choose Aylmer Move, Boarding House Owner Says" *The Toronto Star* (17 July 1997) A7.

⁷ "Everything that has been done has been done with the consent of the residents," Steven Weiss said. "Anyone who has gone to Aylmer is welcome to return." See "Parkdale Tenants Were Warned About Move, Lawyer Says" *The Toronto Star* (14 July 1997) A7.

⁸ *London Free Press* (16 July 1997) B3.

⁹ Conversation with police officer, 46 the Queensway, Toronto (11 July 1997).

¹⁰ "Residents Take Stock of New Town" *London Free Press* (16 July 1997) B3, quoting Bob Barkman of Mercare Homes Inc.

implications of vulnerability and perpetuate the myth that a continuum of care exists for all people in Ontario, that there are "specific programs" open and available for people to reject.

The reality is that there is no "continuum of care" in Ontario. Deinstitutionalization of psychiatric patients has not been accompanied by a concomitant increase in community supports.¹¹ Doctors say that 75 per cent of people requiring psychiatric assistance do not receive treatment and Dr. Ty Turner, Chief Psychiatrist at Doctors' Hospital estimates that "600 of the 2000-2500 people living in shelters or on the streets have major mental illnesses that would have caused them to be admitted to hospital years ago."¹² A similar crisis exists with seniors' health care where a shortage of nursing home beds is growing.¹³

This is where boarding homes, rest homes and retirement homes (called care homes in tenant legislation) enter the picture:

Rest homes evolved in Ontario as a private-sector response to social needs for accommodation and care that were otherwise not being met. ... The rest home is a 'spillover,' a symptom of the failure of government to provide adequately in the community for those not in institutions or being cared for at home by their families.¹⁴

Some care homes are sophisticated seniors' residences with a range of amenities from emergency call buttons to dining rooms to on-site nursing services. These places are geared to seniors with money who need a little help to maintain independent living or who need a great deal of help but cannot secure a bed in a nursing home. But other care homes are little more than run down boarding homes, serving Ontario's poor. Since the quality of care and staffing is completely unregulated, vulnerable tenants are left literally at the mercy of care home operators upon whom they depend for the necessities of life. Sometimes this mercy is in short supply.

Governments were loath to interfere with the care home industry until a 1990's coroner's inquest into the death of care home resident, Joseph Kendall. The coroner recommended a Commission of Inquiry be appointed to examine unregulated accommodation in Ontario. Dr. Ernie Lightman was appointed to conduct the inquiry. His report, *A Community of Interests*,¹⁵ made 148 recommendations concerning care

¹¹ *Supra* note 1 at 25-28.

¹² "Mental Care In Crisis MD's Say" *The Toronto Star* (5 October 1997) A7.

¹³ *Supra* note 1 at 23.

¹⁴ *Ibid.* at 22.

¹⁵ *Supra* note 1.

homes. Lightman recommended that care home residents be given protection under Ontario's tenant laws. The NDP government did so in 1994 with the passage of the *Residents' Rights Act*.¹⁶

Unfortunately, the government did not implement the bulk of Lightman's other recommendations, including those related to standards of care, advocacy and empowerment. Thus the power imbalance between care home residents and their landlords, starkly demonstrated by the Aylmer incident, has not been corrected. Although care home tenants have most of the rights other tenants enjoy, their vulnerability frequently renders them unable to assert or enforce their rights.

In essence, care home tenants are reverse hostages held by care home operators. "No one else will house them and take care of them," operators tell the government, "so stop criticizing us and leave us alone. Otherwise, we'll dump them right back in *your* lap." And so the government ignores "bootleg" nursing homes and tolerates low standards in private care homes.

Hospital and social workers are unwilling accomplices. More often than not, they are the ones who refer patients and clients to these care homes because there is rarely alternative housing available. When a problem arises—insufficient care, unsafe conditions, bad food, a dispute—they will generally negotiate with the operator and avoid legal authorities. Maintaining a working relationship is essential; it's a landlord's market, and astute social workers don't want to burn their bridges with an operator.

Sometimes care home residents are blamed for the effects of their disabilities. They are labelled "hard to house" by governments, bureaucrats, landlords, and social workers. Many care home tenants do exhibit annoying or disruptive behavior. Some wet their pants, drool, yell or wail at night, chain smoke, complain, make messes, or experience violent outbursts. Too often, these actions are treated not as symptoms of illness but as symptoms of character defects. Compassion is replaced by harsh judgement. Sympathy is reserved for the poor care home landlord who must cope with this behaviour. It is the landlords who are given benefit of law, lest they withdraw their services and throw responsibility for these vulnerable adults back on the state.

The Ontario government's new law, the so-called *Tenant Protection Act*, adopts this approach with a vengeance. Some care home tenants lose all tenant protection and those who are still covered by the

¹⁶ S.O. 1994, c. 2.

Act have their rights restricted.¹⁷ Security of tenure is tied to a constant state of health; if health needs change for the better or worse, a landlord can apply to evict a tenant, alleging either the tenant no longer requires care or claiming that the care required is beyond what the landlord can provide.¹⁸ Care home tenants do have a right to dispute their landlord's application but must first go to mediation where parties may agree to contract out of their rights under the *Act*.¹⁹ Care home tenants are the only group facing mandatory mediation when their shelter is at stake, and the prospect is not a healthy one. What chance does a dependent, vulnerable (and probably unrepresented) tenant have in mediation against a well-dressed, soft-spoken care home operator who swears that the tenant's care needs can no longer be met? No wonder the treatment of care home tenants in the *TPA* has been labelled "anti-advocacy" by concerned groups.²⁰

On the one hand, the government downplays disabilities to avoid responsibilities for providing a continuum of care for people it deinstitutionalizes. On the other hand, it uses disability as a justification for taking away tenant rights and giving special rights to care home landlords. This is discriminatory and must be challenged.

Legal clinics and others are already preparing to challenge the constitutionality of the *TPA* at the earliest opportunity.²¹ The Ontario Human Rights Commission's mandate to determine whether a statute is in compliance with the Ontario *Human Rights Code* may also help to scuttle the *TPA*.²²

¹⁷ *Tenant Protection Act*, S.O. 1997, c. 24, s. 3(k),(l); s. 93 [hereinafter *TPA*], repealing *LTA*, *supra* note 3.

¹⁸ *TPA*, *supra* note 17, s. 93.

¹⁹ *Ibid.* s. 171

²⁰ See Ontario, Legislative Assembly, Standing Committee on General Government, *Hansard*, 1st Sess., 36th Parl., 1997 (Chair: D. Tilson) at G-4310 (14 August 1997): Queen Street Patients Council, "Submission to the Standing Committee on General Government regarding Bill 96." Jennifer Chambers, speaking on behalf of the Council at a press conference the same day, called the *Tenant Protection Act*, "the law of the jungle for psychiatric survivors."

²¹ The *TPA*, *supra* note 17, received Royal Assent in November 1997 and is expected to become law in April 1998. The Advocacy Centre for the Elderly and the Advocacy Resource Centre for the Handicapped (ARCH) are just two of the clinics that have expressed an interest in preparing a challenge under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11.

²² *Human Rights Code*, R.S.O. 1990, c. H.19, s. 29(e) [hereinafter *Code*]. Section 2(1) of the *Code* reads: "Every Person has a right to equal treatment with respect to occupancy of accommodation without discrimination because of ... handicap." In my opinion, section 93 of the *TPA* violates the *Code*.

Yet our goal should not be merely to repeal the *TPA*'s offending provisions. We must remember that the Aylmer incident took place when pro-tenant laws were in force. If we fail to address the barriers faced by care home residents in securing their rights, then we join the government in wilfully ignoring the implications of these tenants' vulnerability.

Here, too, the *Code* and the commission may be of assistance. As previously noted, care home tenants are reluctant to assert their rights in adversarial proceedings against their caregivers. The *Code* provides an alternative way to address some problems. It authorizes the commission to initiate complaints by itself or at the request of a third party.²³ In situations of abuse, neglect or threatened eviction, where tenants want help but lack the personal resources or security to initiate action, an advocate could ask the commission to take the lead.

The strategy of involving the Ontario Human Rights Commission should not be intended to take away an individual's choice to decide whether or not to complain; it should be an additional option for consideration by vulnerable tenants who are afraid to "stick their neck out" but desire intervention by an organization sensitive to their special needs and situation.

Landlords and others have a duty to accommodate the needs of people with disabilities in the provision of services and housing.²⁴ While the commission's guidelines on the duty to accommodate are general, they certainly support the proposition that disabilities should be recognized for the purpose of helping the people afflicted, not restricting their rights:

The needs of persons with disabilities must be accommodated in a manner which most respects their dignity ... [this] means to act in a manner which recognizes the privacy, confidentiality, comfort, autonomy and self esteem of persons with disabilities.²⁵

I would venture a guess that giving care home tenants twenty-four hours notice of a mass move to Aylmer violates at least the concept of the duty to accommodate, as do many of the other rules, policies and practices care home tenants have had to endure in Ontario.

The commission, with its broad investigatory powers and understanding of the challenges facing people with disabilities is well situated to deal with care home disputes where human rights are alleged

²³ *Ibid.* s. 32(2).

²⁴ *Ibid.* s. 17.

²⁵ *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities Under the Ontario Human Rights Code* (Toronto: Government of Ontario, 1981) at 4.

to have been violated. Unfortunately, the commission's ability to resolve human rights issues in a timely fashion is questionable. Although the commission can sometimes resolve complaints quickly, it can take years for a complaint to work its way through the commission to the hearings stage.²⁶ Meanwhile, the Ontario government continues to chip away at the human rights of vulnerable tenants. It has abolished the Ontario Advocacy Commission which Lightman envisaged as the agency best equipped to provide advocacy support for care home tenants.²⁷ It is poised to take away the rights of vulnerable tenants on social assistance to handle their own finances and is setting up a system to permit welfare authorities to pay landlords directly.²⁸ The Ontario government also appears hostile to advice from its own Human Rights Commission. It has refused to withdraw other sections of the *TPA* which the chief commissioner believes to be discriminatory²⁹

Thus, advocates taking a "human rights" approach to tenant protection for vulnerable tenants should appeal to the court of public opinion as well. Just as the media coverage prompted a flurry of attention to safeguard the well being of the tenants bussed to Aylmer, so publicity is essential to educate the public to the human rights challenges facing more than 100,000 such tenants in Ontario.³⁰

For tenant advocates, the act of "looking at the bigger picture" may not provide the sense of accomplishment it once did. I believe this is progress. For if our victories of the past were illusory, so then are our current defeats. More importantly, though, by looking at the bigger picture we enlarge our vision to see beyond the laws, into the lives of

²⁶ The Committee for Equality Rights in Accommodation (CERA) has been involved with a complaint of discrimination in accommodation which went to a Board of Inquiry in 1994. No decision has yet been rendered (*Kearney et al. v. Bramalea Investment Ltd.*).

²⁷ *Supra* note 1 at 194.

²⁸ The Ontario *Disability Support Program Act, 1997* being Schedule B to the *Social Assistance Reform Act, S.O. 1997, c. 25*. Section 12 of the *Act* authorizes a Director to appoint a third person to handle the benefits cheque if the Director feels the recipient would spend the money unwisely. Section 13 authorizes portions of the benefits cheques to be paid out to third parties providing food, shelter, or other services.

²⁹ "Landlord-Tenant Legislation Assailed" *The [Toronto] Globe and Mail* (20 June 1997) A5. This article quotes Keith Norton, Chief Commissioner of the Human Rights Commission, concerning sections 36 and 200 of the *Tenant Protection Act*: "[Using income information] treats all families who have lower than average incomes as if they are high-risk tenants This is discrimination." The Ontario government did not introduce any amendment to address the Chief Commissioner's concern.

³⁰ I base this estimate of the number of vulnerable adults on Lightman's study, *supra* note 1, and May 1997 social assistance statistics from the Ministry.

those we represent, and to develop new strategies to protect and enhance our clients' access to justice.