

SUBMISSION TO THE OMBUDSMAN ONTARIO

Concerning the Failure of the
Tenant Protection Act
and the Rules and Procedures of the
Ontario Rental Housing Tribunal
to meet Ombudsman Fairness Standards

Advocacy Centre for Tenants Ontario (ACTO)
Legal Clinics Housing Issues Committee (LCHIC)
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INTRODUCTION

I am writing on behalf of the Advocacy Centre for Tenants Ontario and the Legal Clinics Housing Issues Committee to ask that you initiate, on your own motion under section 14(2) of the *Ombudsman Act*, an investigation of certain aspects of the statutory regime and procedural practices governing the resolution of disputes between landlords and tenants by the Ontario Rental Housing Tribunal. It is our position that aspects of the legislation and of the Tribunal's practice dealing with eviction procedures do not meet the Fairness Standards set by the Ombudsman Ontario. In addition, it is our submission that the legislative treatment of rent increase applications based on one-time utility cost increases is unreasonable and unjust within the meaning of section 21(1)(b) of the *Ombudsman Act*.

We are asking that you make recommendations to the Ontario Government that certain sections of the *Tenant Protection Act (TPA)* be amended, and that certain rules and procedures of the Ontario Rental Housing Tribunal (ORHT) be revised, with a view to introducing greater fairness into the dispute resolution process, and into the rules for regulation of rents.

WHO WE ARE

The Advocacy Centre for Tenants Ontario (ACTO) is a new Community Legal Clinic established by Legal Aid Ontario (LAO) to advocate for legal protection of the housing rights of low-income tenants and homeless persons, through test case litigation and law reform advocacy. ACTO has a provincial mandate and works with and on behalf of other Legal Clinics throughout the province. ACTO also manages the LAO Tenant Duty Counsel Program (TDCP). Through the TDCP, ACTO delivers summary legal services to low-income tenants appearing before the ORHT in communities across Ontario.

The Legal Clinics Housing Issues Committee (LCHIC) is an organization representing Community Legal Clinics funded by LAO across Ontario. LCHIC meets regularly to review and consider housing law issues affecting the client group served by Legal Clinics.

KEY ISSUES

There are three key issues addressed in this submissions as follows:

I Failure to Meet Fairness Standards in Eviction Proceedings

A primary focus of our submission is on the process established for eviction proceedings under the *Tenant Protection Act* and by the *Rules of Practice* and *Interpretation Guidelines* of the Ontario Rental Housing Tribunal (ORHT). It is our submission that the current process is not consistent with the Ombudsman Ontario Fairness Standards in that:

- A tenant facing eviction is not given "adequate, proper and timely notice in plain language by the decision-maker";
- A tenant facing eviction is not given an adequate opportunity to "be able to present his/her point of view, and to respond to facts presented by others";
- A tenant facing eviction is not assisted by ORHT informational materials. The Notice of Hearing and ORHT pamphlets and brochures do not meet the standard that information be given in clear, plain language "to ensure maximum understanding by the persons involved, taking into account special requirements."
- The application resolution process is inflexible and does not show "due respect for difference, circumstances and needs" which characterize the tenant population appearing as respondents in eviction proceedings;
- The application resolution process fails to be "sensitive to the economic reality that people with limited financial or personal resources may be at a disadvantage in presenting their cases" and does not include measures to "redress any imbalance created by such disadvantage".¹

¹ Quoted text taken from *Ombudsman Fairness Standards*, p. 3-4.

In our submission, the eviction process under the *TPA* also fails to meet the standards set by the Ontario Government's Agency Reform Commission in the April 1998 report "Everyday Justice". The process for eviction applications fails to meet the "Everyday Justice" goals of fairness, accessibility and transparency.²

II Failure to Meet Fairness Standards in Procedure for Restoring a Wrongfully Evicted Tenant to Possession

The ORHT *Rules of Practice*, Interpretation Guidelines and internal manuals, fail to establish a process that is responsive to the urgency of the circumstances when a tenant is wrongfully locked out of his/her rental unit by their landlord.

Contrary to the Fairness Standards set by the Ombudsman, and the goals of the "Everyday Justice" report, the process for regaining possession is cumbersome, unclear and inaccessible. It does not demonstrate "due respect" for the "circumstances and needs" of tenants illegally evicted. Further, there are no materials prepared by ORHT that provide information on the process in plain language to ensure "maximum understanding" by tenants who are trying to regain possession of their housing.³

III Rent Increases Based on One-time Increases in Utility Costs

Thirdly, it is our submission that the treatment of one-time utility cost increases in the rent review provisions of the legislation and regulations is unreasonable and unjust within the meaning of section 21(1)(b) of the *Ombudsman Act*. The legislative scheme allows an overly generous pass through of energy cost increases, both as a component of the guideline rent increase and as the basis for an above-guideline increase, without providing any mechanism for removing this cost from the rents when it is no longer being borne by the landlord.

² *Everyday Justice*, p. 18.

³ *Fairness Standards*, p. 3-4.

BACKGROUND

1. The Legislation and the Tribunal

The *Tenant Protection Act* was proclaimed on June 17, 1998.⁴ The new statute established the Ontario Rental Housing Tribunal, with responsibility for adjudication of all matters arising under the legislation, including the enforcement of tenant and landlord rights, the termination of tenancies and rent regulation.⁵

The ORHT is a high volume tribunal. It handles more applications annually than any other tribunal in Ontario, averaging almost 74,000 applications per year since 1998. The bulk of its applications are brought by landlords for termination of tenancies. Between June 1998 and December 31, 2001, landlord applications comprised fully 91% of all applications brought before the Tribunal; almost 94% of these landlord applications sought an eviction order.⁶

ORHT Workload Reports show that eviction applications, taken as a percentage of all filed applications, comprised 86% of the total. According to the Tribunal's last annual report (1999-2000), evictions for arrears of rent formed 76% of the total filed applications in 1998/1999 and 72.63% in 1999/2000.⁷ ORHT Workload Reports for the period between June 1998 and December 2001, show that arrears evictions comprise 84% of all eviction applications.

The bulk of the Tribunal's work is, therefore, to process and resolve applications for eviction, the overwhelming majority of which are based on alleged arrears of rent. The process followed in eviction applications is a primary focus of this submission.

⁴ The new legislation repealed Part IV of the *Landlord and Tenant Act*, the *Residential Rent Regulation Act* and the *Rent Control Act*, 1992, as well as the *Rental Housing Protection Act*.

⁵ What was the goal of the Government of Ontario in creating a new statutory regime to govern residential rental housing? In its submission to Management Board of Cabinet supporting the initiative, the Ministry of Municipal Affairs and Housing stated that the new agency's "business function" would be "both regulatory and adjudicative". More specifically, the tribunal's function was "to protect the public interest by encouraging a greater supply of well-maintained residential rental accommodation; and protect tenants from unjustified rent increases, unfair evictions, etc." : KPMG Operational Review, December 9, 1999, pg. 18.

⁶ Calculated from ORHT Workload Reports, June 17, 1998 to December 31, 2001.

⁷ This statistic is taken from the last ORHT annual report for 1999-2000, pg. 7.

2. The Context: The Affordable Housing Market and the Tenant Population in Ontario in 2002

In evaluating the fairness of the current statutory regime, it is important to consider the social and economic characteristics of the tenant population served by ORHT and circumstances of the rental housing market in Ontario.⁸ A fair and appropriate dispute resolution process should recognize and address social and economic factors that create barriers for disadvantaged members of the community using the service.⁹

A good starting point for examining the social and economic context for landlord/tenant disputes in Ontario today is the rate of vacancies for rental accommodation. A rental vacancy rate of less than 3% indicates an unhealthy rental market in which tenants do not have a reasonable degree of choice.¹⁰ Ontario's rental vacancy rate has never risen above 3% in the last decade.¹¹ In larger urban centres (Toronto, Ottawa) and some smaller cities in southern Ontario (Barrie, Brampton, Kitchener), the vacancy rate has been at or below 1% since 1999.¹² The result is that tenants are competing for an inadequate number of rental units in a market in which there are no legislated rent controls affecting tenants entering into a new tenancy agreement. The removal of new tenancies from rent regulation is a feature introduced in the current statute.¹³

⁸ We are not in a position to present information about the economic characteristics of the landlord group which uses the services of the Tribunal, other than to note that they own revenue-generating residential real estate.

⁹ This approach, which is informed by substantive equality jurisprudence, has been recognized in the agency sector by the Society of Ontario Adjudicators and Regulators (SOAR), an organization comprised of members of all of Ontario's agencies, boards and tribunals. SOAR developed a "Service Equity" policy in 1995 that addressed the issue of how to deliver "adjudication services" in a way that minimizes the impact of disadvantage. The primary recommendation in the policy was that adjudicative bodies should be: "accessible to all persons who may require adjudicative services"; "sensitive to the needs and barriers faced by disadvantaged consumers of the agency" and "accountable for fulfilling the fundamental goals of accessibility and equity": *Towards Service Equity*, Society of Ontario Adjudicators and Regulators, 1995, pg.1.

¹⁰ Dunphy, Noreen and Lapoint, Linda. *Where's Home: A picture of housing needs in Ontario*. Published by the Ontario Non-Profit Housing Association and the Co-operative Housing Federation of Canada, March 1999, p. 16.

¹¹ The overall vacancy rate in Ontario's rental housing market has been less than 2% since 2000. The rental housing market that is included in Canada Mortgage and Housing Corporation surveys is privately owned apartment buildings with three units or more.

¹² CMHC Rental Market Reports for 1999, 2000 and 2001.

¹³ Section 124 TPA.

As the overall vacancy rate has fallen, the number of affordable rental units has dropped disproportionately. Statistics available for Toronto, where 44% of all Ontario residents reside¹⁴, establish that units renting for less than \$800 made up two-thirds of all units in 1996; but comprised only one-third of the total in 2000,¹⁵ and only one-quarter of the total in 2001.¹⁶

The lack of affordable rental units is reflected in the percentage of tenant household income that is being absorbed by housing costs. At 1996 rent levels, 44% of tenant households across the province were spending 30% or more of their household income on shelter costs.¹⁷ A significant number of tenants in Ontario pay more than 50% of their income on rent.¹⁸ At this level of expenditure on housing, tenants have little or no financial flexibility if they experience an unexpected drop in income and are vulnerable to eviction.

Since 1995/6, Ontario's average rent has risen faster than the cost of inflation generally.¹⁹ Increases in income for renter households have also not kept up with rising rents.²⁰ The income of tenants on social assistance (other than seniors and persons with disabilities) plummeted: benefits rates were cut by 21.6% in 1995 and have not

¹⁴ J.D. Hulchanski, *A Tale of Two Canadas*, Centre for Urban and Community Studies, University of Toronto, Research Bulletin #2, August 2001.

¹⁵ *The Toronto Report Card on Homelessness, 2001*, published by the City of Toronto, January 2001, p. 13.

¹⁶ Figure calculated from CMHC Rental Market Report for 2001 for the Toronto CMA.

¹⁷ Mitchell, Andy. *A Profile of Low-Income Populations in Ontario*. Study of Legal Aid Ontario, August 2001. p.22.

¹⁸ Figures available for the province for 1995 demonstrate that 22% of tenant households were paying at this level. In the City of Toronto, almost 24% of renter households were paying 50% or more of their income for rent in 1996: *Toronto Report Card on Homelessness, 2000*, January 2000, p. 12.

¹⁹ In Toronto, the average rent for all units increased by 29% from 1995 to 2001 - outpacing the cost of inflation twofold. Across Ontario, the average rent for all rental units surveyed annually by CMHC increased by 22.5% from 1995 to 2001, while the percentage change in Ontario's Consumer Price Index from 1995 to 2001 was 12.8%: CMHC, Ontario Vacancy rates and rents, October 1995 to October 2001; Statistics Canada, Consumer Price Index, Table 326-0002.

²⁰ Income in tenant households has also not kept pace with increases in income in homeowner households. Between 1984 and 1999, the gap in median income between tenant and homeowners grew by 16%: J.D. Hulchanski, *A Tale of Two Canadas*, Centre for Urban and Community Studies, Research Bulletin #2, August 2001.

been increased since.²¹ During the same period, wage gains were moderate: the average wage gain between 1995 and 2000 was 9%.²²

In 1999, the median after tax income of Ontario renter households (of all sizes) was \$23,215.²³ Consider the circumstances of a family with children, at the median income level, renting a two-bedroom apartment. If the average cost of a two bedroom apartment in Ontario in 1999 (\$785) is deducted from the median income, this tenant household would have had only \$13,795 left for all other expenses over the course of the year. This amounts to only \$287.50 a week for food, clothing transportation and all other expenses.

Not surprisingly, the number of homeless persons in Ontario has risen visibly over the last decade. The City of Toronto has compiled statistical information through its shelter system. The City reports that the number of people using emergency shelters increased by 40% from 22,000 in 1988 to nearly 30,000 in 1999.²⁴ Families are the fastest growing group of shelter users.²⁵ Families using Toronto shelters in 1999 reported that eviction was the reason for having to stay at the shelter in 18% of cases.²⁶ Refugees and other new arrivals in Toronto who are unable to find affordable housing make up the majority of families using family shelters in the city.²⁷

²¹ *Another Look at Welfare Reform*, Report of National Council of Welfare, Autumn 1997, p. 50.

²² *Toronto Report Card on Homelessness, 2001*, published by the City of Toronto, January 2001, p. 12.

²³ J. D. Hulchanski, *A Tale of Two Canadas: Homeowners Getting Richer, Renters Getting Poorer*, Centre for Urban and Community Studies, Research Bulletin #2, "Income and Wealth of Owners and Renters", Fact Sheet, December 2001.

²⁴ *Toronto Report Card on Homelessness, 2001*, p.4.

²⁵ The rising use of shelters by evicted families is reflected in the findings of a study of the Toronto Children's Aid Society (CAS) admissions by the Centre for Urban and Community Studies at the University of Toronto. The study found that, in one in five cases, the family's housing situation was a factor that resulted in the temporary placement into care. The number of children admitted to care where housing was a factor was found to have increased by approximately 60% between 1992 and 2000 (290 children in 1992 to almost 450 children in 2000) with a resulting increase in admission costs of approximately \$18 million: Chau, Fitzpatrick, Hulchanski, Leslie, Schatia, "One in Five ... Housing as a Factor in the Admission of Children to Care", Research Bulletin #5, Centre for Urban and Community Studies, November 2001.

²⁶ *Toronto Report Card on Homelessness, 2001*, p.4.

²⁷ Interview with Sybil Longley, Director of Woodgreen Red Door Shelter, June 13, 2002.

Finally, in considering the characteristics of ORHT's tenant users, research²⁸ establishes that groups identified by a prohibited ground of discrimination under the Ontario *Human Rights Code* are disproportionately economically disadvantaged among the renting population. Persons on social assistance, single parent mothers, unattached women, elderly women, youth under the age of 20, refugees, visible minorities, non-citizens, immigrants and persons with disabilities are all over-represented in the population of low-income tenants.²⁹ Based on this research, we can safely conclude that low-income members of groups identified with a prohibited ground of discrimination comprise a substantial proportion of the population served by ORHT.³⁰

Given the economic and social facts that characterize the rental housing market and the tenant population vulnerable to eviction, it is clear that, as a group, tenants appearing before ORHT are disadvantaged as compared to the landlord user group. Tenants become party to an ORHT proceeding, overwhelmingly, as respondents to an arrears application, at a point of financial crisis. If lawfully evicted, or if wrongfully locked out of their rental unit, a tenant can expect to have a very difficult time finding new affordable rental housing. The landlord, on the other hand, will be able to raise the rent on the vacated unit to whatever level the market will bear.

This imbalance in positioning between the tenant and landlord user groups should be reflected in the design of the ORHT application resolution process, in the supports available to parties, including members of groups with special needs, and in the exercise of statutory discretion to refuse to evict. It is our submission that aspects of the current legislation and of the practice and procedures of the Tribunal are deficient in each of these respects.

²⁸ Ornstein, M., *Income and Rent: Equality Seeking Groups and Access to Rental Accommodation Restricted by Income Criteria*, Institute for Social Research and Dept. of Sociology, York University, October 1994.

²⁹ Ornstein defines low income as persons who pay more than 30% of their income to rent an appropriately sized apartment rented at the 30th percentile – meaning 70% of apartments of the same size were rented for more.

³⁰ Although Ornstein's research also indicates that low-income tenants may be no more likely to default in rent payments than other tenants, this finding, based on pre-1996 data, may no longer hold true given the growing affordability gap.

AREAS FOR INVESTIGATION BY OMBUDSMAN

- I Eviction Process
 - II Process for Restoring a Wrongfully Evicted Tenant to Possession
 - III Rent Increases Based on One-time Increases in Utility Costs
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FIRST AREA FOR INVESTIGATION BY OMBUDSMAN:

I Eviction Process

How many Eviction Applications are taken to ORHT?

The Tribunal received 208,102 applications for eviction between June 17, 1998 and December 31, 2001.³¹ In the last full calendar year, 2001, the Tribunal received approximately 63,300 landlord applications seeking eviction as a remedy. This represents an increase of 28% over the number of eviction applications filed during the last calendar year when evictions were handled by the courts under the previous legislation.³²

How Eviction Applications are Resolved: Default Orders

How does the Tribunal process and resolve eviction applications, and with what result? In 58%³³ of eviction applications since 1998, an eviction order was issued on a default basis, without the tenant respondent having presented his/her position at a mediation or hearing. The *Act* sets a deadline of five calendar (not business) days for a tenant to respond by written dispute to an eviction application

³¹ ORHT Workload Reports, June 17, 1998 to December 31, 2001. This figure includes 7534 "combined" landlord applications that would in almost all cases include eviction as a sought-after remedy.

³² Figure for 1997 (49,679 eviction applications) is taken from a background paper prepared for the Golden Report: *Taking Responsibility for Homelessness*; Lapointe Consulting *Options for Avoiding Eviction*, November 1998.

³³ See ORHT Workload Reports: 1998, 1999, 2000, 2001.

delivered by the landlord.³⁴ If a tenant fails to respond by filing a written dispute within the five day period, a default order will be issued terminating the tenancy and requiring the tenant to leave the rental unit.³⁵

Under the previous legislation, a tenant could respond to an eviction application by appearing in person before a registrar of the Court and was not required to file a written dispute to be entitled to a hearing on the merits.³⁶

Setting Aside a Default Eviction Order

A tenant can bring an application to set aside a default order within 10 days of issuance of the order. Default orders are mailed to the tenant but the 10-day period starts running from issuance of the order, not receipt of the order.³⁷ The Tribunal has the authority, on the tenant's motion brought on notice to the landlord, to set aside a default order - but only if satisfied that the tenant was not "reasonably able to participate in the proceeding".³⁸ Failure to understand the process is often not accepted as a valid basis for setting aside an eviction order.³⁹ ORHT Interpretative Guideline #13 provides that a respondent is expected to "seek help if they cannot read or understand" the Notice of Hearing.

³⁴ Section 177(2), *TPA*. Note that where the notice is delivered by the landlord before a weekend, the tenant will be unable to obtain legal advice for two or even three days of the response period.

³⁵ Section 192(1), *TPA*

³⁶ *Landlord and Tenant Act*, R.S.O. 1990, c.L.7, Part IV. s. 113(5) ("*LTA*").

³⁷ This can create hardship where an order is for any reason not received by the tenant within the 10-day period. A recent ORHT decision refused to extend the time to file a set aside application in these circumstances: *Northumberland County Housing Corporation v. Craig* (May 27, 2002; Senis); File No. TEL- 27531. This can be contrasted with time period for appealing – 30 days after "being given the order": s. 196(1) *TPA*.

³⁸ Section 192(4), *TPA*.

³⁹ See *Ontario Housing Corporation v. Girard*. There is ORHT jurisprudence to the contrary. See *OHC v. Abdulle* (unreported, Feb. 21, 2000; ORHT File No. SWL-14009-SA-I). However interviews with legal clinic lawyers and Tenant Duty Counsel indicates that failure to understand the process is not often accepted as a sufficient basis for setting aside an order. For this perspective, (unreported, June 29, 1999; ORHT File No. 07638-SA).

Unlike the previous legislation, the *Tenant Protection Act* does not expressly give the Tribunal the authority to consider whether a tenant seeking to set aside a default order has reasonable grounds for disputing the landlord's eviction application.⁴⁰ Interpretative Guideline #13 provides that: "Without such authority, and in the face of the statutory test under subsection 192(4), the Tribunal does not consider that it is appropriate to give any weight to potential merits in deciding the set aside motion".

In the period from June 17, 1998, when the Tribunal opened its doors, to December 31, 2001, 16,196 set aside applications have been brought to the Tribunal, of which all but approximately 80 were brought by tenants. Of the tenant set aside applications, over 16,000 were brought to challenge eviction orders.⁴¹

What Happens to Eviction Applications When the Tenant Files a Written Dispute?

Unfortunately, for the 42% of eviction applications where a tenant does file a dispute within the initial five-day period, ORHT statistics record the process for resolution but not the outcome (i.e. whether eviction is ordered). The ORHT has been criticized for not recording the number of evictions and making that information publicly available.⁴² ORHT, unlike for example the Ontario Labour Relations Board or the Human Rights Commission,⁴³ does not track and report application dispositions. Moreover, unlike other Ontario tribunals⁴⁴ ORHT does not make this information accessible by maintaining a public database of decisions. The statistics available through the Tribunal do not allow us to accurately determine the number of applications that result in an eviction order.

⁴⁰ Section 113(8) *LTA*.

⁴¹ ORHT Workload Report, June 17, 1998 to December 31, 2001.

⁴² *Toronto Report Card on Homelessness, 2001*, p.15.

⁴³ See for example the OLRB 1999/2000 Annual Report, Tables 5, 6, 8 and 9; also the OHRC 2000/2001 Annual Report, Tables 2, 3 and 4.

⁴⁴ The only exception, besides ORHT, is the Social Benefits Tribunal, which also does not make its decisions publicly available.

How Many Applications are Resolved through Mediation?

We do know that relatively few applications overall are resolved through mediation. An operational review of the Tribunal by KPMG Consulting recorded that only 7.4% of applications were resolved through mediation in the first year of operation.⁴⁵ A review of ORHT statistics between 1998 and the end of 2001 indicates that less than 9% of all applications are settled at mediation, but the ORHT Annual Report for 1999/2000, states that 20% of applications are successfully mediated.⁴⁶

Inquiries to the Tribunal did not produce an explanation for this discrepancy, but even a settlement rate of 20% is strikingly low when compared to other Ontario boards. By way of contrast, consider the settlement rate of 88% reported by the Ontario Labour Relations Board in its 1999/2000 Annual Report⁴⁷ or the 70-80% settlement rate at the Human Rights Board of Inquiry in Ontario, which is achieved on top of a settlement rate before the Human Rights Commission of 51%.⁴⁸

What are the Outcomes in Eviction Applications?

As noted above, the ORHT does not record information on the outcomes of eviction applications in its statistical reports and does not have a publicly available database of decisions that would allow outcomes to be calculated. Of approximately 90,000 non-default decisions⁴⁹ issued by ORHT to December 2001, only 289 were available on QuickLaw as of June 17, 2002.

One independent study of ORHT records for the year 2000 by the Centre for Equality Rights in Accommodation (CERA) estimated that 74% of all eviction applications resulted in orders (default or hearing

⁴⁵ KPMG Operational Review, December 9, 1999, pg.16. But see on page 31 of the same report the statement that mediation was only attempted in 24% of cases filed, and was successful in 54% of those files.

⁴⁶ ORHT Annual Report, 1999-2000, pg. 3.

⁴⁷ OLRB Annual Report, 1999-3000, Table 3.

⁴⁸ See Ontario Human Rights Commission annual statistics for 2000/2001, as reported on its website as "Yearend Results".

⁴⁹ Figure taken from ORHT Workload Report, June 17, 1998 to December 31, 2001.

orders) requiring the tenant to vacate his or her rental unit.⁵⁰ This estimated rate of success for eviction applications that are resolved by order is in addition to whatever percentage of applications resulted in mediated agreements to vacate.

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

This picture of the tenant user group as the predominant "loser" in ORHT proceedings highlights the importance of insuring that both the legislation and dispute resolution process are clearly and demonstrably fair to tenants. As delineated below, it is our submission that aspects of the eviction application process do not meet the test of fairness articulated in the Ombudsman Fairness Standards. The process also does not, in our submission, meet the goals of fairness, accessibility and transparency as set by the Ontario Government's Agency Reform Commission.⁵¹

What are the Fairness Issues behind the Eviction Application Statistics?

The following aspects of the eviction application process under the *Tenant Protection Act* place tenants in an unfair and disadvantaged position.

⁵⁰ Study of year 2000 case records for 58,652 ORHT files conducted by Centre for Equality Rights in Accommodation. This figure was calculated based on the number of files in which a final date was recorded in the order.

⁵¹ "Everyday Justice", p. 18.

i) Tenants are Disproportionally Affected by the Default Process

The statistical information available from the Tribunal demonstrates that the default order process has a disparate negative impact on tenants. In our submission, the default order process creates a barrier to justice for tenant parties before the Tribunal. A closer look at how the process operates in practice will demonstrate the basis for this position.

Under the *Act*⁵², a limited number of applications require the filing of written dispute to trigger the right to a hearing. These applications are:

- Landlord applications for termination of a tenancy and eviction;
- Landlord applications for termination and payment of rent arrears;
- Tenant applications against an overholding subtenant;
- Tenant applications for illegal rent paid;
- Tenant applications for consent to assign or sublet lease.

Under s.177(2) and Rule 8, in each of these kinds of application, a respondent, whether a landlord or a tenant, must file a written dispute within 5 calendar days of service of the notice of hearing to avoid a default order. However, the impact of this requirement is not experienced equally as between the two users groups, landlords and tenants. Between June 1998 and December 31, 2001, the Tribunal issued 119,158 default orders against tenants as compared to 204 default orders against landlords. Approximately 118,800 default orders against tenants were eviction orders.⁵³

In 58% of eviction applications, the result for the tenant is a default eviction order received in the mail. In contrast, landlords lose by default order in less than one percent of tenant applications, and when a landlord does lose by default, the order has much less serious consequences: requiring them to repay illegal rent money or to consent to a sublease.

⁵² Section 177(1)

⁵³ ORHT Workload Report, June 17, 1998 to December 31, 2001. Figure includes 2220 combined applications.

The default process works overwhelmingly to the disadvantage of tenant parties before the Tribunal. The requirement that a tenant file a written dispute within five days in order to avoid an immediate eviction order⁵⁴ constitutes a barrier to the ORHT's administrative justice process. The deadline produces an expedited default process that has resulted, since June 1998, in 118,800 tenants losing their housing without the benefit of having been heard by an ORHT mediator or adjudicator.

Although we can assume that a portion of tenants who do not meet the five day dispute deadline are content to walk away from their housing, the high number of set aside applications and the experience of Legal Clinics and Tenant Duty Counsel indicate that thousands more tenant households lose their housing because they do not understand the process and do not appreciate that they have the right to have their landlord's claim mediated and adjudicated.

Moreover, the relatively low levels of debt in arrears evictions (which constitute 84% of all eviction applications) make it apparent that solutions other than eviction are possible. The City of Toronto, through its Social Policy and Research Unit, has done extensive analysis of ORHT orders, both default and hearing orders. For 2001, this analysis demonstrates that the median amount of arrears in eviction orders is \$813 in Toronto; \$745 in Greater Toronto Area excluding Toronto; and \$652 for the rest of the province.⁵⁵

The importance of ensuring an accessible, barrier-free adjudicative process is recognized by the Ombudsman Fairness Standards. The Standards provide that:

Anyone personally affected by the decision who wishes to do so should be able to present his/her point of view, and to respond to facts presented by others which will be considered by the decision-maker.

⁵⁴ See discussion in next section. The last ORHT Annual Report 1999/2000 (p.11) states that default orders were issued "within one or two days of the dispute deadline".

⁵⁵ See *Toronto Report Card on Homelessness 2001*, p.15, where the figure of \$800 is given as a median for City of Toronto. We consulted detailed reports of the Social Policy & Research Unit.

We note also that the accessibility of an adjudication process was identified as the very first key principle of administrative justice in a report prepared by the Society of Ontario Adjudicators and Regulators (SOAR), an organization comprised of members of all of Ontario's agencies, boards and tribunals.⁵⁶ Accessibility is also recognized as one of 8 critical performance goals for adjudicative agencies by the Ontario Government's Agency Reform Commission in its 1998 report.⁵⁷

ii) Efficiency is Valued over the Accessibility and Fairness in the Case Resolution Process

The Tribunal prides itself in the efficiency of its application resolution process, and in particular on the speediness of its default process, which, as we have seen, impacts overwhelmingly on tenant respondents to eviction applications. In its last published annual report, for 1999/2000, the ORHT placed notable emphasis on the efficiency of its processing of applications. The text of the section on "Application Resolution" reads, in its entirety, as follows:

The Tribunal has been successful in resolving applications quickly. On average the Tribunal maintains only one month's receipts as open files. We were even more efficient this past fiscal year. We focused on the files that had no disputes and issued default orders as quickly as possible. Our statistics indicate that over all, we were able to issue default orders within one to two days after the dispute deadline. In addition, we issued most orders within 21 days of the application being filed, and even more complex orders were issued within 23 to 25 days.⁵⁸

In placing such importance on efficiency, the ORHT is following the recommendations of an internal review conducted by KPMG

⁵⁶ See *Principles of Administrative Justice*, Society of Ontario Adjudicators and Regulators, June 1995, pg.9.

⁵⁷ Agency Reform Commission, *Everyday Justice*, p.18.

⁵⁸ ORHT Annual Report, 1999/2000, pg. 11.

Consulting in December 1999. In its report⁵⁹, KPMG urged the ORHT to target a consistent 70% rate of default orders. Neither the KPMG Report nor the ORHT Annual Report, quoted above, acknowledge that the losing party in a default order is almost always a tenant being evicted. Following the KPMG recommendations, the ORHT apparently took steps to increase the speed of its default eviction process by having staff telephone landlords to obtain any missing documentation necessary to support a signed eviction order.⁶⁰ The Government also amended the legislation, as recommended by KPMG, to allow staff, not adjudicators, to sign default orders.⁶¹

Efficiency is also a feature of the process for eviction applications that are scheduled for a hearing (because a written dispute is filed within the five day period). The KPMG report stated that the average length of a hearing was 10 to 15 minutes.⁶² Currently, the scheduling of so-called "express" hearing blocks for landlord eviction applications in Toronto ORHT locations can result in an average hearing time of less than 8 minutes per eviction application.⁶³

It is clear from the Annual Report excerpt above that the ORHT has made the efficiency and timeliness of its process, particularly the default eviction process, its key performance measure. In our submission, this emphasis on efficiency over other factors, such as accessibility and procedural fairness, is not appropriate in delivering an administrative justice process. Further, the emphasis on efficiency is not in keeping with the Ombudsman Fairness Standards in that it fails to show due respect of the "differences, circumstances and needs" of tenant parties before the Tribunal.

It is the experience of Legal Clinics that some tenants who have a complete defence to an eviction application are nonetheless not able to meet the five-day deadline, and end up losing their housing unnecessarily. New immigrants without English language ability, young single parents, elderly and disabled persons are among those

⁵⁹ *Operational Review of the Ontario Rental Housing Tribunal*, December 1999, p. 30-31 and 49.

⁶⁰ This was recommended by the KPMG report at p. 30.

⁶¹ Section 192(1.1) *TPA*.

⁶² KPMG Report, p.35.

⁶³ Based on ORHT schedules.

who are most apt to be unable to file a written dispute within the statutory time period.

We note that the "Service Equity" policy of the Society of Ontario Adjudicators and Regulators (SOAR) also emphasizes the need for adjudicative bodies to be: "accessible to all persons who may require adjudicative services"; "sensitive to the needs and barriers faced by disadvantaged consumers of the agency" and "accountable for fulfilling the fundamental goals of accessibility and equity".⁶⁴

iii) The Default Process Does Not Afford an Opportunity to Review of All Relevant Facts, to Hear the Tenant's Side of the Dispute and to Respond to the Facts Relied Upon by the Landlord

The Ombudsman Fairness Standards state that adjudication decisions should be made after "an adequate and proper review" of "all important facts" and "with due respect for all relevant facts". Further, the Fairness Standards provide that both parties to a dispute should be afforded an opportunity to present their point of view and to respond to the other side. In our view, the current 58% rate of default in eviction applications represents a failure in the case resolution process in that a serious remedy (eviction) is ordered without the losing party having presented their evidence and their side of the situation to a neutral adjudicator.

It is indisputable that a significant number of the non-participating tenant respondents would have been able to achieve a better or fairer result through mediation or adjudication. A better result for a tenant respondent might be reasonable time to pay off arrears, or an agreement to repair damaged property or to refrain from making excessive noise, while preserving the tenancy. The fact that the median level of arrears orders is \$813 or less, according to analysis done of year 2001 ORHT orders across Ontario by the City of

⁶⁴ *Towards Service Equity*, Society of Ontario Adjudicators and Regulators, 1995, pg.1. See discussion in footnote 9.

Toronto,⁶⁵ demonstrates that allowing a reasonable period of time to pay off arrears would allow many tenancies to be preserved.⁶⁶

Notably, because default orders for arrears of rent are based entirely on the written statement on the landlord's application as to the amount owing, the order will not reflect any payments made by the tenant since the application was filed. If the default process straddles two months, the Tribunal typically includes another month's rent in the default order without the benefit of any evidence on this from either party. Interviews with Tenant Duty Counsel suggest that a significant number of default orders are based on an inaccurate over-assessment of the amount of rent owing.

An eviction application process that allowed a tenant in every case to present his/her side of the dispute to an adjudicator, and to have the opportunity to meet with a mediator, would be consistent with the practice of other administrative tribunals in Ontario and would, as compared to the current default process, provide an opportunity for the Tribunal to address the special needs of parties who are disadvantaged.

The current high rate of default orders in eviction applications, and the targeted goal of an even higher default rate of 70%, are in striking contrast to the accepted principles of adjudicative fairness that are premised on the importance of achieving a balanced result based on a full and fair review of all the relevant facts and issues on both sides of a dispute. Moreover, we have seen that, as a practical matter, the high default rate is a performance goal of the Tribunal that benefits landlord applicants and that works against the interests of tenant respondents in the overwhelming majority of cases.

⁶⁵ *Report Card on Homelessness, 2001*, p.15. The City of Toronto has calculated this median figure based on a comprehensive study of ORHT Orders by its Social Policy Analysis and Research Unit. It has looked at orders for the Greater Toronto Area, the City of Toronto and the rest of the province. For 2001, the highest median figure for arrears, according to their calculation, was \$813 for the City of Toronto.

⁶⁶ This would be an even more effective approach if the Ontario Government established a "rent bank" to assist tenants overcome a short-term financial crisis. The City of Toronto operates a limited rent bank to assist tenants facing eviction for arrears.

iv) The ORHT Notice of Hearing Fails to Provide Clear and Understandable Notice to Tenants Facing Eviction

The Notice of Hearing used in eviction applications is prepared by the Tribunal and provided over the counter to landlords who are responsible for delivery to tenants. The contents of the form itself have been problematic. From the day that the Tribunal opened its doors in June 1998 until recent amendments, the Notice of Hearing issued by ORHT was a notably confusing and even misleading document.

The Notice informed the tenant of the date and place of hearing in bold in a large box at the top of the form, and then below that, less prominently, informed the tenant that a hearing would take place only if the tenant filed a written dispute within five days.⁶⁷ If a tenant assumed from the Notice of Hearing that a hearing would take place on the date indicated, and did not understand the requirement to file a dispute, he or she would receive a default order in the mail, usually before the scheduled hearing date, as indicated on the form. The hearing would be cancelled by the Tribunal at the same time as the default eviction order was sent out to the tenant in the mail.

The new Notice of Hearing, issued in February 2002, is considerably improved. However, it is unacceptable that it took the Tribunal almost four years to make substantive amendments to a form that was identified as inadequate by Legal Clinics in the Tribunal's first months of operation. Moreover, the current form is still confusing in that it is entitled "Notice of Hearing", and sets out a hearing date, even though, in the majority of cases, no hearing will in fact take place because of the tenant's failure to file a dispute within five days.

Clearly a better form could be developed that would advise the tenant in plain language that an eviction application has been filed at the Tribunal and that they are required to file a written response within the five day period or face a default eviction order. This form would most simply be called a "Notice of Application for an Eviction Order". We note that the Ombudsman Fairness Standards place importance

⁶⁷ The box with the information about the need to file a dispute was added in 1999.

on ensuring that notices and other information issued by the tribunal are in clear, plain language and written “in a manner to ensure maximum understanding by the persons involved, taking into account any special circumstances.” The Standards specifically require “adequate, proper and timely notice in plain language by the decision-maker”.⁶⁸

The Society of Ontario Adjudicators and Regulators has also emphasized the importance of a clear, understandable hearing process as a fundamental principle of administrative justice:

Administrative justice requires that the adjudicative process be understandable and transparent. An understandable adjudicative process is readily comprehensible to the people who use it.⁶⁹

The ORHT Notice of Hearing still fails to meet this standard, particularly given the diversity of the tenant population, and the fact that few tenants are able to obtain legal advice before the five-day deadline. Only a small minority of tenant respondents retain counsel at any point in the eviction process.⁷⁰

v) The Tribunal is Not Required to Deliver the Notice of Hearing to Tenant Respondents

The *Tenant Protection Act* places responsibility for delivery of the Notice of Hearing on the landlord applicant in eviction applications. This is a very unusual provision in Ontario's administrative justice system. The rules of most, if not all, other adjudicative tribunals require that the notice of hearing be served on the parties by the

⁶⁸ *Fairness Standards*, p.3-4.

⁶⁹ *Principles of Administrative Justice*, p.10.

⁷⁰ ORHT has not published figures establishing the number of tenants who are represented and may not have an estimate based on hearing dockets etc. Through the TDCP, it is estimated that less than 20% of tenants arriving for a hearing are represented by counsel, often Legal Clinic counsel. The number of tenants evicted by default order (58% of eviction applications) who have consulted with counsel is unknown but expected to be very insignificant.

tribunal itself. This is the process established under section 6 of the *Statutory Powers Procedure Act (SPPA)*⁷¹. Currently, section 175(2) of the *Tenant Protection Act* suspends the application of section 6 of the *SPPA* to the ORHT.

As noted above, the Ombudsman Fairness Standards provide for “adequate, proper and timely notice in plain language by the decision-maker”. (emphasis added)

The legislation should be amended to require the Tribunal to deliver the Notice by mail to the responding tenant. This change in process is necessary to ensure that tenant respondents to eviction applications actually receive notice of the eviction application and understand that there is an opportunity to have their dispute mediated and adjudicated.⁷²

Although there is no research data establishing that landlords do not always properly serve tenant respondents, the 58% default rate suggests that a percentage of tenants do not receive the notice at all, or only at the end of the five day notice period. This conclusion is consistent with the high number of set aside applications and with anecdotal evidence from Legal Clinics and Tenant Duty Counsel across the province who regularly advise tenants who appear to have not received the Notice of Hearing.

By not making the Tribunal responsible for delivery of the Notice, the legislation has left the process unnecessarily open to abuse.

⁷¹ R.S.O. 1990, c.S.22.

⁷² We note that this recommendation could even be implemented without legislative amendment, as an adjunct to the current process of delivery by the landlord applicant. In fact, the Tribunal is already moving in this direction to a limited extent. Recent amendments to ORHT rules now make the Tribunal responsible for delivery of the notice of hearing in review applications. See ORHT Rules of Practice, Rule 27, effective February 4, 2002.

vi) The Five Day Dispute Period Does Not Afford Tenant Respondents an Adequate Opportunity to Respond to an Eviction Application

The remarkably short dispute period is the most egregious feature of the default process and requires separate comment. A tenant has only five calendar (not business) days to respond by filing a written dispute to an eviction application delivered by the landlord.⁷³ Filing the dispute generally means that a tenant must attend at an ORHT office or at a Government Document Filing Centre. Although a dispute may be filed by fax, this information does not appear on the Notice of Hearing form.⁷⁴

As we have seen, in 58% of all eviction applications, the tenant fails to file the required written dispute within the statutory five-day period and a default order terminating the tenancy is issued by the Tribunal. The most recent ORHT Annual Report notes that default orders are generally issued on average within one or two days of the filing deadline.⁷⁵

A review of the landlord/tenant legislation in other provinces indicated that only British Columbia has a similar default eviction process with an extendable five-day deadline in arrears cases, and a ten-day deadline in other eviction applications.⁷⁶ The five-day dispute period in the *TPA* is much shorter than other procedural deadlines under Ontario statutes. For example, the Rules of the Small Claims Court provide that a defendant who wishes to dispute a plaintiff's claim has 20 days from the date of personal service, and 40 days after service by mail, to file a defence, failing which the court

⁷³ Section 177(2). Note that where the landlord delivers the notice before a weekend, the tenant will be unable to obtain legal advice for two or even three days of the response period.

⁷⁴ Although the time period for filing a written dispute under the previous legislation was also extremely short (four days), there were two differences that made it less onerous. First of all, a written dispute was not a requirement under the *Landlord and Tenant Act* – a tenant could dispute an eviction application by attending at court on the date stated in the Notice. Secondly, the calculation of time did not include weekends and holidays – a tenant always had four business days to file a written dispute if s/he did not want to attend on the return date of the application.

⁷⁵ ORHT Annual Report, 1999/2000, pg.11.

⁷⁶ R.S.B.C. 1996, c.57, s. 35(2).

clerk is authorized to issue a default judgement.⁷⁷ Significantly, although the response time in a Small Claims Court proceeding is considerably more generous than the position of a tenant facing an eviction proceeding under the *Tenant Protection Act*, the consequences of failure to respond will rarely be as significant as the loss of housing.

In our submission, the five day period is inconsistent with the stipulation in Ombudsman Fairness Standards that notice should be “adequate” and “timely” and that the adjudication process should demonstrate “due respect for differences, circumstances and needs” of the litigants. The inflexible five-day deadline fails to recognize the needs of the diverse population served by the ORHT including, to a disproportionate degree, single mothers, elderly women, immigrants, refugees, non-citizens, and persons with disabilities.

viii) There is No Opportunity for Mediation in the Default Eviction Process

As discussed above, a review of ORHT statistics between 1998 and the end of 2001 indicates that less than 9% of all applications are settled at mediation.⁷⁸ This rate of settlement is strikingly low in comparison with other Ontario tribunals,⁷⁹ particularly given the relatively small sums of money at issue in most applications. The low rate of settlement suggests that the Tribunal does not give priority to its mediation process as a means of resolving applications. This interpretation is consistent with the fact that the default process is seen as the most efficient method of resolving eviction applications.⁸⁰

⁷⁷ O.Reg. 258/98, as amended by O.Reg.295/00; O.Reg.461/01, Rules 9.01(1) and 11.01(1). Where the amount claimed is not a liquidated sum or debt, the matter then goes to an assessment hearing.

⁷⁸ See discussion on p. 12 above. The KPMG Consulting report recorded that only 7.4% of applications were resolved through mediation in the first year of operation. The ORHT Annual Report for 1999/2000, on the other hand, states that 20% of applications are successfully mediated (pg. 3). We were unable to clarify this discrepancy through inquiries to the Tribunal.

⁷⁹ See discussion on page 12. The OLRB for example achieves a settlement rate of 88%.

⁸⁰ As the Tribunal noted in its last Annual Report in the section entitled “Application Resolution”: “We focused on the files that had not disputes and issued default orders as quickly as possible. Our statistics indicate that over all, we were able to issue default orders within one or two days after the dispute deadline.”

There is no opportunity for mediation in the default process. A tenant who fails to file a dispute within the five-day period has no opportunity to seek a resolution through the ORHT's mediation process. This is in contrast to the practice of other tribunals, such as the Ontario Labour Relations Board or the Grievance Settlement Board, both of which give parties an opportunity to speak with a mediator as a matter of course. Significantly, other Ontario adjudicative tribunals have set goals for their rate of settlement, not their rate of default order, and then have successfully designed the mediation process to achieve mutually acceptable agreements in the great majority of cases.

Outside Ontario, at least one other province has made settlement efforts a major focus of its landlord/tenant dispute resolution process. Manitoba's *Residential Tenancies Act* states in its preamble:

..... Manitobans recognize that the small sums of money typically at issue between landlords and tenants, the need for prompt settlement of disputes and the desirability of preserving ongoing harmonious relationships between landlords and tenants require innovative dispute resolution that is fair, informal, accessible, inexpensive, expeditious and amicable.

We also note that the Society of Ontario Adjudicators and Regulators has highlighted the importance of affording parties an informal opportunity to resolve disputes in the following passage:

Administrative justice requires that the adjudicative process provide an opportunity to resolve issues without a formal hearing and be as informal and non-confrontational as the law and subject reasonably permit.⁸¹

In our submission, introducing an opportunity for mediation in all eviction proceedings could significantly enhance the fairness of the process for tenant parties in a manner that is consistent with

⁸¹ *Principles of Administrative Justice*, pg. 12.

Ombudsman Fairness Standards. A mediation process that takes as its starting point the statutory entitlements and responsibilities of both parties could serve as a measure to “redress” the imbalance between landlord and tenant parties in most eviction applications.⁸²

ix) The Mediation Process is not Designed to Facilitate Fair Settlements and to Avoid Evictions Where Breaches Can Be Corrected

In our submission, the ORHT mediation process has not been designed to facilitate a fair and full exploration of settlement options. Unlike under many other legislative regimes, mediation is not offered to all parties as a first scheduled appearance on a separate day from the hearing.⁸³ In eviction proceedings, only a tenant who manages to file a written dispute within the five day period will be given the opportunity to meet with a mediator, and then, only on the same day as the hearing itself. Hearings are scheduled in hearing blocks, and mediators are usually only available to parties during or just before their hearing block. In many parts of the province, mediation is not generally or consistently available, even on the day of the hearing.⁸⁴ The Notice of Hearing form⁸⁵, which the landlord delivers to the tenant respondent, does not include the information that a mediator will be available during the scheduled hearing block.

Although in many cases, the landlord will be familiar with the ORHT mediation process – it is their business – few tenants facing eviction appreciate that mediation is available and could be of assistance in finding a solution other than eviction. Many tenants only learn that mediation is available when they arrive for their hearing and are approached by one of the mediators outside the hearing room.

⁸² Section 181(2) *TPA* provides that mediated settlements can contain provisions that are contrary to the legislation.

⁸³ For example, the Grievance Settlement Board, the Human Rights Board of Inquiry and the Pay Equity Hearings Tribunal all schedule mediation conferences in advance of the hearing.

⁸⁴ Mediators are not generally available in Northern Ontario, where hearings are often by videoconference, or in some smaller centers in the south (e.g. Orangeville).

⁸⁵ We understand that at some ORHT locations the Notice of Hearing are stamped with the message that mediators will be available on the day of the scheduled hearing time.

Frequently the adjudicator must be asked to delay the start of a hearing to give the parties an opportunity to meet with the mediator. If a tenant does successfully manage to sit down to explore settlement options with a mediator, the pressures of a tightly scheduled hearing block, with average hearing durations of 10-15 minutes⁸⁶, allow little opportunity for parties to explore a range of settlement options.

Moreover, in many cases, the tenant will not appreciate the difference between the role of the mediator and that of the adjudicator, especially if their first language is not English or if, as in most cases, they are unrepresented by counsel. Although a Tenant LAO Duty Counsel Program will soon be available at most ORHT locations to give summary advice, there are too few duty counsel to allow for more than summary advice in most cases. The mediation process and the hearing process should be designed to allow a tenant facing eviction to successfully navigate his/her way without counsel.

In urging improvements in the mediation process, we are not suggesting that mediation will always produce a fairer or better result than adjudication, particularly given the power imbalance in landlord/tenant disputes. However, a properly designed and supported mediation process, in which the parties are fully informed of their rights, can offer advantages over adjudication, including predictability and a result that is more fine-tuned to the actual needs of both parties. Currently ORHT mediators are trained to apply an interest-based approach to mediation.⁸⁷ A more appropriate model would recognize the entitlements under the legislation as a starting point for settlement discussions.

Moreover, the practical fact is that, for tenant respondents to eviction applications, the alternative to mediation is currently, in the majority of cases, not a hearing on the merits but a default eviction order

⁸⁶ KPMG Report, p.35.

⁸⁷ ORHT sends its mediators to the Stitts, Feldman courses. A better approach would be to bring in experienced mediators from other tribunals where mediation is conducted in the context of statutory entitlements.

issued when the tenant fails to file a written dispute within the statutory five-day response period. Viewed from this perspective, an improved mediation process could save many tenants from unnecessary evictions, and help both parties to find an acceptable resolution, particularly if accompanied by an adjudicative shift towards an expanded exercise of discretion to relief against eviction.⁸⁸ An improved mediation process would also be consistent with Ombudsman Fairness Standards as a measure that could serve to redress the imbalance between landlord and tenant parties.⁸⁹

x) The Tribunal Does Not Make Available Public Information Materials to Inform Tenants of the Application Process

The availability of plain language information in brochures, pamphlets and guidelines has been identified as an important element of a fair and transparent administrative justice system by the Society of Ontario Adjudicators and Regulators⁹⁰. As we have already noted, the Ombudsman Fairness Standards also emphasize the importance of providing information “in a manner designed to ensure maximum understanding by the persons involved, taking into account any special requirements”. How well do the ORHT public information materials stack up to these standards?

A review of the pamphlets available on the ORHT website is striking in that one finds only one pamphlet written primarily for tenants (“Termination of Tenancy by a Tenant”) and no pamphlets written to assist tenants in understanding how to respond to a landlord’s

⁸⁸ Another support for settlement would be a “rent bank” to assist tenants by bridging short term financial difficulties, such currently offered, in a limited form, by the City of Toronto.

⁸⁹ Currently, the low settlement rate also reflects the absence of a shared basis for settlement in many landlord/tenant disputes under the present statutory regime for rent regulation. The vacancy decontrol provision in section 124 of the *Tenant Protection Act* creates a significant disincentive to settle. Prior to the introduction of vacancy decontrol, when there was no right to raise rents freely upon vacancy, Legal Clinics could more often negotiate the withdrawal of an eviction application on the basis of, for example, a repayment schedule for arrears or the repair of minor property damage. Before vacancy decontrol was introduced, there was a shared basis for negotiating mutually-satisfactory settlements. Repeal of the vacancy decontrol provision would rebalance the competing interests of landlords and tenants at the mediation table, and support a renewed interest in settlement options on the part of landlords.

⁹⁰ *Principles of Administrative Justice*, p.3.

application, notwithstanding that tenants are respondents in 91% of ORHT cases.

There are a few ORHT pamphlets with information that could assist both landlords and tenants (e.g. "Fees for Applications"; "Rules About Rent"; "Mobile Homes"; "Care Homes"; "Administrative Fees"; "Maintenance and Repairs"). Several pamphlets are written primarily for landlord applicants (e.g. "Terminating a Tenancy"; "Reasons for Terminating a Tenancy by a Landlord" "Terminating a Tenancy in a Care Home"; "If a tenant doesn't pay rent".). Surprisingly, there is no pamphlet entitled "If Your Landlord Applies for an Eviction Order" or "If Your Landlord Locks You Out of Your Rental Unit".

Even more remarkable is the fact that a tenant will look in vain in ORHT pamphlets and brochures, available in paper copy and through its website, for information that explains the need to file a dispute within five days in avoid a default eviction order. In fact, some of the information provided by the Tribunal through its website has been misleading or incorrect in this respect. In the currently unavailable "Frequently Asked Questions" section, the answer to the question "What is the process for evicting a tenant?" stated that "A tenant will always have an opportunity to present arguments against the eviction at a hearing", making no mention of the need for a written dispute.

The "Frequently Asked Questions" section was removed from the ORHT website in October 2001 and has not been re-posted in revised form. However, a careful review of the brochures and pamphlets section reveals that the need to file a dispute is noted, but the short timeframe of 5 days is not mentioned. Even the pamphlet entitled "Filing an Application", does not tell a tenant reader that there is only a five day dispute deadline; it mentions that there is a deadline but does not say what it is. By way of contrast, one finds that all the timeframes for landlord applications are set out clearly in the informational pamphlets dealing with eviction procedure, such as "If a tenant does not pay rent" and "Reasons for Terminating a Tenancy by a Landlord".

The pamphlet on the mediation process is also misleading. Entitled "Mediation" and available on the ORHT website, the pamphlet does not inform a tenant that there will be no opportunity to go to mediation in an eviction proceeding unless a written dispute is filed within the five day period. The pamphlet states:

"When an application is filed with the Tribunal, a mediator may telephone the landlord and tenant to see if they want to try to resolve their dispute informally through mediation. If both agree, the mediator will meet with the landlord and tenant to discuss the problem and, hopefully, help them reach an agreement which is acceptable to both of them".

The pamphlet also states that: "Mediation does not delay the hearing. If there is no agreement, the hearing will take place as originally scheduled".

Nowhere in the pamphlet does it state that a tenant responding to an eviction application (86% of all applications) will not be given the opportunity to participate in mediation unless she/he files a written dispute within 5 calendar days of receiving the notice of hearing. If a tenant facing eviction obtains a copy of the pamphlet and reads it, they might well expect a telephone call from a mediator. The reality is that such calls are not made in eviction cases, before or after the dispute deadline.

We have already noted the research⁹¹ that establishes that the persons identified with a prohibited ground of discrimination under the *Human Rights Code* are over-represented among low-income tenants. Social assistance recipients, single mothers, elderly women, refugees, immigrants, non-citizens, persons with disabilities and youth are all well represented among the tenant population named as respondents to ORHT proceedings. It is thus extremely important that informational materials be drafted to "maximize understanding"

⁹¹ Ornstein, M. *Income and Rent*, York University, October 1994.

and to take into account special needs, in accordance with Ombudsman Fairness Standards. Instead, the ORHT pamphlets and brochures are unhelpful to tenant respondents and in some instances are even misleading.

Finally, we note that ORHT pamphlets are not readily available to tenants who often will not have access to the Internet. Other tribunals have a practice of mailing informational materials to unrepresented parties with the notice of hearing, explaining how the hearing process works or what to expect at mediation.⁹² The ORHT does not mail pamphlets and brochures, or even, as we have seen, the notice of hearing itself, to the parties. Moreover, in some ORHT hearing locations, ORHT pamphlets and brochures are not on display or available for pick-up at the counter.⁹³

It would be fair to say that this almost complete absence of useful information for tenants facing eviction, when considered together with the confusing Notice of Hearing, only recently improved, and the extremely limited 5 day response time, casts the 58% rate for default for tenant respondents in a disturbing light.

xi ORHT Decisions are Not Fully Available to the Public

There is no public database of ORHT decisions. As noted above, of approximately 90,000 non-default decisions⁹⁴ issued by the Tribunal to December 2001, only 289 were available on Quicklaw as of June 17, 2002, four years to the day after the Tribunal began operations. Further, even the posted decisions are not necessarily consistent with the body of caselaw developed by the Tribunal. The decisions sent by the Tribunal to Quicklaw are simply chosen by individual adjudicators as "significant or interesting" in their own view⁹⁵. It is

⁹² For example, the Office of the Information and Privacy Commissioner, Pay Equity Hearings Tribunal and the Human Rights Board of Inquiry.

⁹³ In the Toronto North ORHT hearing offices, there are no ORHT pamphlets or brochures on display. In a random check, we found that there were no ORHT pamphlets available for ORHT sittings in Halton, and none on display in the Government Information Centre in Sarnia, where ORHT applications and disputes can be filed.

⁹⁴ Figure taken from ORHT Workload Report, June 17, 1998 to December 31, 2001.

⁹⁵ See the description of the 'scope' of the database published by QuickLaw.

not possible to assess whether the posted decisions represent current adjudicative wisdom at the ORHT.

A recent ORHT publication, issued in February 2002, provides a summary of "Selected Decisions" from June 17th 1998 to June 30th 1999. It is disappointing that the Tribunal would issue this publication over 2½ years after release of the most recent decision summarized in the collection. Moreover, the 42 decision summaries included represent a minuscule portion of the more than 90,000 non-default decisions issued to date by the Tribunal. If a member of the public wants a copy of the full text of any of the decisions summarized in this publication, it must be purchased from the Tribunal. The practice is to charge a photocopying fee, now at \$1.00 per page, for any such request. This should be contrasted with the practice of other tribunals, such as the Office of the Information and Privacy Commissioner and the Workplace Safety and Insurance Appeals Tribunal, that make decisions available free of cost through a fully searchable database on their own websites.

The failure to make decisions fully available to the public is both a highly unusual circumstance and a worrying one. It is a basic principle of the rule of law that the law must be knowable. In addition to the Workplace Safety and Insurance Appeals Tribunal, and the Office of the Information and Privacy Commissioner in Ontario, many other Canadian tribunals, such as the Canadian Human Rights Tribunal and the British Columbia Human Rights Tribunal, go to great lengths to make all their decisions fully available and searchable on their own websites.

If we consider labour tribunals across the country, for example, we find that the practice is typically to make all decisions available through publishers and commercial online research services. Smaller Ontario tribunals, such as the Pay Equity Hearings Tribunal, publish all decisions in a free internal publication⁹⁶, in addition to making decisions available through commercial publications and online research services.

⁹⁶ Pay Equity Reports.

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

But even apart from the need for a decision database to support both litigation and research use, there is another reason why full public availability of ORHT decisions is important. An adjudicative body is responsible for developing a coherent body of jurisprudence.⁹⁷ The Ombudsman Ontario has recognized this in its definitional guide, which states that an adjudicative decision may be considered "unreasonable" if it is "inconsistent with other decisions which involve similar facts or circumstances".⁹⁸

The Code of Professional and Ethical Responsibilities published by the Society of Ontario Adjudicators and Regulators underlines this in the following passage under the heading "Decision-Making Responsibilities":

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

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

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

⁹⁸ *Fairness Standards*, p.6.

previous tribunal jurisprudence and the need for a degree of consistency in the interpretation of the law.⁹⁹

A tribunal that does not compile a fully searchable and public collection of all substantive decisions is not only not accountable to the public through scrutiny of its decision-making, but cannot be accountable to itself in developing a coherent and internally consistent body of interpretation of its own statute. Such a tribunal is free to be capricious in its interpretation of its statute. At the very least, the ORHT is vulnerable to criticism that it is inconsistent in its jurisprudence and cannot answer that criticism.

xi) The Tribunal Does Not Appropriately Exercise Its Discretion to Refuse to Order Eviction

Under subsection 84(1)(a) of the *Act*, the Tribunal has the discretion to refuse to evict “unless satisfied, having regard to all the circumstances, that it would be unfair to refuse” to do so. Under subsection (1)(b), the Tribunal also has discretion to order that enforcement of an eviction order be postponed for a period of time.

Although it is impossible, in the absence of a database of decisions, to know with certainty the extent to which the Tribunal is exercising its discretion to refuse to evict in appropriate circumstances, a survey of Ontario legal clinics in early 2001 confirmed a significant degree of dissatisfaction¹⁰⁰ with the manner in which the Tribunal exercises its discretion to refuse to grant an eviction order. The Tribunal seems to proceed on the basis that a landlord is entitled to an eviction order if he or she can prove that the tenant has breached an obligation under the *Act*, almost regardless of the seriousness of the breach.

⁹⁹ Laird, K. and Cottle, C. *A Model Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals*, Society of Ontario Adjudicators and Regulators, October 1996, p.13.

¹⁰⁰ Survey was conducted by the Advocacy Centre for Tenants Ontario. Thirty-six legal clinics across the province responded. 75% of responding clinics identified the reluctance of the Tribunal to exercise s.84 discretion as one of the top three highest priorities for ORHT reform.

This apparent reluctance of the Tribunal to actively exercise its discretion is contrary to the weight of jurisprudence under the previous legislation, the *Landlord and Tenant Act*. The courts have been more willing to exercise discretion by balancing the seriousness of the tenant's alleged breach against the severity of the remedy of eviction.¹⁰¹

In contrast, ORHT adjudicators have at times been remarkably unwilling to refuse or postpone eviction in appropriate circumstances, notwithstanding direction to the contrary from the Divisional Court.¹⁰² For example, in a decision released March 13, 2002, an adjudicator made the following determination:

It would be unfair to the Landlord to refuse the application for eviction. The Tenant is an elderly man, in poor health, and living on a disability pension. In the circumstances, it is appropriate to postpone enforcement of the order of eviction until after March 31, 2002. There are no special circumstances that warrant postponement of enforcement of the order of eviction beyond March 31, 2002.¹⁰³

It is worth noting that the Tribunal routinely allows a 10-day period before an order becomes enforceable, so that the postponement from March 13th to March 31st represented only an 8 day extension. This is clearly insufficient time to find new accommodation, particularly given the difficult personal circumstances of the tenant.

Housing rights organizations have noted the failure of ORHT adjudicators to exercise their discretion to not evict in a manner which recognizes the personal circumstances of a tenant facing a

¹⁰¹ See *Re Peel Non-Profit Housing and McNamara* (1991), 2 O.R. (3d) 414 (Div. Ct.) [CRO No. LLT-290]; *586903 Saskatchewan Ltd. v Dube Investments Ltd.*, [1994] SJ No. 470 (Sask. CA) [unreported]; *Re Rexdale Investments Ltd. And Gibson*, [1967] 1 O.R. 251 (CA).

¹⁰² See *Luray Investments v. Recine-Pynn*, [1999]O.J. No.3643 (QL) (Div. Ct.); *Clandfield v. Queen's University* (2001), 54 O.R. (3d) 475 (C.A.)

¹⁰³ *Victoria Park Community Homes v. Liszek* (13 March 2002; Gregory) File No. SOL- 29889 (ORHT).

shortage of affordable housing if evicted. For example, the Centre for Equality Rights in Accommodation (CERA), in a final report to the City of Toronto in respect of a city-funded eviction prevention project, contrasted the ORHT's seemingly routine issuance of eviction orders for arrears of rent with the much slower, more measured approach of lending institutions when a mortgage or other financing payment is missed.¹⁰⁴ CERA submitted that, just as foreclosure and repossession are remedies of last resort for financial institutions, the ORHT should exercise its discretion to relieve against eviction in appropriate arrears cases so that eviction is also a remedy of last resort.

We cannot emphasize too strenuously the fact that many evictions could be avoided if the Tribunal was willing to exercise its discretion in appropriate cases. In many cases, solutions are available that would meet the needs of the landlord while allowing the tenant to remain in the housing. Given that 84% of all evictions applications before the ORHT are for arrears, and that 50% of arrears eviction orders are for amounts of \$800 or less¹⁰⁵, there is every reason to think that many applications could be resolved through an ordered repayment schedule. Moreover, if such orders became more common, it would encourage parties to negotiate repayment agreements in mediation.

xii) ORHT Application Fees Create Barriers to Justice for Low Income Tenants

The ORHT has announced new application fees effective July 2002 for landlord applications. The increase in fees is from \$60 to \$150. This fee increase creates a barrier to justice for low-income tenants because tenants reimburse landlords for these fees to avoid eviction.

¹⁰⁴ Early Intervention Pilot Project, Final Report, April 2000, pg. 16.

¹⁰⁵ *Report Card on Homelessness*, 2001, p.15. The City of Toronto has calculated this median figure based on a comprehensive study of year 2000 ORHT Orders. The Social Policy and Analysis and Research Unit has since looked at 2001 orders for the Greater Toronto Area, the City of Toronto and the rest of the province. The highest median figure for arrears, according to their calculation, was \$813 for the City of Toronto. For the GTA excluding Toronto, the median arrears in eviction orders was \$745 and \$652 for the rest of the province.

Under the *Tenant Protection Act*, an eviction order for arrears can be discontinued if the tenant pays the rent owing and the landlord's application fee prior to an order becoming enforceable.¹⁰⁶

Legal Clinics are concerned that the higher fees will mean that fewer of our financially disadvantaged clients will be able to find the necessary funds to retain their housing. A primary focus of our legal work is to assist tenants to negotiate a payment plan that satisfies the rent debt and covers the landlord's application fee. Legal Clinics wrote to the Minister of Municipal Affairs and Housing before the recent increases were announced to urge the Ministry to abandon plans to increase the application fees.

It is our submission that the increase in application fees fails to meet the requirement in Ombudsman Fairness Standards that the adjudication process be "sensitive to the economic reality" of people with limited financial resources. Further we submit that the requirement of substantial fees is not in keeping with the expectation in the Fairness Standards that "due respect" be shown to the "circumstances and needs" of affected parties. In 84% of all eviction applications, the respondent is a tenant in arrears of rent and in financial difficulty, without the ability to readily absorb the landlord's \$150 filing fee.

Other tribunals where Legal Clinics appear do not have filing fees that are paid or transferred to our clients. Examples include: the Workplace Safety and Insurance Appeals Tribunal, the Ontario Labour Relations Board, the Human Rights Board of Inquiry, Social Benefits Tribunal, the Criminal Injuries Compensation Board and the Pay Equity Hearings Tribunal.

The increased fees mean that fewer tenants will have the financial resources to absorb the application fee, in addition to arrears of rent, with the result that more eviction orders will be executed across the province. The larger picture is that there will be more tenants seeking emergency housing, a greater need for temporary shelters

¹⁰⁶ Section 72(4) *TPA*

particularly in urban centers, more dislocation and hardship for low-income tenants who will be forced to compete for affordable housing in a very tight rental market.

The \$75 fee that tenants and landlords have to pay to request an internal review of an ORHT decision is also an issue. The internal review process allows a party to ask the ORHT to take a 'second look' at an order when there is evidence that a serious error has been made in the initial decision. The filing fee for a review was increased from \$25 to \$75 in May 2000. This increase has impeded the ability of low-income tenants to initiate an internal review.

We note that the Society of Ontario Adjudicators and Regulators has considered affordability as an administrative justice issue in the following passage from its publication on the basic principles of administrative justice:

Persons should not be barred from initiating or completing the adjudicative process due to limited financial resources.¹⁰⁷

SECOND AREA FOR INVESTIGATION BY OMBUDMAN:

II Process for Restoring a Wrongfully Evicted Tenant to Possession

A tenant who has been wrongfully locked out of his/her housing is in an emergency situation. Under section 35(3) of the *Act*, the Tribunal can order a landlord to allow a tenant to recover possession, but only if satisfied that the unit has remained vacant. This makes it vital that a tenant be in a position to bring an emergency application quickly. A delay may give the landlord an opportunity to re-rent the unit.

¹⁰⁷ *Principles of Administrative Justice*, p. 11.

The Tribunal has not established an accessible and efficient process to be used by a tenant who has been wrongfully locked out by a landlord.¹⁰⁸ The Tribunal's *Rules of Practice*, Interpretation Guidelines, Application Resolution Manual and Procedures Manual¹⁰⁹ fail to establish a clear and understandable process for an emergency lock-out application. The process is virtually incomprehensible based on a reading of the relevant passages of each of these publications. The passages fail to deal directly with the situation at issue and fail to establish straightforward and clear procedures to be followed.

Further, there is no pamphlet or other plain language material that sets out the steps to be taken in this kind of application. This is in marked contrast with the materials available on the website and in pamphlets to assist landlord applicants.¹¹⁰

There is no specific application form designed for an emergency tenant application. The only form that a tenant can use to get the process expedited, by shortening the time for service, is confusing on its face and designed for other purposes. The form fails to provide an appropriate check off box for this purpose among the several check off boxes on the form. A tenant using the form is required to handwrite on the form that he or she is requesting that the time for service on the landlord be shortened to allow an earlier hearing date. There is nothing in writing in any materials published by the Tribunal that would tell a tenant how this form could be used or why it might be advisable to use this form to obtain an order shortening the usual time for service.

A landlord who locks a tenant out of their housing, has resorted to unlawful self-help tactics and may also be capable of moving in a new occupant on a temporary basis simply to prevent the Tribunal from restoring the tenancy. Moreover, a locked out tenant will be without

¹⁰⁸ This issue was raised with the Tribunal at a meeting with the Chair and staff on November 28, 2001, as well as in a meeting with senior ORHT and Ministry of Housing staff on February 13, 2002. We were given no indication that amendments would be considered and followed up in detailed correspondence sent on March 27th to senior staff and on April 17th, 2002 to the Chair. At a meeting on June 6, 2002, staff indicated that revision of the Rules and internal manuals would be considered.

¹⁰⁹ See memo and correspondence attached to this submission.

¹¹⁰ See for example the ORHT pamphlets entitled "If a tenant does not pay not pay rent" or "Reasons for Terminating a Tenancy by a Landlord"

all of his/her belongings and obviously will incur expenses in finding other accommodation, clothing etc. The low-income tenants represented by Legal Clinics often have to stay in a shelter or with friends if they find themselves in this situation.

An efficient and straightforward application resolution process is required to serve the needs of a tenant seeking to re-establish their lawful tenancy. Ombudsman Fairness Standards provide that the process should show “due respect” for the “circumstances and needs” of the locked-out tenant. In accordance with Fairness Standards, a straightforward and transparent process should be established that recognizes the urgency of the situation and the likelihood that a tenant applicant will have only limited financial or personal resources. Further, informational materials should be available that describe the process to be followed by tenant applicants in clear language designed for “maximum understanding”.

Finally, a tenant who manages to successfully obtain an order restoring his/her possession of their housing, faces a final barrier at the Sheriff's office. Regulations under the *Administration of Justice Act* do not allow the Sheriff to waive the fee of over \$300 for restoring a tenant to possession. This is the same fee that a landlord pays when the Sheriff is evicting a tenant by ORHT order. A tenant with limited income may be unable to find the money to cover the Sheriff's fee, particular if their cash is locked up in the apartment to which they need access. The *TPA* and the regulations under the *Administration of Justice Act*¹¹¹ should be amended to give the Tribunal discretion to require the Sheriff to waive the fee. This amendment would be consistent with Ombudsman Fairness Standards in recognizing that persons with limited financial resources should not be at a disadvantage in securing their rights.

¹¹¹ R.S.O. 1990, c.A.6, s. 5; O.Reg 217/00, s.1(1).

THIRD AREA FOR INVESTIGATION BY OMBUDMAN:

III Rent Increases Based on One-time Increases in Cost of Utilities

The *Tenant Protection Act* allows landlords to raise the rents in three ways: by an unregulated amount when a unit is re-rented to a new tenant¹¹²; by the percentage set by the Ministry rent increase guideline on an annual basis¹¹³; and by making an application for an above-guideline increase.¹¹⁴ The provisions in the *Act* for the treatment of above-guideline rent increases based increased costs for utilities are, in our submission, unreasonable and unjust within the meaning of section 21 of the *Ombudsman Act*. The recent experience of skyrocketing natural gas prices in the winter of 2000/2001, and their subsequent decline to 1999 price levels, has demonstrated a fundamental unfairness in the treatment of rent increase applications based on temporary increases in utility costs.

Natural gas prices rose dramatically during 2000, reaching a peak in December 2000 and January 2001. The average price during the year 2000 was about 70% higher than 1999's average price. In December 2000 the average price for natural gas rose 40% from November 2000 and in January 2001 gas prices increased again by 63% from December 2000. The increase in gas prices was the result of an unprecedented combination of events affecting the demand and supply of natural gas. These prices had returned to 1999 levels by August/September 2001.¹¹⁵

When the cost of utilities decreases, a tenant has no remedy. Unlike the previous legislation, the *Rent Control Act, 1992*¹¹⁶ the current *Act* contains no provision for a tenant to apply for a rent reduction on the basis of decreased utility costs experienced by his/her landlord.

¹¹² Section 124, *TPA*.

¹¹³ Section 129, *TPA*

¹¹⁴ Section 138, *TPA*

¹¹⁵ See the Affidavit of Tom Adams in the appendices to these submissions. The Affidavit was filed before the ORHT in a case currently before the Divisional Court.

¹¹⁶ S. 24(1), *Rent Control Act*, S.O. 1992, as amended.

For greater clarity, the calculation of guideline and above-guideline increases is outlined below.

i) Guideline Rent Increases

The guideline rent increase is calculated each year by the Ministry of Municipal Affairs and Housing. The guideline is the sum of two parts: (1) the first part changes annually and is intended to pay for increases in the cost of running a building and (2) the second part is a constant amount of 2%.¹¹⁷

The first part of the calculation of the guideline rent increase is based on a Rent Control Index (RCI). The RCI is comprised of operating cost categories ("cost categories"). Individual cost categories are weighted to account for the individual importance of each cost category in the typical operating costs of a landlord. The increase in each of the cost categories is averaged over three years to produce a three-year moving average. There are eight operating cost categories: insurance, heating, hydro, water, municipal taxes and charges, administration, maintenance and miscellaneous.¹¹⁸

In 2001, the first part of the guideline rent increase was 0.9%. In 2002, the first part of the guideline is 1.9%. The major reason for the 1% increase in 2002 was the increased gas heating costs faced by communities across Canada in the winter of 2000-2001.¹¹⁹

In 2001, the three- year moving average for heating was 5.44%.

ii) Above- Guideline Rent Increases

A landlord may apply to the Tribunal for an above-guideline rent increase where there has been an "extraordinary" increase in the cost for municipal taxes and charges or utilities or both for the residential

¹¹⁷ S.129(2) TPA

¹¹⁸ O. Regulation 455/00, Table of Operating Cost Categories for 2001

¹¹⁹ Ministry of Municipal Affairs and Housing, News Release, August 27, 2001; Ontario Rental Housing Tribunal, Year 2001 Rent Increase Guideline

complex. An “extraordinary”¹²⁰ increase is defined to be any increase greater than the percentage increase set out in the corresponding cost category in the *Table of Operating Cost Categories* (“TOCC”).¹²¹

Under the current legislation, an application based on an increase in operating costs must show that there has been an extraordinary increase over two successive accounting periods. The landlord uses the two most recently completed calendar years that end 90 days before the first effective date of the application. Accounting periods are made up of a *base year* (the most recently completed year immediately preceding the day that is 90 days before the effective date of the rent increase) and a *reference year* (the year immediately before the base year). An application must be accompanied by evidence of the costs for the base year and the reference year and by evidence of payment of those costs.¹²²

Subsection 138(6) provides that the Tribunal shall make findings in accordance with the prescribed rules. The prescribed rules for making findings related to extraordinary increases in the cost for utilities are set out in s. 24, 26 and 27 of O. Regulation 194/98. The amount of the allowance for an extraordinary increase in the cost for utilities is to be calculated by applying the following formula:

- (1) Multiplying the reference year costs by the three- year moving average for the operating cost category for the calendar year in which the effective date of the first intended rent increase referred to in the applications falls;
- (2) Subtracting the amount in (1) from the base year costs;

¹²⁰ Under the *Rent Control Act, 1992*, an increase had to meet a threshold of 50% to be considered “extraordinary”: Section 14(2), *RCA*.

¹²¹ *Tenant Protection Act*, s. 138(2) and (6); *O. Regulation 455/00*, *Table of Operating Cost Categories*, 2001.

¹²² *O. Regulation 194/98*, s. 18, para. 1; Ministry of Municipal Affairs and Housing. “*Proposed Regulations under the Tenant Protection Act*” Draft - January 28, 1998 at 29.

- (3) Multiplying the amount in (2) by the factor determined under ss. 17(2);
- (4) Dividing the amount in (4) by the total rents; and
- (5) Multiplying (5) by 100.¹²³

iii) *Panorama Court: Example of Above-Guideline Rent Increase Application*

To illustrate how this formula operates, we will use as an example a recent ORHT decision now under appeal to the Divisional Court: *Hilltop Heights Developments v. Tenants of 50 Panorama Court*¹²⁴ ("Panorama Court").

The decision in *Panorama Court* involved an application by the landlord for an above-guideline increase based primarily on increased heating costs, filed on August 29, 2001. By August/September 2001, natural gas prices had returned to 1999 levels but the three-year moving average for heating in 2001 was 5.44%. The Tribunal calculated the landlord's above-guideline increase to be 3.38% as follows:

(a) HEAT

- (1) Reference Year Costs (\$107,350.83) X three year moving average (5.44%) = 5,839.88 and add 107,350.83 and 5,839.88 = 113,190.71;
- (2) Subtract 113,190.71 from Base Year Costs (\$198,914.88) = 85,724.16;
- (3) Multiply 85,724.16 by 1 (223/223) = 85,724.16;

¹²³ *O. Regulation 194/98*, s. 24, para. 2, 26(1).

¹²⁴ (January 29, 2002; Moore) File No. TNL-29979 (ORHT)

(4) Divide 85,724.16 by 12 by total rents (219,665.63)
= .0325;

(5) Multiply .0325 x 100 = 3.25%.

(b) HYDRO

(1) Reference Year Costs (\$207,180.46) x 3 year moving average (0.31%) = \$642.26 and add 207,180.46 and \$642.26 = \$207,822.72;

(2) Subtract 207,822.72 from Base Year Costs (\$213,440.74) = \$5,618.02;

(3) Multiply \$5,618.02 by 1 (223/223) = \$5,618.02;

(5) Divide \$5,618.02 by 12 by total monthly rents (219,665.63) = .0021;

(6) Multiply .0021 x 100 = 0.21%.

(c) WATER

(1) Reference Year Costs (64,885.95) x 3 year moving average (1.65%) = 1,070.62 and add \$64,885.95 and \$1,070.62 = \$65,956.57;

(2) Subtract \$65,956.57 from Base Year Costs (\$63,755.71) = -\$2,200.86;

(3) Multiply -\$2,200.86 by 1 (223/223) = -\$2,200.86;

(4) Divide -2,200.86 by 12 by total monthly rents (219.665.63) = .0008;

(5) Multiply .0008 by 100 = - .08%.

The landlord's actual out-of-pocket increase in utility costs from the reference year to the base year was \$97,824.33 for heat (\$91,564.05) and hydro (\$6,260.28), based on the figures agreed to by the parties and accepted by the Tribunal. There was a small decrease in water costs. Given that the landlord will be entitled to a rent increase of 7.28% in 2002 (calculated by adding the 3.9% guideline plus the 3.38% Tribunal-ordered rent increase above the guideline), and given that the landlord has a gross monthly rent of \$219,665.63, the landlord will recover \$15,991.66 per month in additional rent as a result of the Tribunal's decision.

To further illustrate the point, the landlord will have collected, over the next 12 months, \$191,899.89 in additional rent, far outstripping the actual difference in reference and base year operating costs of \$97,824.33. Further, the landlord will recover this amount every subsequent year, in addition to guideline rent increases. The effect of the Tribunal decision, in applying the formula in the Regulation, is to pass through a large and ongoing windfall to the landlord, even though the actual increased operating costs are no longer being borne due to the decline in the commodity cost of natural gas.

The result is that the landlord will be permitted to collect an excessive increase in rental revenues, above and beyond the sum necessary to allow for full recovery of one-time out-of-pocket costs.

iv) How to Address the Unreasonable and Unjust Result

In the particular case described above, we are asking the Divisional Court to overturn the Tribunal's decision on the basis that the adjudicator had the discretion, under section 188 of the *Act*, to consider the real circumstances of the landlord's costs. However, it is our view that statutory amendments would be the most appropriate and effective way to address the unreasonable and unjust results that follow from the application of the current formula to temporary increases in the costs of utilities.

We are asking the Ombudsman to find that the current provisions in the *Act* and regulations governing the treatment of increases in the cost of utilities are unreasonable and unjust under section 21(1)(b) of the *Ombudsman Act*. Further, we are asking the Ombudsman to recommend to the Government of Ontario that amendments be made to the legislation and regulations to address this inequity.

WHAT CHANGES COULD THE GOVERNMENT AND THE TRIBUNAL BE ASKED TO MAKE WITHOUT LEGISLATIVE AMENDMENTS?

A number of the fairness issues addressed in this submission can be rectified without legislative change. We are asking the Ombudsman to consider recommending that the following steps be taken to bring the procedures under the *Tenant Protection Act* into line with the Fairness Standards.

1. New Notice of Eviction Application

The ORHT should prepare a new notice for all tenant respondents to eviction applications. The notice would advise tenant respondents that they had five days after receiving the Notice of Hearing from their landlord to file a written dispute with ORHT. The notice would explain how to file the dispute and give the fax number for doing so. The notice would clearly explain that the tenant is entitled to have the eviction application mediated and adjudicated by the ORHT.¹²⁵

¹²⁵ The Centre for Equality Rights in Accommodation and various Legal Clinics and community groups current participate in an “Early Intervention Eviction Prevention Program” which mails this kind of information to tenants in several locations across the province. The program is operated through a mixture of volunteer labour, donations and agency and municipal funding. Senior ORHT staff acknowledge the value of this program and have estimated that a majority of tenants facing eviction receive some explanation of the eviction process in this way. This figure may not be accurate. In any event, it is completely inappropriate that the ORHT rely on Legal Clinic and volunteer labour, and other source funding, to do the work that the Tribunal should be doing itself.

2. Mail New Notice of Eviction Application to Tenant Respondents

The ORHT should adopt the practice of mailing the new Notice of Eviction Application to all tenant respondents to eviction applications. This would ensure that every tenant received the important information contained in the new notice.

3. New Informational Materials for Tenant Parties

The ORHT should develop pamphlets and brochures to assist tenant parties by making its procedures clear and understandable. For example, the ORHT could publish and make readily available pamphlets that inform tenant parties of relevant ORHT procedures. This would balance the pamphlets currently available that primarily assist landlord applicants. For example, pamphlets should be available that explain the process for defending an eviction application and the process for making an emergency application to regain lawful possession of housing.

4. Reduction in Application Fees

The Ministry of Municipal Affairs and Housing should reduce the fee for eviction applications and for internal reviews to a nominal amount. Alternatively, the legislation could be amended to provide that the tenant is not required to pay the landlord's application fees except in exceptional circumstances.

5. Better Training for Adjudicators in Discretionary Relief

The quality of ORHT adjudication varies significantly but for present purposes a starting position would be that adjudicators receive better training in respect of the exercise of their discretion to refuse to evict in appropriate circumstances.

6. Establish a Full Database of ORHT Decisions

The Ontario Government should provide the funding to allow ORHT to quickly bring on line on its website a full searchable database of decisions.

7. Establish a Transparent and Accessible Process for Tenants Wrongfully Locked Out of Housing

The ORHT should make revisions of its *Rules of Practice, Applications Resolution and Procedures Manuals, Interpretation Guidelines and Forms* to a clear and understandable process for emergencies tenant applications when a tenant is locked out of their housing.

8. Offer Mediation in Advance of Hearing Date in Disputed Eviction Applications

The ORHT should start to follow the practice set out in its mediation pamphlet and have mediators phone the parties in all disputed eviction applications. Where the parties are willing to discuss a possible settlement, the mediator could play a "shuttle" role or convene a meeting in person or by conference call in advance of the hearing.

The mediation process should be moved from its current interest-based perspective to a model that recognizes that tenant parties have statutory protections that should only be bargained away with full knowledge and for appropriate compensation.

WHAT CHANGES REQUIRE LEGISLATIVE AMENDMENTS?

Legislative changes are necessary to bring procedures under the *Tenant Protection Act* into line with Ombudsman Fairness Standards. We are asking the Ombudsman to consider recommending the following legislative amendments to the Ontario Government.

9. Removal of Default Eviction Process

Loss of housing is a serious remedy and should not be ordered without the affected tenant having a fair opportunity to have their landlord's application mediated and adjudicated.

Amendments should be made to allow a Notice of Non-Dispute to be filed by a tenant who has no interest in maintaining a tenancy. Incentives could be created for this by providing that no application fees would be recoverable if the Notice was filed by a set date.

10. No Requirement to File a Written Dispute

Every eviction application should be scheduled for a hearing unless the tenant files a Notice of Non-Dispute. There should be no requirement to file a written dispute within five days.

Alternatively, ORHT could schedule a mediation/prehearing conference to explore settlement options and to deal with preliminary issues (such as disclosure) in cases that do not settle. In this option, a written Dispute could reasonably be required at the close of the prehearing to require the tenant to specify the grounds for dispute.

11. Amend Provision for Discretionary Refusal to Evict to Make Consideration Mandatory in Every Case

Section 84 of the *Tenant Protection Act* should be amended to clarify that it is incumbent on the adjudicator in every case to consider whether or not the facts support the exercise of the discretion to refuse to evict the tenant. The legislation currently provides that the adjudicator has the discretion to refuse an eviction application unless it would be unfair to the landlord to do so.

12. Delineate Factors to be Considered in Exercising Discretion

A new subsection should be added to section 84, which incorporates the concept of proportionality. The adjudicator hearing an eviction

application should be required to balance the severity of the remedy (eviction) against the seriousness of the breach (arrears, noise, property damage). Where a tenant can correct the breach or otherwise make the landlord whole, eviction should not be ordered.¹²⁶

13. Repeal Provision Allowing Above-Guideline Rent Increases for the Cost of Utilities

The current formula for calculating above-guideline increases for the cost of utilities results in an unreasonable windfall when prices fall. Landlords are fairly compensated for increases in the cost of utilities through the formula for calculating guideline rent increases. This provision should be repealed.

14. Alternatively, Introduce a Mechanism to Roll Back Rents When Costs are No Longer Borne

If the legislation continues to allow above-guideline increases for utilities increases, amendments should establish a tenant application to roll back rents when the increased costs are no longer experienced by the landlord. A preferable solution would be an automatic roll back where increases are no longer being experienced, similar to the provision with respect to property tax rollbacks.

WHAT ARE WE LOOKING FOR FROM THE OMBUDSMAN?

The Ontario Ombudsman has a mandate to investigate and review the practices of the Ontario Government organizations to determine, among other things, if any action or omission has been taken in accordance with a statutory provision or a practice that is "unreasonable, unjust, oppressive or improperly discriminatory". In furtherance of this mandate, the Ombudsman has developed Fairness Standards to be used in evaluating complaints about the practices of government organizations.

¹²⁶ Legal Clinics have put forward a suggested re-wording for section 84 in a submission recently sent to the Minister of Housing and included in appendices to this submission.

The Introduction to the Ombudsman Fairness Standards states that the Ombudsman will determine in each investigation if there are broad systemic issues that must be addressed. The Ombudsman has the authority to recommend that the practices of any government organization be altered and to recommend that legislative provisions be reconsidered. Where the Government does not act on Ombudsman recommendations, the Ombudsman can file a report with the Legislative Assembly.

In making this submission to the Ombudsman, we are asking that he consider the information which we have brought forward establishing that aspects of the *Tenant Protection Act* and of the rules, practices and procedures of the Ontario Rental Housing Tribunal fail to meet the Fairness Standards set by the Ombudsman. We are asking the Ombudsman to undertake an investigation of the systemic issues outlined in our submission and to make recommendations for statutory and procedural reforms, which will address the fairness issues which we have documented.

We have turned to the Ombudsman because our efforts to raise these issues with the Government and the Tribunal have not met with success to date. The people affected by the issues that we are raising are low-income clients of Legal Clinics across Ontario. We do not think that our clients should have to wait indefinitely to have their issues addressed.

CONCLUSION

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

immigrants, refugees, elderly single women, youth and other groups identified under human rights legislation. The quality of justice that is delivered to vulnerable people, who may lose their housing as a result of a Tribunal application, is a reflection on our society as a whole.

We urge the Ombudsman to take steps introduce greater fairness into the legislation and into the rules, practices and procedures which govern the dispute resolution process of the Ontario Rental Housing Tribunal and the rules for rent regulation.