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“Deferencc” versus “Security of Tenure”: Eviction of Residents of Subsidized Housing Co-operatives at the Superior Court of Justice for Ontario, 1992-2009

Jeff Schlemmer*

RÉSUMÉ
Les résidents ontariens de logements subventionnés par le gouvernement bénéficient de différents niveaux de protection contre l'expulsion arbitraire selon qu'on leur a offert un logement dans une coopérative de logement ou dans un autre type de logement subventionné. Cependant, les lois protégeant le droit au maintien des lieux dans ces deux types de logement sont écrites de façon très similaire. La différence provient de la jurisprudence qui a évoluée au cours de la dernière décennie, depuis que toutes les expulsions de la location résidentielle, à l'exception des coopératives de logement, ont été enlevées de la juridiction des tribunaux judiciaires. Les juges entendaient couramment des causes d'expulsion par analogie à des procès sommaires devant les Cours des petites créances; mais, à présent, ils entendent des causes d'expulsion peu fréquemment et ont oublé la procédure des « petites créances ». Ces résidents ont des revenus très bas et ne peuvent observer les exigences des cours quant aux mémoires, affidavits détaillés, et dépens d'indemnisation partielle. Les cours suivent de plus en plus un courant jurisprudentiel qui en défère aux coopératives requérantes, en se fondant sur la théorie que les coopératives fonctionnent comme des « démocraties » et en présument, sans fondement, que par le fait même d'accepter un logement subventionné dans une coopérative de logement, les résidents perdent volontairement le droit législatif au maintien, qui protège tous les autres types de locataires.

Ce domaine de la loi est devenu insoutenable. La cour devrait se souvenir des raisons pour lesquelles elle a traité ces cas d'expulsions différemment et effectuer un retour à ses anciennes pratiques — qui procuraient des procès justes et accessibles aux plus démunis des Ontariens que servent les tribunaux judiciaires.

INTRODUCTION
Low-income Ontarians who apply for government-subsidized housing generally wait on a list for years before being offered subsidized housing. When a subsidized unit is offered, applicants usually feel compelled to take it—regardless of whether it happens to be in rental housing owned by a non-profit housing corporation [a non-profit] that is governed by the Residential Tenancies Act [RTA], which regulates...
most other residential tenancies in Ontario, or in housing owned by a co-operative housing corporation [co-op] that is exempt from the RTA and under Ontario law is governed by the Co-operative Corporations Act [CCA], which is a completely separate legislative scheme.

Residents of government-subsidized rental housing experience two very different standards of risk of exposure to arbitrary eviction, depending upon whether they happen to reside in a co-op or in another type of subsidized housing. Residents of non-profits enjoy extensive protection from unfair eviction, as provided by the RTA and administered by a rental housing tribunal, the Landlord andTenant Board [LTB]. Under the RTA, the tribunal offers no deference to the will of the landlord. By contrast, even though the RTA and the CCA are worded very similarly, courts have increasingly over the past decade paid deference to the will of co-op boards and significantly emasculated the provisions of the CCA that protect co-op residents from arbitrary eviction. There is little statutory basis for this dramatic distinction in security of tenure since the applicable sections of the CCA and the RTA that govern evictions are similar in language.

Some courts have characterized co-ops as “participatory democracies”, owed great deference in eviction decisions. Their rationale is that eviction from a housing co-op proceeds from a democratic vote of the other residents of the housing complex or its democratically elected board of directors. Presumably this democracy provides protection analogous and equivalent to what courts provide to the residents of the other types of subsidized housing. When a co-op applies for an eviction order, courts tend to defer to the will of the majority and do not necessarily require the co-op to fully prove its case for eviction in the same way that would be required of any other housing provider. This deferential approach stands in stark contrast to the historical

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3. Federal housing co-ops incorporated under the Canada Cooperatives Act, s.c. 1998, c. 1, have a corporate structure different from that of provincial housing co-ops incorporated under the CCA, ibid. However, differences in corporate structure do not affect the issues of eviction under consideration in this article.
4. Compare, for example, s. 171.21(1) of the CCA, ibid., which states that upon an application by a co-op for eviction “a judge may, despite any other provision of this Act or the co-operative’s by-laws, (a) refuse to grant the application if he or she is satisfied, having regard to all the circumstances, that it would be unfair to grant it”, with s. 83(1) of the RTA, supra note i, which states that upon an application for eviction of a tenant, “the Board may, despite any other provision of this Act or the tenancy agreement, (a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse”.
role that the courts have played in preventing the arbitrary termination of other government-funded social services and that housing tribunals have played in protecting residents of most other rental housing from unfair eviction since taking over this role from the courts in 1998.6

When co-operative democracies work fairly, they do not need deference. They are fully able to prove their case, because they come to the court in good faith and with admissible evidence justifying eviction. But democracies are not always fair, and courts should not always defer to the majority co-op rule. When the less generous instincts of human nature take hold, a majority will not be fair to an individual, and that is precisely why laws protect the rights of an individual from the will of the majority. The protection of individual rights is, for example, one the most important reasons for the enactment of the Canadian Charter of Rights and Freedoms.7 President James Madison, one of the drafters of the Constitution of the United States of America, identified the problem in this way: “A pure democracy can admit no cure for the mischiefs of faction. A common passion or interest will be felt by a majority, and there is nothing to check the inducements to sacrifice the weaker party.”8

The Ontario legislature modelled the CCA, which is intended to protect security of tenure for co-op residents, on other laws that protect tenants of most other rental housing in Ontario. It intended the courts to act as a check where they find a “common passion” to sacrifice the tenancy interests of a particular resident. The legislature intended the courts to do this by requiring the co-op to prove with admissible evidence that it has lawful grounds to evict a co-op resident—just as any other housing provider would have to do. If the court does not take on this responsibility, there is a substantial risk that the rights of an individual co-op resident will not be respected.

A growing line of case law suggests that courts should generally not intervene to protect co-op residents against arbitrary eviction, except by requiring that minimal standards of procedural fairness and compliance with the co-op’s procedural by-laws be met.9 This type of deference arises most frequently where the credibility of evidence is in issue, or where the law requires the exercise of discretion based upon “fairness”. Courts tend to accept findings of credibility made by co-op boards comprising laypersons equipped with none of the expertise or tools, such as cross-examination, that are employed by courts to discover the truth and ensure a fair result. Co-op residents,


9. See e.g. Arulappah, supra note v.
once evicted, are then practically speaking barred for life from living in government-subsidized housing.10

There is, however, another line of jurisprudence that has protected security of tenure for co-op residents.11 While decisions protecting security of tenure are increasingly the exception, these cases more accurately reflect the legislative intent behind the CCA—to provide a similar process and protection from unfair eviction to co-op residents as what exists for other residential tenants in Ontario.

**A HISTORICAL SYNOPSIS OF HOUSING CO-OP EVICTIONS**

**Background and Structure of Housing Co-ops**

In Ontario a housing co-op is a form of subsidized rental housing that has unique legal characteristics but from a consumer's point of view is entirely equivalent to and interchangeable with all other forms of subsidized rental housing.

A housing co-op legally comprises a corporation established by the government.12 The corporation owns a residential rental housing complex, generally comprising family units almost exclusively. The government ultimately owns any equity in the non-profit corporation13 but permits the residents (referred to as "members" in the CCA) to manage the complex.14 Residents are contractually entitled to occupy their units pursuant to leases (called "occupancy agreements" in the CCA), which require residents to obey the housing co-op's by-laws and pay rent (which the CCA refers to as "housing charges").

Housing co-ops are regulated by and operate with the considerable financial support of government.15 A significant part of this support is in the form of subsidization of government.

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10. Per Social Housing Reform Act ["SHRA"], S.O. 2000, c. 27, s. 7 (1) (i), (g) and (h).
12. Federally incorporated co-operatives, unlike provincially incorporated co-operatives, are not governed by the CCA or the SHRA. Both, however, rely upon CCA, s. 171, for applying to Ontario Superior Courts for eviction orders, and the author was unable, in the roughly 170 reported cases reviewed for this article, to find a case where the court found any significance in whether the applicant co-operative was federally or provincially incorporated.
14. Some deference cases, such as McBride v. Comfort Living Housing Co-op Inc. [1992] O.J. No. 260; 7 O.R. (3d) 394; 89 D.L.R. (4th) 76; 54 O.A.C. 286; 22 R.P.R. (2d) 126; 31 A.C.W.S. (3d) 663 (Ont. C.A.) Blair, Finlayson and Arbour J.A., para. 49, mistakenly say that the residents share "co-operative ownership", but residents have no ownership or equity interest in the co-operative corporation. Rarely, a resident may not also be a member—in which case his or her rights are governed as a tenant by the RTA.
15. All descriptions of the operation of housing co-operatives attributable to interview with Louise Stevens, director of housing for the Corporation of the City of London, 16 January 2008. The Ontario Ministry
rents for rental units, which the co-op is then required to offer to persons of modest financial means who become eligible for subsidized housing by reaching the top of the local municipal subsidized housing waiting list. The government reserves the right to dismiss housing co-op boards of directors and take over management if the board proves incapable of competently operating the co-op.

Co-ops are only one of several types of subsidized non-profit housing established and regulated by government. A second type is residential rental accommodation owned by non-profit corporations, often sponsored by community groups, churches, or labour organizations, and governed by volunteer boards of directors elected by "members" (who may or may not also be residents). A third type is government-owned rental housing non-profit corporations governed by volunteer boards of directors appointed by the local municipality.

The most significant unique features of co-operatives are that (1) some residents do not receive a housing subsidy—but rather pay "market rent", (2) most residents are "members" and thus entitled to vote and to stand for the co-operative corporation's board of directors, and (3) all member residents are required to volunteer time to assist in the operation of the complex, typically by serving on committees for such matters as maintenance, finance and membership.

Actual day-to-day management, however, is typically delegated to either a property-management company or to an employee, often referred to as a "co-ordinator".

Housing co-ops are vehicles through which the government provides the social service of low-cost housing by paying substantial subsidies directly to the co-ops. In exchange for this subsidization, the co-ops agree to limit themselves to having the same discretion in deciding whom they permit to rent their subsidized units as

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16. SHRA, s. 68. In Toronto, for example, called "Housing Connections". In London called "Housing Access Centre". In federal co-operatives, the subsidy list may be maintained, subject to federal oversight, by the individual co-operative.


18. For example Interchurch Community Housing Toronto, Rotary Cheshire Homes North York, Lift Non-Profit Housing of London Inc.

19. For example London & Middlesex Housing Corporation, Toronto Community Housing Corporation.
that permitted other non-profit housing providers. This is appropriate because the government is not permitted to discriminate when it provides social services, even where it subcontracts the provision of these services to a non-profit corporation.

The decision as to whether an Ontarian of modest means ends up living in subsidized rental housing owned by the government, non-profit rental housing, or a non-profit housing co-op depends largely upon which housing unit is vacant when the person reaches the top of waiting lists, which are typically several years long. For example, in regions where the Social Housing Reform Act imposes municipal waiting lists for subsidized housing, the list serves as a single point of contact. Applicants for subsidized housing will ultimately be offered housing in whatever housing complex is available when they reach the top of the list—including provincial co-ops. This fact alone undermines the old view that co-ops are a form of social club that are entitled to deference in their decision-making process. In 2009, it would be a fiction to suggest that everyone living in a provincially subsidized housing co-op has freely and voluntarily consented to live there rather than in another type of subsidized housing.

**Grounds for Housing Co-op Evictions**

Housing co-ops, like all other residential landlords, must be able to require their residents to comply with applicable laws, by threat of eviction proceedings if necessary. Generally respondents in eviction proceedings enjoy the right to defend themselves and to succeed if it is found that they did not break the law in a way that would compromise their security of tenure. This principle has, however, been significantly eroded in co-op eviction cases by the principle of “deference”—by which courts will not require a co-op applying for eviction to prove, on balance of probabilities, that the co-op resident has breached any law or by-law. Rather, the co-op need only show that it reasonably thought the resident had broken a rule—regardless of whether the resident had actually done so. The test of “reasonableness” that the courts have applied is whether no reasonable person could have made the same decision.

20. Louise Stevens, supra note 15: The housing provider may consider financial history and previous rental history. Thus, for example, the government would not permit the co-operative's board of directors to permit friends and relatives to "jump the queue" and be offered a subsidized housing unit without spending several years on the government's local subsidized housing waiting list, nor could it refuse to house a family because it did not think that it would "fit in."
22. *SHRA*, s. 68. The *SHRA* does not apply to federal co-operatives—which maintain their own, generally long, waiting lists.
The principle of deference to the decision-making authority of co-op boards has affected several other aspects of court applications for eviction of housing co-op residents. Some courts have begun to restrict eviction application hearings to affidavit evidence—no longer permitting residents to call oral evidence in their defence or to cross-examine their accusers. Courts have refused to hear defences to alleged arrears where the reason for the "arrears" is the housing co-op's unlawful cancellation of the resident's rent subsidy. Courts have awarded costs against residents who unsuccessfully defend eviction applications on a substantial-indemnity scale—making it prohibitively expensive for a resident of modest means to defend himself or herself from a wrongful eviction and creating a barrier to access to justice.

The Impetus for Law Reform

Pre-Law-Reform Co-op Housing Evictions

Prior to 1970, residential tenants living in rental housing in Ontario had virtually no right, at common law, to retain that housing if the landlord decided to evict them.\(^2\)\(^6\) This was also the situation for housing co-op residents until 1992,\(^2\)\(^7\) when significant amendments intended to protect the security of tenure of co-op residents were made to the CCA. Before the 1992 CCA amendments were enacted, co-op residents effectively occupied their homes at the landlord's pleasure. Most eviction orders, including those for commercial and residential tenancies, and housing co-ops, were obtained pursuant to Part III of the Landlord and Tenant Act\(^2\)\(^8\) [LTA]—which did not give a substantive right of security of tenure in residential tenancies.

In 1968 the Law Reform Commission of Ontario [LRCO] released a report which stated its concern

> to redress the imbalance which existed in the law in favour of landlords, an imbalance resulting from the law's preoccupation with the rigid property principles of feudal origin and the failure of the common law of landlord and tenant over the centuries to develop a legal philosophy based on a theory of vital interests.\(^2\)\(^9\)


\(^{27}\) There was no consistency, but it was common practice to proceed under Part I-III of the LTA. Some cooperative decisions under these sections were very good, but Part IV of the LTA was more specifically crafted to protect the tenure rights of residential tenants.


\(^{29}\) \textit{Supra} note 26.
The LRCo report was implemented in 1969 as Part IV of the LTA, which in respect of residential tenancies has since been succeeded by the RTA. Security of tenure, which is the right to occupy one’s home free from the threat of arbitrary eviction, has been the central right protected by the Ontario residential tenancy statutes since then.

The Principle of Deference
McBride v. Comfort Living Housing Co-op Inc. (1992)
In 1992, the Court of Appeal released its decision in McBride v. Comfort Living Housing Co-op Inc. and made a definitive statement of the common law respecting co-op evictions. Justice Finlayson, for the Court, in obiter, articulated the “deference theory”:

The material before us reveals in detail the concept of collective ownership which is the basis for the occupancy rights of members of this co-operative. The co-operative can be likened to a social club, where membership is by application and acceptance in accordance with criteria set out in the club's by-laws or regulations.

In the context of clubs, decisions to expel members must be made according to the rules set out by the membership. The courts recognize the supremacy, in this setting, of these consensual rules and will not interfere with a bona fide decision to terminate membership made in accordance with them [emphasis added].

Justice Finlayson ruled that the LTA did not apply to co-operative housing. In obiter, he even went so far as to criticize the concept of security of tenure as protected in Part IV of the LTA, referring to it as “a paternalistic statute.”

McBride is generally cited as the leading case that established the theory that deference is owed to co-ops in eviction applications—just as the courts would defer to a decision of a member-owned men’s club that a particular member was no longer its “sort of people”. All later co-op “deference” cases build from this foundation, despite

31. “It is clear, therefore, that Part IV of the Act sets up a new regime for landlords and tenants in this Province. Many of the old—even ancient—doctrines of feudal tenure have been swept away and replaced by statutory rules more consistent with some of the more benevolent aspects of modern contract law. Equally clear is the fact that, by virtue of the recent amendments in 1975, the Legislature sought to achieve a more substantial measure of security of tenure for tenants than previously obtained. It is now clear that no grounds exist for recovery of possession from a tenant during the currency of the lease, save for non-payment of rent within s. 103 (e) [enacted 1975 (2nd Sess.), c. 13, s. 3] or the enumerated causes within s. 103f and that the whole process is subject to Court supervision.” London Housing Authority v. Appleton, [1978] O.J. No. 3229; 18 O.R. (2d) 345; 82 D.L.R. (3d) 559; 5 R.P.R. 324; [1978] 1 A.C.W.S. 228, (On. Cty. Ct.) Killeen J.
32. Supra note 14.
33. Ibid. para. 49.
34. Ibid. para. 17. McBride has been cited as current law as recently as St. Charles Co-operative Homes Inc. v. Henney, [2008] O.J. No. 978; 165 A.C.W.S. (3d) 940 (Sup. Ct.) Matheson J.
subsequent legislative amendments that were quickly made to ameliorate the devastating effect of this decision on security of tenure in housing co-ops.

**Law Reform: 1992 CCA Amendments**

In response to *McBride*, the Ontario government quickly enacted extensive amendments to the *CCA*, closely modelled on Part IV of the *LTA*,\(^\text{35}\) and thereby demonstrated an intention to provide protection from arbitrary eviction to residents of cooperatives similar to that enjoyed by those governed by Ontario’s residential tenancy legislation. Under these amendments, the *CCA* protects security of tenure by providing that a co-op resident may only be evicted (1) for contravening a co-op by-law, (2) with an application made on proper notice, (3) on a ground for eviction set out in the by-law, and (4) only if that ground is not arbitrary or unreasonable.

Even if the proper procedure was followed and reasonable grounds exist, the court may still refuse to evict a co-op resident where, in all the circumstances, it would be unfair to do so.\(^\text{36}\) The *CCA* amendments appeared to grant security of tenure to co-op residents, provided they did not breach the co-op’s by-laws.\(^\text{37}\) In particular, s. 171.8(2) of the amended *CCA* sets out a right to security of tenure such that

> membership and occupancy rights may be terminated only if the member ceases to occupy a member unit or *on a ground set out in the by-laws*. Membership and occupancy rights may not be terminated on a ground in the by-laws that is unreasonable or arbitrary.

Furthermore, s. 171.21 of the amended *CCA* also protects security of tenure on a discretionary basis, stating that

> upon an application by a co-operative for writ of possession relating to a member unit, a judge may, despite any provision of this act or the co-operative’s by-laws ... refuse to grant the application if he or she is satisfied, having regard to *all* the circumstances, that it would be *unfair* to grant it. [Emphasis added.]\(^\text{38}\)

If the legislature had intended to continue what had been declared to be the law in *McBride*, it could have modelled the *CCA* amendments on Parts I-III rather than Part IV of the *LTA*—which was crafted specifically to protect the right of security of tenure for residential tenants. The 1992 amendments modelled on Part IV appeared to have rejected the private “social club” theory and to have enshrined something more akin to the security of tenure provided to other residential residents in Ontario. The *CCA* amendments in s. 171 apparently addressed the concern that the “pure democracy” in

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36. S. 171.8 (2) 2 and s. 171.21(1)(a).

37. *Tamil Co-operative Homes Inc. v. Arulappah*, supra note 35, para. 11: “In my view the court has to determine whether or not there was in fact a breach of the by-law.”

38. *CCA*. 
co-ops was susceptible to the "mischiefs of faction" referred to by President Madison and recognized that some sort of "check" was needed to protect the homes of individual residents. The CCA amendments mandated judicial oversight of housing co-op eviction decisions, to ensure both procedural and substantive fairness. 39

When the legislative changes were first introduced in the legislature as Bill 166, the Honourable Brian Charlton, then minister of finance, stated, "The bill also ensures members receive similar protection as tenants in privately owned rental accommodations while preserving the distinctive character of co-ops and member control" [emphasis added]. 40

These sections, virtually identical to the equivalent sections in Part IV of the LTA, appear to be quite straightforward and clear on their face. On principles of statutory interpretation, 41 there would appear to be no reason to qualify or add to these words. The CCA has not been amended in any material way since the 1992 amendments.

POST-LAW-REFORM HOUSING CO-OP EVICTION JURISPRUDENCE

The Survival of the Principle of Deference

Since 1992, and particularly since 1998 when Ontario courts stopped hearing residential tenancy eviction applications, a line of jurisprudence has ignored the fact the CCA was enacted to overcome the effect of the McBride decision. This jurisprudence, which still defers to McBride, is based on the assumption that co-ops have remained "participatory democracies" analogous to "social clubs" and that they operate on the

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39. When residential tenancies were transferred from the jurisdiction of the courts in 1998, co-operatives remained under judicial scrutiny.

40. Tamil Co-operative Homes Inc. v. Arulappah, supra note 35, para. 7.

41. "Departure from the ordinary, plain meaning of the word should only be resorted to in the face of an absurdity or inconsistency that is apparent from the very language of the statute (Driedger, Construction of Statutes (2d ed.) Toronto: Butterworths, 1983 at pp. 47-57)." Ontario (Regional Assessment Commissioner Region No. 3) v. Graham [1993] O.J. No. 2443; 16 O.R. (3d) 83; 106 D.L.R. (4th) 577; 67 O.A.C. 362; 36 R.P.R. (2d) 13; 43 A.C.W.S. (3d) 341 (C.A.), Tarnopolsky, Krever & Arbour J.J.A., p. 8:

(1) Principles of Statutory Interpretation:

In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

basis of “co-operative ownership.” Therefore, according to those courts, co-ops should be given substantial deference in deciding whether to evict a resident.

Within four years of the amendments, several courts had ruled that the CCA amendments were not intended to effect a substantive change in the law and that McBride effectively remained the law of Ontario—namely that because co-ops were analogous to private “social clubs”, they were largely free to decide whom they wanted to keep as members. The role of the courts, in co-op eviction cases, was limited to ensuring that the “club’s” procedural by-laws, and basic procedural fairness, has been honoured when it removed a “member”.

**Tamil Co-operative Homes Inc. v. Arulappah**

**Arulappah: Trial Decision**

This approach was articulated in the decision of Justice Molloy in Tamil Co-operative Homes Inc. v. Arulappah, which subsequent courts have generally relied upon as authority for the continuation of the “deference” theory. While Justice Molloy’s reasoning was later rejected by the Divisional Court, the Divisional Court’s decision was then reversed by the Court of Appeal for reasons of jurisdiction for mootness.

At trial, Justice Molloy held that:

> while I do not consider myself bound to follow the reasoning in Comfort Living [McBride], there is much in the logic of that reasoning which I find compelling, as more particularly referred to below … I was referred to only two cases dealing with the standard of review in these situations since the legislative amendments.

In Mimico Co-operative Home Inc. v. Ward (unreported, 21 July 1995), Ewaschuk J. held:

> My duty is to ensure that the Board had a reasonable basis to arrive at their decision though it is not my role to second guess the Board as to the correctness of the decision so long as I am satisfied that they acted reasonably in the circumstances.

Similarly, in Woburn Village Co-operative Homes Inc. v. Kannundurai, Epstein J. stated that she agreed with the approach taken by Ewaschuk J. and held:

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44. Tamil Co-operative Homes Inc. v. Arulappah, ibid.

45. Supra note 35.


47. Supra note 5 at para. 56.
The Court's duty in situations such as this is to ensure that the Board acted reasonably in the circumstances.\textsuperscript{48}

It was argued before me that the decisions of Ewaschuk J. and Epstein J. are not binding on me (which is true) and that the standard of review applied by them is simply stated without any extensive supporting legal analysis (which, again, is true) \ldots  I find myself in substantial agreement with the views expressed by Ewaschuk J. and Epstein J. as well as with the observations made by Finlayson J.A. in \textit{Comfort Living [McBride]}.\textsuperscript{49}

\ldots  The philosophy underlying co-operative housing would be completely undermined if the decisions of co-operatives were treated in the same manner by the court as decisions of private landlords. Some degree of deference to the democratically elected Board is required. It is not appropriate, in my view, for the court to substitute its own opinion for that of the co-operative or to second-guess what the co-operative has done.\textsuperscript{50}

Thus, the trial judge found that the substantial amendments to the \textit{CCA} had resulted in no substantive change in residents' security of tenure. The \textit{McBride} decision, which had been the impetus for remedial amendments to the \textit{CCA}, then remained the law of Ontario.\textsuperscript{51}

Justice Molloy did not articulate what the philosophy underlying co-op housing was, or why it would be completely undermined if co-ops could not evict residents who have contravened no by-law. However, in \textit{Sequoia Co-operative Homes Inc. v. Forsyth},\textsuperscript{52} Justice McKinnon characterized the philosophy of co-ops as "choosing as a lifestyle to care and support one another". Under this deference theory, an eviction application by a co-op will be granted by the court even if the resident had not, in fact, contravened a by-law, so long as it was not unreasonable for the lay members of the co-op board to have believed that the resident had done so. Importantly, this was the outcome in both \textit{Arulappah} and \textit{Mimico}—where the courts found that grounds did not in fact exist to evict the resident—but out of deference to the co-ops they evicted them anyway.\textsuperscript{54}

\textsuperscript{48.} \textit{Ibid.} at para. 57.
\textsuperscript{49.} \textit{Ibid.} at para. 58.
\textsuperscript{50.} \textit{Ibid.} at para 59.
\textsuperscript{53.} \textit{Supra}, note xliii
\textsuperscript{54.} \textit{Ibid.} \textit{Arulappah} para. 64: "[W]hile on the evidence before me I am satisfied that there was no profiteering, the evidence that was before the Board was quite different. In the circumstances, the Board had a reasonable basis for its decision to terminate on this ground."
\textit{Mimico} para. 18: "I doubt that I would have found that Mr. N'dem's conduct had reached the level of a disturbance, given the need for a measure of tolerance on the part of the Co-op."
The 2007 decision of *John Bruce Village Co-operative v. Goulding* 55 is typical of recent cases that have upheld the principle of deference as articulated in Justice Molloy’s decision as settled law. There, the court held:

This court’s jurisdiction on an application by a co-op under s. 117.13(1) of the Act is fairly limited … Judges will usually defer to an eviction decision made by a housing co-operative because of its democratic and self-governing nature. The court should not interfere with the eviction decision unless the decision was unreasonable or procedurally unfair … The decision of the housing co-operative may be set aside as unreasonable only when “it is apparent that the decision was so unreasonable that no reasonable authority could have made it” … the case law has narrowed the scope and content of this provision and has limited the court’s discretion under s. 171.21(1)(a) to cases of exceptional and extenuating circumstances.

The “deference” case law since Justice Molloy’s decision has all applied similar rationales.

*Arulappah*: Divisional Court

Under a second line of at least twenty cases, courts have preferred to follow the plain words of the statute, which direct that the court may evict only if the resident has contravened a by-law and may refuse to evict if in all of the circumstances it would be unfair to evict. 56 This approach is best summarized in the Divisional Court decision in *Arulappah* where Justice Rosenberg held that:

Before the amendment the co-operative corporation board was in an entirely different position. Section 66.1 of the CCA provided:

A member may be expelled from membership in a co-operative by resolution passed by a majority of the board of directors at a meeting duly called for the purpose …

Section 171.8(1) eliminates this right to so expel a member, if the member had occupancy rights. Under the old regime the decision was made by the board of directors since occupancy rights depended on membership. Once the board had taken away the membership, the court would issue a writ of possession if the member did not vacate. The court was not making the decision. While it might review the decision of the board on the grounds of reasonableness or even procedural fairness or compliance with the procedural by-laws relating to termination, the decision had been made and the court while reviewing it was not making the decision. As previously stated, under the new regime s. 171.13(2), the court

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was determining the applicant’s claim and was not reviewing a decision of the board. Under these circumstances I am of the view that the court is in the same position with regard to residents in the co-operative housing project as the court is with regard to privately owned projects. The court must determine whether the grounds for eviction have been established. Since Molloy J. found that the grounds for termination and eviction had not been established, her decision terminating and evicting cannot stand. [Emphasis added.]57

Arulappah: Court of Appeal
The only housing co-op eviction case upon which the Ontario Court of Appeal has ruled since McBride is Tamil Co-operative Homes Inc. v. Arulappah.58 Unfortunately, the court ruled that the case was moot, as a settlement had been reached prior to the Divisional Court decision. However at paragraph 34 Justice Doherty, for court, wrote, in obiter, that:

Section 171.13(12) does not articulate a standard of review. The determination of the operative standard of review is as much an exercise in judicial self-discipline as it is an exercise in statutory interpretation. As Campbell J. observed in Ryegate (Tecumseh) Co-operative Homes Inc. v. Stallard, supra, [2000] O.J. No. 5423. at para. 36, the standard of review will vary depending upon the issues raised. It is impossible, in my view, to hold that s. 171.13(12) of the Act creates a single standard of review applicable to each and every challenge made to a Board of Director’s decision to terminate membership and occupancy rights.

The Court of Appeal’s suggestion, in obiter, that there is no one standard of review of housing co-op eviction decisions unfortunately gives little guidance on what factors would determine whether and how much the courts should defer to the co-op’s eviction decision in any given case.

Despite the Court of Appeal’s suggesting a flexible standard of review, it appears that Justice Molloy’s interpretation that the CCA amendment did not substantively alter the common law obligation to defer to the “social club” has been gaining ground in the past several years.59

Comparison to Residential Tenancies Act
Under the RTA, security of tenure in government-owned subsidized housing or subsidized housing owned by non-profit corporations is virtually identical to that enjoyed by tenants who rent from landlords in the for-profit private sector. The law does not distinguish security of tenure rights except that tenants living in subsidized

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58. Supra note 6.
housing are required to disclose financial information, and have low incomes, in order to remain entitled to a rent subsidy.60

Eviction applications for virtually all residential housing, except co-ops, were moved from the courts to the Ontario Rental Housing Tribunal (now the LTA) in 1998. There is no deference towards landlords at the LTA. All landlords, including government-subsidized non-profit corporations with democratically elected volunteer boards of directors, must prove the tenant to be in breach of the law before the LTB has jurisdiction to evict the tenant.61

AN ANALYSIS OF THE THEORY OF DEFERENCE

Housing Co-ops as "Social Club" or "Government-Funded Social-Service Providers"

Justice Molloy's analysis, and that in McBride,62 that a co-op should be given significant deference when its board decides to evict a resident, is no longer apt. In 2009, co-ops are not "co-operatively-owned social clubs"—they are in large part subcontracted providers of government social services. No other social service providers, including the government, are granted deference when they decide to discontinue benefits. A housing co-op should be required to prove a substantive case on balance of probabilities, like any other litigant, that its respondent is not longer entitled to social housing benefits.

In 1992, when McBride was decided, the common law respecting member-owned "social clubs" largely entitled private golf and men's clubs to restrict membership however they wished, on the grounds that social clubs were in effect an extension of one's own private property—and that one could exclude anyone from one's private club, just as one could exclude anyone from one's living room.63 We have evolved from this position. Men can no longer exclude women from their clubs in Ontario.

The consequences of eviction from any form of social housing are profound. Ontario's Social Housing Reform Act provides that any tenant who receives subsidized housing from which he or she is then evicted will effectively be placed on a blacklist and barred from ever moving into any other subsidized housing.64

60. *RTA*, s. 7 and *SHRA*, O.Reg.298/01 s. 21.
61. The LTB does not, however, have jurisdiction under the *RTA* to reverse a decision to remove a subsidy pursuant to the *SHRA*.
62. *Supra* note 32.
63. Although the *Ontario Human Rights Code* existed, courts of the day were not very vigilant in applying the Code.
64. *Supra* note 10.
Liberal Construction of Remedial Legislation

To offer deference to one litigant necessarily tilts the playing field against its opponent. In co-op evictions, the issue is whether a government-mandated and subsidized social service—subsidized housing provided pursuant to various statutes—65—is to be terminated. The general principle of statutory interpretation in cases of withdrawal of such social services was established in the leading case of Abrahams v. Canada (Attorney General), and was well articulated by Chief Justice McMurtry (as he then was) in Gray v. Ontario (Director, Disability Support Program).67

As remedial legislation, the [Ontario Disability Support Program Act] should be interpreted broadly and liberally and in accordance with its purpose of providing support to persons with disabilities. Section 10 of the Interpretation Act, R.S.O. 1990, c. I.11 provides:

10. Every Act shall be deemed to be remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.68

In Gray, the court adopted the court’s reasoning from Wedekind v. Ontario (Ministry of Community and Social Services), that “the principle of construction ... applicable to social welfare legislation ... is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.” It also relied upon the reasoning of the Federal Court of Appeal in Villani v. Canada (Attorney General): “The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.”70

To tilt the playing field in favour of the social-service-provider housing co-op, against the rights of the recipient, is contrary to basic principles of fairness. It also reads into the statute something that clearly is not there. As such, it would seem inappropriate to undermine the plain words of s. 171 of the CCA by adding a common law “deemed deference”. There is no reason to relieve the housing co-op social-service provider of its onus, as applicant, of proving that the resident clearly did contravene a by-law, that the proper procedure was followed, and that in all of the circumstances termination of subsidized housing would not be unfair.

65. CCA, SHRA, National Housing Act, CMHC Act, supra note 15.
68. The Interpretation Act has been replaced by the Legislation Act, S.O. 2006 c. 21, Schedule F.
Deference to Co-operative Landlord as “Participatory Democracy”

There is no legal precedent for the proposition that courts must defer to corporate litigants, including non-profit corporations, by not requiring them as litigants to fully meet the onus of proving their case simply because the applicant corporation is directed by a board of directors who have been democratically elected—as corporate boards generally are by their shareholders, and non-profit corporation boards are by their members. Moreover, although a citizen has the right to vote for, or be elected to, government, there is no suggestion that the court must give deference to the government in litigation with its citizens. Deference is not given to the eviction decisions of other social housing providers under residential tenancy legislation in Ontario, and there is no reason that similar housing providers under the CCA should be accorded great deference by the courts. The collective operation of a housing complex does not mean that the residents should be at constant risk of losing their family's homes if they happen to momentarily lose popularity with a majority of neighbours—any more so than other residents.

Standard of Review Based upon “Reasonableness” Rather Than “Correctness”: Administrative Law Principles

It is perhaps unfortunate that impartial adjudicative administrative law entities may be called “boards”, just as boards of directors of corporations are called “boards”. One is, of course, very different from the other. Impartial adjudicative boards are entitled to deference if a party to litigation decided by these boards seeks to have the decision judicially reviewed—just as appellate courts defer to trial courts. In such cases the board itself rarely becomes the applicant at court. It is the parties to the board's decision who are generally the litigants. Boards of corporate litigants are not entitled to deference.

Boards in co-op eviction cases are not impartial adjudicative boards. Rather, their corporations are the applicants. Their corporations are suing the respondent residents. These cases are not judicial reviews of decisions of an impartial adjudicative board, and as such any suggestion that they are owed deference under administrative law principles is misplaced. They are simply party litigants who have commenced litigation and should have to prove their case like any other litigant—including non-profit subsidized housing providers under the RTA and, for that matter, government-owned subsidized housing providers—both of whom, like housing co-ops, generally provide a right to appeal to their volunteer boards where staff decide to evict a resident. In each case the LTB would give no deference to the board of the non-profit

71. In fact, under s. 83(2) of the RTA, the trier of fact is, since 2006, expressly required to make a finding about the fairness, in all the circumstances, of evicting the tenant.

72. Louise Stevens supra note 17. For example, the government-owned London & Middlesex Housing Corporation has an Admissions and Evictions Review Committee of its Board of Directors to whom such appeals may be made.
landlord should it commence an eviction application—just as it does not give deference to any landlord or tenant litigant.

**Board and Members' Meetings as “Equivalent to Trials”:**

One rationale advanced in the context of co-operative eviction cases, for limiting the procedural protections that courts have traditionally employed to get to the truth (such as cross-examination) is that the resident at a housing co-op has other equivalent protections. In *Arulappah* Justice Molloy held that:

Members of co-operatives have many protections and privileges that regular residents do not. There is a hearing process before the Board (with a right of appeal to the membership) before a member’s rights can be terminated. There is also a democratic process for removal of a board of directors in whom the membership has no confidence. 73

Despite Justice Molloy’s dictum, the reality is that these meetings are in no sense hearings. At best, co-op board and member meetings could be compared to town hall—style settlement meetings. These meetings are particularly ill-suited to get to the bottom of disputed facts, especially, as is often the case, where credibility is in issue. Members meetings tend to be factional, personal, and raucous, and emotions often run high. Inevitably some neighbours do not get along with some other neighbours. The member/residents are laypersons to whom it is difficult to explain the law, much less to make submissions about the unreliability of allegations.

The co-op board controls its process, as both prosecutor and judge and typically asserts that it would be disloyal for the members not to support the co-op board’s decision. There is no opportunity to lead sworn evidence or test credibility. 74 These meetings are often characterized by the most troubling qualities of unchecked pure democracy and in no sense are similar to a trial in the ability to determine the complete and accurate facts—much less to determine how the law applies to those facts.

The court hearing constitutes the first realistic opportunity for a co-op resident to lead evidence and test credibility—before an experienced trier of fact and law. If, as is generally the case, the facts are disputed, cross-examination is imperative to get to the truth, particularly where the real reason for the eviction is not apparent. 75

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73. *Arulappah, supra* note 43, para. 59.
74. The author has attended many of these board and members’ meetings and recalls one such meeting in which the board voted to fire their own lawyer mid-meeting when he tried to explain that they were bound by the law, and another where the board’s lawyer ruled that counsel was not permitted to make submissions to the members—but rather the client, who did not speak English, was required to make them. Also see *St. Charles Co-operative Homes Inc. v. Henney* [2008] O.J. No. 978; 165 A.C.W.S. (sd) 940 (Sup. Ct.) Matheson J.: “I find the Board of Directors presented an unfair and biased impression of the situation to the full membership. This was done to the detriment of Ms. Henney. The membership was acting with improper and slanted evidence.”
The Problem with Deference

There is no concept of "deference" to any other landlord or government-funded social service provider under Ontario law. From the standpoint of the individual resident, subsidized occupancy in a housing co-op is substantially similar to tenancy in other government-subsidized non-profit housing. The co-op's "participatory democracy" does not warrant the court's deferring to unfair or otherwise unlawful eviction any more than it would defer, for example, to an arbitrary or unfair "democratic" decision to expropriate private property. Just as the RTA provides that the trier of fact should look at the "real substance" of matters under consideration, the courts should do so too, as they had previously done under the since repealed Part IV of the LTA.

The fact that a housing co-op is managed by a board of directors who reside at the co-op will not ensure fair-minded decisions. The CCA amendments were designed to protect residents' homes when the utopian ideal of communal living occasionally crashes into the more base reality that sometimes human behaviour falls short of the ideal. Sometimes the very closeness of the relationship of neighbours holding the power to evict neighbours, or contending for control of that power, may exacerbate personal conflict—and bring out the most petty and vindictive qualities of pure democracy. Terminating tenancy by popular vote of neighbours (the "members' meeting") can occasionally be, in essence, a "thumbs up, thumbs down" "unpopularity contest", dominated by inflamed tempers and the rhetoric of intolerance—a far cry from the sober, reasoned respect for law and the search for the truth, found at court.

The issue of deference is particularly troubling where the "mischiefs of faction" may be at play, that is, where, beyond the ostensible reason for eviction, the real reason for the eviction may be retaliation, discrimination or simple mean-spiritedness. This is sometimes seen, in the context of co-operatives, where the resident is facing eviction based on alleged misconduct or for arrears resulting from suspension of subsidy, and the resident happens to be a former board member or long-term resident who has dared to challenge some action of the co-op board.

It may also be seen where the resident is in some way an "outsider", such as a physically or developmentally disabled resident, a single mother with many children, an

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76. RTA, s. 202.
77. LTA, s.188.
79. Westmount Community Housing Co-operative Inc. v. Krajc-Cuprak, supra note 75.
immigrant or other residents found in some way to be different, eccentric, irritating or unpopular.\textsuperscript{80} To paraphrase President Madison,\textsuperscript{81} in a democratic co-operative there is nothing to check the inducement of the majority, here represented by its duly elected co-op board, to sacrifice the weaker party, in this case the dissenting or “unpopular” resident. The 1992 amendments to the CCA apparently represented the legislature’s creation of a “check” on such boards in the form of statutory protection from arbitrary eviction and meaningful oversight of board eviction decisions by the courts.

The purpose of the CCA is to provide a check upon those few boards who would abuse their power, by unfairly evicting a resident. In those cases residents who challenge those boards have only the law and the courts to protect them from arbitrary or retaliatory eviction. Human nature being what it is, some lay boards react strongly to any perceived challenge to their authority. The fact that the resident has the right to challenge the board’s decision to that same board and to appeal to the members who have elected that board offers no real protection. Absent the protection of the courts, \textit{bona fide} dissent by individual subsidized residents may become hazardous—and chill healthy democracy.

\textbf{TREND TOWARDS LOSS OF ORAL HEARINGS / SUBSTANTIAL INDEMNITY COSTS / REFUSAL TO RESTORE UNLAWFULLY TERMINATED RENT SUBSIDY}

Housing co-op eviction applications are probably among the smallest cases, in financial terms, that judges of the Superior Court still hear—and they see them only rarely. The collective memory of the court for the “quick and basic” oral hearings for eviction applications pursuant to the LTA, which the courts routinely heard until 1998, appears to have faded following the removal of those applications to the OHRT. They were summary proceedings similar to Small Claims Court trials. Co-op eviction applications used to generally be modelled on these “quick and basic” oral hearings.

Today, eviction hearings at the LTB remain quick and basic. Paperwork is kept to a minimum. Hearings are based upon oral evidence and usually do not exceed one hour in length. Landlords are represented generally by inexpensive paralegals. Community legal-aid clinics are still active in defending tenants—which, because these procedures are so simple, legal-aid clinics can still manage despite increasingly limited resources.

As memory of the “quick and basic” eviction hearing has faded, the courts have apparently looked elsewhere, such as the practice for applications commenced pursuant to Rule 38 of the \textit{Rules of Civil Procedure}, and Rule 72 simplified trial rules, for

\begin{thebibliography}{9}
\bibitem{footnote1} \textit{Forest City Housing Co-operative Inc. v. Chourbagi} [2005] O.J. No. 707; [2005] O.T.C. 141; 137 A.C.WS. (3d) 642, (Sup. Ct.), W.A. Jenkins J.
\bibitem{footnote2} \textit{Supra} note 8.
\end{thebibliography}
guidance in determining how applications commenced pursuant to s. 171 of the CCA should be held.

Non-profit housing co-ops, impoverished residents receiving subsidized housing and community legal-aid clinics cannot afford to litigate housing co-op eviction cases where courts now require the filing of extensive pleadings, including comprehensive affidavit evidence and the delivery of factums.

Loss of Oral Evidence and Cross-examination

The increase in “deference” has led some courts to hold that, since the hearing is not a full review of whether the resident has breached a by-law, there is no need for oral evidence and cross-examination—notwithstanding the fact that virtually every reported housing co-op eviction case (in which the reasons disclose whether oral or affidavit evidence was led) until 2003 proceeded with oral evidence, and some still do. One may wonder how a court can exercise its “relief from eviction where unfair to evict” mandate as required by s. 171.21 (1)(a) of the CCA if it does not assess the parties’ demeanour and credibility, and how it can do so in a meaningful way if it has only affidavits.

Traditionally applications under the CCA have been commenced by the housing co-op filing an affidavit. This practice is carried over from s. 74 of Part III of the LTA, which governed housing co-op evictions until 1992. It provided that “the tenant’s landlord may apply upon affidavit to a judge of the Superior Court of Justice to make the inquiry” and “if the tenant appears, the judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and, if it appears to the

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82. These cases do not refer to the practice prior to 2003—except Cordova, which dismisses it as “Toronto practice”. A trend in many of these cases is that the resident is unrepresented and the case law that is contrary to the co-operative’s interests is not referred to. Ujamaa Housing Co-operative Inc. v. McKenzie [2007] O.J. No. 4131, (Sup. Ct.), D.M. Brown J. (require “responding record”); Phoenix Housing Co-operative Inc. v. Amaral [2006] O.J. No. 4714; 153 A.C.W.S. (3d) 229, (Sup. Ct.), P.B. Hockin J.; Lakeshore Gardens Co-operative Homes Inc. v. Bhikram [2006] O.J. No. 2941; 148 A.C.W.S. (3d) 523, (Div. Ct.), E.M. Macdonald, G.J. Epstein & D.R. Cameron JJ.; Three Streets Housing Co-operative Inc. v. Mizzi [2005] Ct. file no. 05-CV-288877 (Sup. Ct.), Day J.; Cordova Co-operative Homes v. Duval [2005], Ct. file no. 27732/03 (Sup. Ct.) Timms J. In Alexandra Park Co-operative v. Hamilton [2009] O.J. No. 2768, Code J., the resident’s lawyer was all but accused of malpractice for asking the court to use the pre-2003 practice. This may further “chill” the defence of these residents.


85. Ibid. s. 74.
judge that the tenant wrongfully holds against the right of the landlord, he or she may order the issue of the writ” [emphasis added].86

It seems perhaps an anachronism that these applications are commenced by filing an affidavit but proceed based on oral evidence. There is no requirement for the respondent housing co-op resident to file any pleadings. The CCA requires only that “the respondent may dispute the applicant’s claim by attending on the return of the application”87

It now appears that some courts, perhaps not knowing this procedural history, have assumed that, since the application is commenced with an affidavit, only affidavit evidence should be permitted and that, since factums are required for other types of applications under the Rules of Civil Procedure, the same procedure must also apply under the CCA. Despite that comparison, the same procedure does not apply. Paperwork for residential eviction cases had always been kept to a minimum, as continues to be the case under the present RTA. This recent significant increase in paperwork has increased the cost of litigating these cases significantly. Fortunately, some courts continue to permit oral evidence.88

**SUBSTANTIAL INDEMNITY OR SUBSTANTIALLY DISPROPORTIONATE COSTS**

Deference has led some courts to unquestioningly order substantial indemnity costs89 against housing co-op residents,90 sometimes far beyond the financial amounts in issue.91 Housing co-ops routinely claim these costs where permitted by the co-op by-laws. Some courts, although rejecting substantial indemnity costs, still award partial indemnity costs that are far beyond the a low-income housing co-op resident’s abil-

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86. Ibid. s. 76(2).
87. CCA s. 171.13(6).
89. “Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.” Young v. Young [1993] S.C.J. No. 112; [1993] 4 S.C.R. 3, McLachlin, CJ.
ity to pay. For example, in *Ujamaa Housing Co-operative Inc.*, costs of $22,000 were awarded—equal to several years of the residents' social benefits.\(^{92}\)

Other cases, such as *Cornerstone v. Spilchuk*,\(^ {93}\) have recently been followed by other courts as authority for awarding substantial indemnity costs.\(^ {94}\) In *Cornerstone*, the housing co-op residents were unrepresented. The judge referred to no case authority, much less distinguishing any of the rationale for traditional co-op awards of modest costs, in his decision. There is no evidence he was referred to it. The learned judge's award of costs against the elderly pensioner resident couple of $50,000 (because the pensioners were inefficient in presenting their defence) is equal to several years of their pension income. The costs award would apparently bar them from subsidized housing for life, as they would not be re-eligible until the costs were paid in full.\(^ {95}\)

Other courts have, however, awarded costs consistent with a Small Claims Court and LTB scale of $750 or less.\(^ {96}\) To award costs on a substantial indemnity scale simply because the by-law permits this ignores the court's discretion to award appropriate and reasonable costs. In *Ibrahim v. Kadhim*, for example, the court limited costs on the basis that:

> There must be practical and reasonable limits to the amount awarded for costs and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated ... The objective of a costs order is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful party.\(^ {97}\)

The LTB continues the courts' pre-1998 practice of holding summary eviction hearings with oral evidence and very little paperwork. The maximum costs award at the LTB, which is rarely granted, is approximately $500. At Small Claims Court, which

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94. Supra note 89.

95. Supra note 64.


has a limit of 15 per cent of the amount claimed.\textsuperscript{98} Cost awards rarely exceed $500. Costs award of this magnitude would recognize that in order to qualify for subsidized housing the tenant must already be quite poor.\textsuperscript{99} Yet exorbitant cost awards are becoming all too common in housing co-op evictions. The risk of such large awards strongly deters low-income residents from defending themselves in court against eviction.

\textit{Unlawful Termination of Rent Subsidy}

Some courts have in recent years held that if a housing co-op unlawfully terminates a resident’s rent subsidy (pursuant to the SHRA), the court cannot intervene. The resident is evicted for rent arrears.\textsuperscript{100} Many other courts, however, have restored the resident’s subsidy—thus eliminating the “arrears” and refusing eviction.\textsuperscript{101} This is a common tactic of boards who may not be acting in good faith. This may been seen, for example, where a housing co-op does not generally insist upon strict compliance with deadlines for verification of income but decides to with one unpopular resident.

\textbf{Conclusion}

The concept of deference to subsidized non-profit housing co-ops is a creature of common law rooted in factual assumptions and resultant rationales that are outdated and not applicable to modern government-subsidized housing co-ops. These are not

\begin{footnotes}
\item[98] CJA, s. 29.
\item[99] “[T]he Board does not want to use its power to award costs in a way which would discourage landlords and tenants from exercising their statutory rights ... In most cases, the only costs allowed will be the application fee [$150.00] ... A Member has the discretion to require a party to pay, as costs, any representation or preparation expenses of another party where the conduct of the party was unreasonable. Conduct is unreasonable if it causes undue expense or delay ... the amount allowed in total for the proceedings cannot exceed $500, including any amount ordered for the hearing": RTA, s. 204; \textit{Landlord and Tenant Board Rules of Practice} r. 27; LTB Interpretation Guideline 3 "Costs", \textit{Ontario Landlord and Tenant Law Practice}, 2007, Fleming J., Lexis/Nexis, pp. 475 and 513; "An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed": \textit{Rules of the SCC} O.Reg. 258/98, r. 19; CJA R.S.O. 1990 c. 43, s. 29.
\end{footnotes}
private social clubs, but rather are contracted government-funded social service providers.

There is still a line of cases, although that they are fast becoming the exception, that protect security of tenure on the basis of plain words of the CCA, where oral hearings are still held, where costs remain within a range that is not ruinous to the low-income resident, where courts refuse to evict where the housing co-op does not prove its case upon admissible evidence or where the circumstances warrant relief from eviction despite grounds for eviction existing.

The recent trend evidences an enormous judge-made discrepancy between the security of tenure rights enjoyed by residents who happen to be offered accommodation in subsidized non-profit housing corporations versus residents offered accommodation in subsidized non-profit housing co-ops. It may be that the only hope of remedying this apparent imbalance at this point is an appellate ruling on sympathetic facts after a thorough argument and analysis of the law and the legislative history of the non-profit housing co-op legislation.

Perhaps the simplest solution is for the CCA to be amended so that these matters are moved from the courts to the LTB, like most other residential eviction applications were in 1998. It would be unfortunate if the court lost this last connection with Ontarians of modest means. However, this alone may not be enough, unless the legislature also signalled that the transition was intended to remedy the judge-made imbalance.

Laws and courts exist to regulate behaviour, where necessary, in those rare cases where people are perhaps not at their best. It is fine to respect co-operative boards and to recognize that they generally behave fairly towards their residents. But good management by most should not give a free pass for substantive unfairness to the few housing co-ops that would unfairly evict a resident of modest means from government-subsidized home notwithstanding that he or she or has contravened no law or by-law. It is here that the courts’ processes for getting to the truth, such as hearing admissible oral evidence and cross-examination, are most needed. Families facing the loss of government-funded subsidized housing need their security of tenure protected—perhaps more than most residents, as they cannot afford market-cost housing.

When a co-operative board fairly wishes to evict a resident family, there is no need for the court to offer it deference. It can prove its case just like any other applicant. Neither should courts defer if a board unfairly attempts to evict someone, or if the true facts weigh against eviction for other reasons. The courts should instead “check” the unfairness, and protect these families’ homes.

102. The government is considering this. Moving Forward on Co-operative Housing Tenure Disputes Resolution, Consultation Paper, Ontario Ministry of Municipal Affairs and Housing, August 2009 (as endorsed by the Co-operative Housing Federation of Canada by Resolution of Ontario Region at its 2009 AGM).