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Seema Shafei

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Résumé de l'article

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“A So-Called Tenants’ Union”: Defining the Organizational Power of Tenants within and outside the Law

Seema Shafei*

How is a tenants’ union defined within the parameters of the law? How have tenants been defining themselves as a union outside of the law? This paper will examine the answers to these questions by laying out the historical context of the current rental regime in Ontario, analyzing the current case law on tenant associational activity, and highlighting the organizational tactics that tenants’ associations have used to build power where the law has failed to protect their interests. While advancing a legal case for robust tenant associational rights may force landlords to the bargaining table, the future of tenants’ associations in and outside of the law should draw on lessons learned from the labour movement in Canada with a “whole-worker organizing” approach in mind.

Comment une association de locataires est-elle définie dans les paramètres de la loi? Comment les locataires se sont-ils définis comme syndicat en dehors de la loi? Le présent document examinera les réponses à ces questions en décrivant le contexte historique du régime de location actuel en Ontario, en analysant la jurisprudence actuelle sur les activités des associations de locataires et en présentant les tactiques organisationnelles que les associations de locataires ont adoptées pour acquérir des pouvoirs dans les cas où la loi ne protégeait pas leurs intérêts. Bien que l’introduction d’une action en justice afin d’obtenir des droits solides pour les associations de locataires puisse forcer les locataires à se rendre à la table de négociation, la formalisation des associations de locataires dans la loi devrait s’inspirer des enseignements tirés du mouvement ouvrier au Canada, en gardant à l’esprit une approche fondée sur l’« organisation du travailleur intégré ».

I. INTRODUCTION

At a case management hearing before the Landlord and Tenant Board [LTB] of Ontario on February 16, 2021, the Crescent Town Tenants’ Union challenged their landlord, Pinedale Properties. The tenants’ association argued that Pinedale retaliated against them for forming the union, that their eviction hearings should be heard together, and that the landlord had a duty to negotiate with the members as a collective.¹ The presiding adjudicator referred to the group as a “so-called tenants’ union.”² This paper will examine underlying questions raised by the adjudicator: How is a tenants’ union defined within the parameters of the law? How have tenants been defining themselves as a union outside of the law?

* Seema Shafei was a member of the East Scarborough Tenants Union. She will be practicing as a union-side labour lawyer in Ottawa in the upcoming Fall.

¹ *Pinedale Properties v Crescent Town Tenants’ Union* (25 February 2021), TSL-15749-20-IN2 (Ontario Landlord and Tenant Board) Case Management Hearing. (Online hearing).

² *Ibid.*

First, this paper lays out the history of rental housing legislation and policy in Ontario to situate the conditions that tenants currently face. Second, I raise questions left unanswered about the legal protection of tenant organizing through analyzing the current dearth of case law on tenants' associations. Third, I trace how tenants have built power themselves outside of the LTB. Finally, I argue that while advancing a legal case for robust tenant associational rights may force landlords to the bargaining table, the future of tenants' associations both in and outside of the law should draw on lessons learned from the labour movement in Canada. A "whole worker organizing" approach has the potential to build organizational power across movements. This approach towards organizing takes into account all of the simultaneous power dynamics at play in an individual's life rather than simply examining an individual's life through a tenant lens or a worker lens. Any prospective steps for tenants' associations should be taken with a "whole-worker organizing" approach in mind.

II. WHAT IS THE STORY OF THE TENANT IN ONTARIO?

A. The Power Imbalance Between Landlords and Tenants

At the very heart of labour law, there is a recognition that the relationship between employers and their employees contains an inequality of bargaining power. Similar power dynamics play out within tenant law. While employers have power over employees' income, landlords have power over tenants' housing. If threatened with eviction, tenants risk losing their shelter, their jobs, and their community.³ Children might have to change schools, disrupting their education and social bonds. Individuals may struggle to find employment in a new area, or they may have to allot more time to commuting for work. The stress of precarious conditions has numerous negative health outcomes.⁴ In addition, landlords know exactly where tenants live and have control over the conditions in which they live. They have access to tenants' homes, the most private and personal space known to an individual.

A landlord is generally "the owner of a rental unit or any other person who permits occupancy of a rental unit."⁵ Landlords have legal obligations towards tenants such as ensuring that the unit is in a good state of repair,⁶ maintaining tenants' quiet enjoyment of the unit,⁷ ensuring vital services,⁸ and respecting privacy.⁹ In turn, a tenant pays rent for the right to occupy and has duties to pay rent on time in the agreed upon amount.

³ R Hare, "Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota" (2020) 38:1 JL & Equality 135 at 136.

⁴ See Health Justice Program, "Improving Housing Conditions, Improving Health: Final Report of a Community Engagement Project for Low-income Tenants – to Identify Joint Strategies to Improve Tenant Health from a Medical-Legal Partnership Perspective" (2020), online: *Neighbourhood Legal Services* <http://www.nlstoronto.org/uploads/4/4/3/9/4439251/final_health_justice_program_cmhc_report_march_27_20.pdf>.

⁵ *Residential Tenancies Act*, SO 2006, c 17, s 2(1) [RTA].

⁶ *Ibid*, s 20.

⁷ *Ibid*, s 22.

⁸ *Ibid*, s 21.

⁹ *Ibid*, ss 26, 27.

Where landlords fail to meet their obligations, tenants can take the landlord to the LTB and seek a remedial order from the Board. Where tenants fail to meet their obligations to the landlord, the landlord can take the tenant to the LTB and seek an eviction.

According to a comparative study done in 2020, Ontario had the highest number of working tenant households amongst the provinces with less than a month’s savings to their name.¹⁰ When demand for rental units is high, vacancy rates are low, and when households have little savings, landlords have immense power over their tenants. Evictions threaten the stability, livelihood, and health of tenants where there is a lack of affordable housing.

Ontario has a history of tenant organizing to address this power imbalance.¹¹ Documented as far back as 1951, the Regent Park Ratepayers’ and Tenants’ Association mounted a successful campaign against a Housing Authority of Toronto [HAT] policy which prohibited television in the social housing project.¹² It was raised that tenants in public housing “should not be able to afford such luxuries.”¹³ Tenants began to openly challenge the policy by setting up aerials “in clear defiance of regulations, effectively forcing the HAT to provide a central antenna system for a nominal monthly charge.”¹⁴ Together, tenants have worked to address concerns of building neglect, mismanagement, inadequate maintenance and repairs, onerous rent increases, and neighborhood evictions.

While tenant associations fight to address many localized concerns, they also respond and adjust to the landscape for renters as a whole. Over time, housing prices in Ontario have risen dramatically, leading to a crisis.¹⁵ Investigating how this problem emerged is key to examining the increased reliance upon tenant associations.

B. The Weakening of Rent Control and Social Housing Protections

The rental market in Ontario has been in crisis for over forty years.¹⁶ The decline in construction of new private purpose-built rental buildings began in the 1970s. Ontario went from having 27,543 new rental starts in 1969 to under 5,000 by the mid 1980s.¹⁷ Rents were fixed as rent control was in effect by

¹⁰ R Tranjan, “The Rent is Due Soon: Financial Insecurity and COVID-19” (2020), online: *Canadian Centre for Policy Alternatives* <<https://policyalternatives.ca/sites/default/files/uploads/publications/2020/03/Rent%20is%20due%20soon%20FINAL.pdf>> at 8.

¹¹ Look to the current organizing by groups like: Parkdale Organize, Hamilton Tenant Solidarity Network, East Scarborough Tenants Union, Herongate Tenants Coalition, Goodwood Tenants Union, Kensington Tenant Network, Crescent Town Tenants Union.

¹² S Purdy, “By the People, For the People: Tenant Organizing in Toronto’s Regent Park Housing Project in the 1960s and 1970s” (2004) 30:4 *J Urban History* 519 at 525.

¹³ *Ibid* at 548.

¹⁴ *Ibid* at 526.

¹⁵ Centre for Equality Rights in Accommodation, “The numbers behind the housing crisis in Ontario” (2020), online: *Centre for Equality Rights in Accommodation* <<https://www.equalityrights.org/numbers-behind-ontario-housing-crisis/>>.

¹⁶ L Smith, “The Crisis in Rental Housing: A Canadian Perspective” (1983) 465:1 *The Annals of the American Academy of Political and Social Science* 58.

¹⁷ P Mendonça-Vieira, “Actually, Rent Control Is Great Revisiting Ontario’s Experience, the Supply of Housing, and Security of Tenure” (2018), online: Federation of Metro Tenants’ Associations <<http://okayfail.com/2018/rent-control-great-security-of-tenure.html>> at 4.

1975 where landlords could only increase rent once within an annual period.¹⁸ Landlords were only allowed to charge whatever they wanted on a new unit in a new dwelling. Once a tenant moved in, every subsequent rent would have to adhere to the guideline amount as there was no vacancy decontrol yet.

J R Miron points out the weaknesses in the 1975-1979 regime for tenants,

There were no penalties to landlords for charging rents in excess of what was permitted except repayment of the excess if caught. Further, there were only minimal restrictions on landlords to prevent them from reducing maintenance or otherwise reducing the cost and quality of the housing they supplied. Finally, cost pass-through and hardship provisions enabled landlords to argue the case for special increases because of renovation, refinancing or repair costs that presumably might otherwise have been funded out of past rent revenues. This weakness was augmented by a lack of information that worked against new tenants. The practice of increasing rents surreptitiously when new tenants moved in was probably commonplace. Not knowing when the rent had last been increased, nor even the previous rent charged, the new tenant was generally not in a position to question whether the rent demanded was legal.¹⁹

In 1986, the *Rent Regulation Act* [*RRA*] was enacted where annual rates of increase were tied to,

a formula related to changes in costs of maintaining rental buildings...Guideline rates for the first time applied to the 'maximum rent'; actual rent may be lower, although the initial maximum rent was the existing rent for rental dwellings in use at enactment, or first rent paid since for newer (or other) dwellings. A rent directory was introduced under *RRA* to record rents for individual apartments, and rent regulation was extended to rental dwellings built since 1976.²⁰

The *RRA* was then replaced by the 1992 NDP *Rent Control Act* [*RCA*]²¹ which continued to uphold a strictly regulated rental scheme. The *RCA* only allowed above-guideline increases for necessary repairs and these increases would stop once the landlord recouped the cost. The government assigned registered rents to most buildings.²² Where the landlord charged a market rate above the registered rent, tenants could get refunds. There were extra enforcement mechanisms in place to ensure landlord compliance.²³ While this seemingly benefitted tenants, housing starts were still decreasing.

Lawrence Smith claims that rent controls provided little incentive for private developers to build as,

¹⁸ J R Miron, "Security of Tenure, Costly Tenants and Rent Regulation" (1990) 27:2 *Urban Studies* 167 at 171 [Miron, "Security of Tenure"].

¹⁹ *Ibid* at 172.

²⁰ J R Miron, "Private Rental Housing: The Canadian Experience" (1995) 32:3 *Urban Studies* 579.

²¹ *Rent Control Act*, SO 1992, c 11.

²² M Thiele, "Ontario and the Rent Control See-Saw" (31 December 2018), online (blog): *Ontario Landlord and Tenant Law Blog*, <<https://ontariolandlordandtenantlaw.blogspot.com/2018/12/ontario-and-rent-control-see-saw.html>>.

²³ Miron, "Security of Tenure", *supra* note 18.

rent control artificially lowers the income that landlords can expect to receive from rental properties. This depresses any motivation investors may have for responding to demand by creating new rental buildings. Meanwhile, lower rent costs relative to ownership encourage more people to stay in the rental market, which creates more demand for fewer units. A control imposed in response to unaffordable rents and low vacancy rates will therefore exacerbate both. Rent controls don’t just affect new construction, and therefore new tenants; they can have stark effects on existing units as well. Faced with a control where increases in rent grow at a rate slower than the costs of maintaining the property, existing landlords are strongly encouraged to let their properties deteriorate or convert them to condominiums.²⁴

In 1993, the federal government of Canada transferred the funding and administration responsibilities of social housing onto the provinces. It was then in 1995 that the provincial Ontario government pushed the subject further onto the municipalities.²⁵ Citing a lack of proper funding, the municipalities kept up with neither the maintenance of existing units, nor the construction of new ones.²⁶ Martine August traces that,

privately owned, purpose-built rental housing stock...was largely produced in the 1960s and 1970s, when federal subsidies and tax advantages attracted development...In the following decades, these subsidies were withdrawn, and developers turned to condominium construction... By the late 1990s, when financialized investment began, private rental housing was a moribund sector. In Toronto, losses of rental housing to demolitions and condo conversions was outpacing new construction...and supply was stagnating nationwide, despite growing demand.²⁷

Atop the lack of supply, the Ontario Progressive Conservative government revoked the *Rent Control Act* in 1998 and, in its place, passed the *Tenant Protection Act* [*TPA*] with a number of landlord-friendly policies.²⁸

C. Major Changes with the Tenant Protection Act

To incentivize the creation of new housing for the benefit of landlords and developers, the *TPA* newly introduced vacancy decontrol and incorporated looser rules for above-guideline increases.²⁹ Both these policies complicated the bill of what exactly tenants paid for in terms of rent. The right to occupy a unit

²⁴ As summarized by Phillip Mendonça-Vieira, *supra* note 17 at 4-5.

²⁵ M August, “‘It’s all about power and you have none:’ The marginalization of tenant resistance to mixed-income social housing redevelopment in Toronto, Canada” (2016) 57 *Cities* 25 at 27.

²⁶ E Power & B S Risager, “Rent-striking the REIT: reflections on tenant organizing against financialized rental housing in Hamilton, Ontario, Canada” (2019) 1:2 *Radical Housing J* 81 at 83.

²⁷ M August, “The financialization of Canadian multi-family rental housing: From trailer to tower” (2020) 42:7 *J Urban Affairs* 975 at 979.

²⁸ *Tenant Protection Act*, SO 1997, c 24.

²⁹ E Mahoney, “The Ontario Tenant Protection Act: A Trust Betrayed” (2001) 16:10 *J L & Soc Pol’y* 261 at 266.

was an initial base charge, but the fees for upkeep and building improvements were forced upon tenants as add-ons. Elinor Mahoney highlights this extractive relationship,

The most common inequity occurred where a new tenant agreed to a certain rent because the landlord had plastered and painted the apartment, and had installed a new refrigerator and stove. Nine months later, the tenant would receive a notice for an above-guideline rent increase. In these situations, tenants paid twice for the renovations: once when assuming occupancy and again, a year later, by order of the Tribunal.³⁰

If a tenant stayed in their unit, then the landlord could only raise the rent in accordance with annual guidelines set by the province. Despite that, vacancy decontrol allowed landlords to charge whatever the market could sustain on a unit whenever a tenant left. This policy created a perverse incentive for landlords to target and pressure longstanding tenants to move out. Once these older tenants moved away, landlords could then raise the price on the same unit to reflect market rates. As a business strategy, “[it] drives displacement, particularly in gentrifying neighbourhoods where each vacancy (and suite turn) represents the loss of affordable rental housing.”³¹

Added to the justifications for above-guideline increases was the inclusion of tax increases, building security measures, and capital expenditures including renovations and some cosmetic changes. The new above-guideline increases had an expiry date tied to the “useful life” of the expenditure, typically between 10-25 years. Since most tenants do not stay in a unit for that long, the majority would never see the decrease materialize during their tenancy.

D. The Financialization of Housing

Recently, one unique player irrevocably altered the rental housing market: real estate investment trusts [REITS]. REITS are financialized landlords which are publicly traded on the stock market. Emily Power and Bjarke Skærlund Risager note that “it is no coincidence that REITs first emerged in Ontario in the late 1990s at the same time the government stopped building affordable rental stock, vacancy rates declined, and rent control laws were eroded.”³²

To become a landlord, the barriers to entry into the housing market were high. Landlords before were limited by the amount of rent they could charge and typically had to be “expert local investors with specialized knowledge (of markets, building codes, property management, planning regulations, [and] tenant laws)”³³ in order to be successful. In contrast, financialized landlords could “raise and pool capital from investors, buy and operate buildings, and divvy up the rental income.”³⁴

In 1996, REITS owned none of the rental suites in Canada. By the end of 2019, they owned more than 194,000. While many of the statistics are difficult to trace, Martine August has estimated that the 24 largest

³⁰ *Ibid* at 268.

³¹ M August & I Toy, “The Big Debate: Can landlords afford to forgive rent during the pandemic?” *Toronto Star* (28 April 2020).

³² Power & Risager, *supra* note 26 at 85.

³³ August, *supra* note 27 at 977.

³⁴ August & Toy, *supra* note 31.

financialized landlords control “about one in five homes in the private, primary rental market (not including smaller buildings and rented condos).”³⁵

REITS provided investors with an opportunity to turn a largely unproductive asset into a productive one. Martine August emphasizes that,

...this concentration in ownership among big landlords (and financialized landlords) is a new phenomenon. In just 5 years, the proportion of Canadian suites owned by the 20 biggest landlords rose from 15.8% in 2011, to 20.2% in 2017. This is an increase of 27.8%, while the number of apartments grew by only 6.5% over these same years, demonstrating the swift rise in the concentration and of ownership among big owners and financialized landlords in particular. In Canada, financialization of multi-family private rental has not been driven by global capital and foreign firms, but is homegrown— involving the evolution of small, locally based, often family run firms into sophisticated financialized players.³⁶

The difference here is important. This massive consolidation of real estate power into these abstract financial operators has taken an already existing power imbalance between a landlord and a tenant to a power imbalance between a tenant and a landlord who is also a huge corporation. The legislative changes and the introduction of REITS onto the Ontario housing market intensified the relations between tenants and landlords. Their interests could often become directly opposed to one another, as “[w]hat [tenants] would define as affordable property, [landlords] identify as an underperforming asset.”³⁷

To increase the value of their asset, landlords did not necessarily have to invest their own profits into their buildings but could instead pass onto tenants the costs of the investment. As reported in the *Toronto Star*,

In a 2017 report, CAPREIT [Canada’s largest financialized landlord] told investors it pursues above-guideline rent increases “in line with its focus to maximize average monthly rents.” That practice appears to continue to this day.

In late February, CAPREIT said in its annual report that, despite the pandemic, operating revenue increased 13 per cent in 2020, due in part to “a solid increase in average monthly rents.” It attributed growth in rents in part to “significant rental increases on turnover” in the Ontario market as well as increases in rent renewals “due to AGIs achieved in Ontario.”³⁸

Without any input from tenants as to how their money would be spent, landlords could file for an above-guideline increase as a strategy to raise rents and raise revenues.³⁹

³⁵ *Ibid.*

³⁶ August, *supra* note 27 at 980.

³⁷ C Dobby, “The Big Business Behind the Affordable Rental Housing Crunch” *Toronto Star* (6 March 2021).

³⁸ *Ibid.*

³⁹ NG Ali et al, “Stop COVID Evictions! Rent Relief Now!: A demand for social justice and public health”, (December 2020) online: *Landlords of Toronto* < <https://www.landlordsoftoronto.com/report> > at 10.

E. The Tribunal System that Hears Disputes and the *Residential Tenancies Act*

With the *TPA* came the creation of the Ontario Rental Housing Tribunal (what is now known as the LTB).⁴⁰ Landlord and tenant disputes for the previous 25 years were adjudicated within the federal courts. The new Tribunal was meant to create efficiency to hear landlord-tenant matters, ostensibly because courts were seen as slow to respond.

Tony Clement, then minister of Municipal Affairs and Housing, stated in 1999 that,

The new Ontario Rental Housing Tribunal...was set up to ensure a fair, more efficient process of hearing landlord-tenant disputes, moving them from the court system into a less formal system of mediation and adjudication. It has meant that disputes are heard much more quickly. It used to regularly take months and months to get a court date. Applicants are now generally getting their cases heard within three weeks. Members of the tribunal are getting their decisions out to the parties within two to three days.⁴¹

Today before the LTB, it would be virtually impossible for applicants to get a hearing within three weeks. For instance, only 16% of tenant applications were scheduled for a hearing within 30 business days in 2019, compared to 53% in 2017. These statistics relate to *scheduling* for a hearing and do not reflect how much longer the wait could be for the actual hearing date itself.

The LTB has been facing delays for years. It takes months for some tenants to even get their matters heard before the Board. Many issues become moot by the time they get heard, as tenants may face deteriorating conditions and decide to move out before their hearing date comes around. Individual tenants often face large, financialized landlords unrepresented, confused about navigating the hearing procedure and its process.

Although delays are getting worse, it is worth examining the actual contents of the applications coming before the Board. From 2019-2020, 72,752 landlord applications were received by the Board.⁴² The amount of tenant applications paled at 8,122 within the same year. Landlords utilized the LTB nearly nine times more than tenants did to address their concerns. In addition, 90% of landlord applications sought eviction.⁴³ The top three tenant applications related to tenants' rights, maintenance requests, and illegal rent collection.⁴⁴

This Tribunal system set up in 1998 not only lacks the intended efficiency it purported to achieve; it has become a mechanism that overwhelmingly attends to landlord eviction applications. Tenant concerns are not the primary focal point of the LTB. Currently in force is the *Residential Tenancies Act* [RTA],

⁴⁰ Mahoney, *supra* note 29 at 269.

⁴¹ Ontario, Legislative Assembly, Standing Committee on Estimates, Tony Clement (16 November 1999) online: <<https://www.ola.org/en/legislative-business/committees/estimates/parliament-37/transcripts/committee-transcript-1999-nov-16>>. (Online hearing)

⁴² Ontario, Tribunals Ontario, *Annual Report 2019-2020* (Toronto: Tribunals Ontario) at 50-51.

⁴³ Numbers found by combining the amounts for an L1, L2, and L4 (excluding combined application A3 which usually includes L1): *Ibid.*

⁴⁴ Excluding Combined applications (A3).

which is theoretically meant to be remedial legislation broadly interpreted in favour of tenants.⁴⁵ The legislation has arguably not provided adequate protections for tenants and has maintained the aforementioned policies of the previous *TPA*.

Due to COVID-19 pandemic concerns beginning in March 2020, the LTB transitioned to online hearings. The recent technological shift has put many tenants at further disadvantage. In a 2021 report by the Advocacy Centre for Tenants Ontario, a landlord representative was present in 86.5% of online hearings observed while tenants themselves were present in only 44.6% of hearings.⁴⁶ Many tenants were unfamiliar with how to navigate the technology and many have faced interruptions or were unable to join hearings due to poor internet connection. The LTB made “little to no effort...to accommodate tenants with mental health issues, who are illiterate or innumerate, or who do not have English as their first language.”⁴⁷

The cost of at-home internet was cited as one of the biggest barriers for tenants to participate and, “this much is clear: a tenant’s inability to participate in a hearing has potentially dire consequences - the loss of their home.”⁴⁸

The instruments designed to remedy problems that tenants face have been collapsing under pressure. As many tenants face similar issues of accessibility within their own buildings, tenants’ associations have filled some of the gaps that governments have left open. While the *RTA* recognizes the right for tenants to form an association, the legislation still leaves much unanswered about how the law will recognize that association and how its associational activity will be protected.

III. WHAT IS THE SCOPE OF LEGAL RIGHTS THAT TENANTS’ ASSOCIATIONS CURRENTLY HAVE?

Nothing in the *RTA* defines what constitutes a tenants’ association. In fact, the term “tenants’ association” only appears in the legislation twice: first to provide the Board with the power to refuse a landlord application where the application is brought in retaliation for being involved with a tenants’ association⁴⁹ and second, to make it an offence where a person harasses, hinders, obstructs or interferes with a tenant in the exercise of participating in a tenants’ association.⁵⁰ There is a dearth of reported case law expanding upon these two sections.

⁴⁵ For the *Tenant Protection Act: Ontario (Rental Housing Tribunal) v Metropolitan Toronto Housing Authority*, 2002 CanLII 41961 (ON CA) at para 19, further upheld for the *Residential Tenancies Act* by *Elguindy v Destaron Property Management et al*, 2016 ONSC 3662 (CanLII).

⁴⁶ Advocacy Centre for Tenants Ontario, “Digital Evictions: The Landlord and Tenant Board’s experiment in online hearings” (2021) at 3, online (pdf): *Advocacy Centre for Tenants Ontario* <<https://www.acto.ca/production/wp-content/uploads/2021/06/Digital-Evictions-ACTO.pdf>>.

⁴⁷ *Ibid* at 1.

⁴⁸ *Ibid* at 3.

⁴⁹ *RTA*, *supra* note 3, s 83(3)(c).

⁵⁰ *Ibid*, s 233(h)(iii); *RTA*, s 236 also makes it an offence where an individual knowingly attempts to harass, hinder, obstruct or interfere with a tenant in the exercise of participating in a tenants’ association. Sections 94.12(3)(b) and 94.17(1)(a)(iii) refer to organizing a “members’ association.”

Without explicit parameters to define a tenants' association, understanding the state of the law proves to be difficult. How can a tenants' association adequately protect its associational activity from retaliation when associational activity is not defined? Concerns may be raised against expanding the reach of the law as it relates to tenants' associations; these arguments will be explored further in depth in sections three and four of this paper. In this section, I will first examine where the law currently stands for tenants' associations in comparison to labour associations.

For associational rights, labour law's detailed jurisprudence provides the tenant context with a potential blueprint. In the analogous labour context, there is case law acknowledging that organizing activity must be allowed at work to the extent that it does not interfere with legitimate business interests.⁵¹ There is case law breaking down how employer's actions affect the legitimate rights of workers and their unions.⁵² There is case law outlining the scope of union members' right to strike.⁵³ None of this is explicit in the tenant context.

The main differences between the rights enshrined in tenant law and labor law can be traced back to their home statutes. Labour statutes across the country impose positive obligations upon employers and workers. These pieces of legislation directly address what scope of rights are available to which party. There is no separate legislative regime governing tenants' associations, nor does there necessarily have to be.

The Supreme Court in *Ontario (Attorney General) v Fraser*, 2011 SCC 20 (*Fraser*) ruled that the *Charter of Rights and Freedoms* did not entitle anyone to a particular model of collective bargaining.⁵⁴ The majority found that legislatures were not,

... constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements... What is protected is associational activity, not a particular process or result [emphasis added].⁵⁵

Applied to the present tenant context, there may be no positive obligation upon the legislature to enact more fulsome tenants' association legislation. Instead, the analysis turns on whether or not what is currently outlined in the *RTA* meaningfully protects the freedom of association under 2(d) of the *Charter*. Freedom of association is not a collection of individual rights that interrogate individual action, but instead are inherent to collective action and collective activity.⁵⁶ Still, what is explicitly afforded to tenants' associations is severely lacking in substance.

⁵¹ *Retail, Wholesale and Department Store Union AFL-CIO-CLC v T Eaton Company Limited*, 1985 CanLII 989 (ON LRB) [*Eaton*].

⁵² *Canadian Broadcasting Corp v Canada (Labour Relations Board)*, 1995 SCC 157.

⁵³ *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

⁵⁴ *Ontario (Attorney General) v Fraser*, 2011 SCC 20 [*Fraser*].

⁵⁵ *Ibid* at para 47.

⁵⁶ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 62.

A. What is Left Unanswered in the Law for Tenant Associational Rights?

1. Harassment or organizing?

Attempting to restrict certain organizational activities, some landlords have characterized the actions of tenants’ associations as harassment. There is a lack of clear distinction in tenant law between “harassment” and “organizing.”⁵⁷

In one case, a landlord brought an ex parte application against a tenant for failing to pay rent on time in accordance with a prior conditional order. The tenant suggested that this ex parte application was brought in retaliation for his associational activity when he tried to distribute tenants’ association materials to his neighbours.

As a defence, the landlord’s agent provided testimony that they received complaints from other residents, classifying the organizing activity as harassment. Landlords are legally obligated to deal with inter-tenant disturbances should they interfere with other tenants’ right to quiet enjoyment.⁵⁸ The tenant’s own witness agreed that others in the complex were harassed as they did not want to participate in the association. The outcome in this case failed to address any ambiguity around the harassment question and instead the adjudicator determined that there was not enough evidence present on a balance of probabilities to conclude that the landlord brought forth the application in retaliation for tenant associational activity:

There was no evidence to support the Tenant’s allegation that the Landlord tried to prevent, or otherwise interfere with, the tenants’ association’s efforts to organize the tenants. There was also no evidence to support the Tenant’s allegation that he was specifically targeted for eviction because of his activities with the tenants’ association.⁵⁹

This case exposes a potential problem for tenants’ associations: when landlords interpret organizational activity as harassment, they are able to claim that their subsequent actions seek to address the alleged harassment, rather than the organizing itself. Landlords could then target a wide variety of activities which go to the heart of tenant organizing, such as door knocking, flyer, talking to neighbours in the building, and requesting contact information. Certain organizing activity could be vulnerable to losing its protection against retaliation where the behavior of organizers is framed as harassment. Tenant organizers would feel they had to maintain a pristine image as a “perfect tenant” for fear of the landlord using any ground to base an eviction application. Creative, disruptive, and radical tactics could readily become pretexts to evict organizers.

The lack of definition between organizing and harassment burdens both sides with an inability to distinguish between protected acts and those that can fall afoul with other parts of the *RTA*. This issue has recently come to a head in Toronto. In a building owned by Starlight Investments, Canada’s largest

⁵⁷ TNL-63287-14-SA-AM (Re), 2014 CanLII 83140 (ON LTB).

⁵⁸ *Hassan v Niagara Housing Authority*, 2001 CarswellOnt 4890 SCDC at para 16: “It is not that the other tenant’s actions are imputed to the landlord, but, rather, the landlord’s legal responsibility to provide the tenant with quiet enjoyment that gives rise to the responsibility on the landlord to take reasonable steps to correct the intrusion of the neighboring tenant on the tenant’s right to quiet enjoyment.”

⁵⁹ *Supra* note 57 at para 14.

landlord, a tenants' association tried to deliver a list of demands to the landlord.⁶⁰ Management refused to engage, locked themselves in their offices, and called the police.

Within a matter of weeks, some tenants were served with "eviction notices alleging forceful confinement."⁶¹ A tenant protest then unfolded against the eviction notices, to which Starlight Investments sent out a letter warning that tenant organizing was threatening the security of staff, property, and tenants.⁶² Tenant organizers were dismissed as violent. In response, tenants returned these letters back to the management office.

At the time of this paper, the question still remains open. If an attempt to deliver a letter collectively results in a finding of "forceful confinement," then the scope of protected tenant associational activity is rendered effectively hollow. As the decision of *Fraser* emphasizes, "consideration of [associational] goals cannot be avoided... A content-neutral right is too often a meaningless right."⁶³

2. Individual Agreements or a Collective Agreement?

Tenancy agreements are legally defined as individual contracts between tenants and landlords. Frequently, the individual nature of the relationship has been raised as a reason why landlords do not need to engage with a collective. This is particularly the case in instances where tenants fall into arrears and demand to negotiate repayment plans collectively with the landlord. Where landlords refuse collective negotiations, they refer to the fact that each individual tenant has separate financial concerns and separate tenancy agreements, thus preferring to deal with arrears issues one-on-one.

___The issue of individually-negotiated tenancy agreements comes into conflict with collective tenant activity, just as individualized employment contracts would undermine the collective bargaining structure of the union.⁶⁴ This tension is apparent in a case where a tenants' association sought "unrestricted access to either the Recreation Area or the Lounge or both at all times to use as they wish for recreational activities, without the prior consent of or notice to the management."⁶⁵ The Board found that the tenants did not have a right to the unrestricted use of the common area within the complex.⁶⁶ As each individual tenant signed an individual tenancy agreement that did not mention the use of the common areas, the tenants were bound by the terms of their individual contracts.

Without reference to the power imbalance between the parties, the adjudicator found that "there was no reason ever presented as to why the management would care one way or the other if the Tenants formed

⁶⁰ S Carranco, "Parkdale Tenants Rally Against Goliath Corporate Landlords" *The Hoser* (29 March 2021) online: <<https://www.thehoser.ca/posts/parkdale-tenants-rally-against-goliath-corporate-landlords>>.

⁶¹ *Ibid.*

⁶² Parkdale Organize, "After Saturday's protest, the landlord at 55 Triller put out a letter to all tenants saying organizing is a threat to staff, the property and to tenants. They described tenant organizers as violent. Today, tenants returned dozens of these notices to the building office. (1 April 2021 at 21:59) online: *Twitter* <<https://twitter.com/ParkdaleOrg/status/1377802884901916675>>.

⁶³ *Fraser*, *supra* note 54 at para 75.

⁶⁴ CET-34004-13 (Re), 2014 CanLII 28556 (ON LTB).

⁶⁵ *Ibid* at para 18.

⁶⁶ *Ibid* at para 11.

an association.”⁶⁷ In addition, the adjudicator noted that there was no obligation incumbent upon the landlord to provide meeting space for associational activity.⁶⁸

While individual tenancy agreements could protect the acts and needs of a tenants’ association, this remains an elusive solution as few landlords would agree to such far-reaching terms and few tenants would be in a position to negotiate those terms. Practically, it would be nearly impossible for individual tenants to negotiate tenancy agreements with particular tenants’ association rights enshrined. Within the increasingly costly housing market, most tenants are unable to negotiate their own terms in addition to the standard rental agreement, for fear of losing out on units. The more a tenant presents onerous terms to protect their own interests, the more likely an individual will be considered a ‘problem tenant.’ The landlord could then easily choose to rent the unit to another person who shows no interest in forming or becoming a part of a tenants’ association and who did not seek collective rights as part of their lease.

Instead, tenants’ associations may be able to apply collective pressure to form a separate collective agreement with the landlord to replace any individual agreements. Still, there is nothing in the law thus far that forces a landlord to negotiate a collective agreement with a tenants’ association, no formal mechanism to bind them to the agreement, and no law that directs a collective tenancy agreement to supersede individual agreements.

3. Damage to Building or Posting Materials?

Matters before the board have raised the issue of when and where tenants’ associations can post their materials.⁶⁹ Each tenancy agreement could have varying clauses, prohibiting tenants from posting in common areas. One landlord sent a letter to a tenant claiming damage to the residential complex from taping flyers to the doors.⁷⁰ This incident raises a dilemma in which the distribution of associational material may be misinterpreted as destruction of property.

Arguably, common areas in a residential complex are the most conducive to organizing notices and pertinent associational information. While these common areas are landlord property, tenants have some degree of access for their own use. The defined limitations on that use are set out in individual tenancy agreements. While landlords frequently use public building space to post advertisements and promotional material, tenants may not be in a position to negotiate the use of these common areas for their own organizational material.

On its face, a blanket provision against the posting of materials would seem to violate the *RTA* as this would hinder tenant organizing. For example, it is foreseeable that tenants may put up meeting posters in the elevators, contrary to a blanket provision in their tenancy agreements, and the landlord could move to evict. The argument could be made that the eviction must be refused under 83(3)(d) as retaliation for tenant organizing.

⁶⁷ *Ibid* at para 44.

⁶⁸ *Ibid* at para 23.

⁶⁹ Where the tenancy agreement had a clause that prohibited tenants from posting notices in common areas: TSL-58725-14 (Re), 2015 CanLII 9140 (ON LTB) ; where the Tenants’ Association received a letter from the Landlord’s lawyer alleging damage to the complex by taping flyers to doors and walls: SWT-83475-15 (Re), 2017 CanLII 48954 (ON LTB); Where tenants needed permission to post flyers in common areas: SWT-83466-15 (Re), 2017 CanLII 48793 (ON LTB).

⁷⁰ SWT-83475-15 (Re), 2017 CanLII 48954 (ON LTB).

In labour law, employers cannot impose a blanket prohibition of union material on employer property. No solicitation policies of employers are only valid where the employer can prove a legitimate business interest in the policy.⁷¹ Absent this, the union's organizing needs cannot be subject to threats of discipline. It is unclear if, absent a valid management purpose, the landlord can stop a tenants' association from posting its materials.

4. Open Common Space or Special Meeting Space?

Common areas are available to tenants, but few cases have addressed instances where landlords interfere with associational meetings in a managerial capacity. This is a question of when and where tenants' associations can hold organizational meetings.⁷² Lobby meetings are critical to tenant organizing as a central, accessible location for individuals in the building. Where tenants are forced to go elsewhere, many tenants would be excluded, and attendance would quickly drop off. Issues of accessibility would be raised preventing some tenants from joining, as many tenants might need childcare, mobility accommodation, and increased time and cost for travel. As a result, the stakes are very high for tenants' association access to common space.

Landlords may allege harassment with other tenants or raise certain safety hazard concerns, especially in the time of the COVID-19 pandemic, as a reason to deny meeting congregation. Without parameters in place with regards to what exactly the right to forming a tenants' association means, the actual meetings and organizing may be quickly dismissed with limited space as the alleged cause.

Where one tenant organized by holding an associational meeting in the lobby, one landlord sent out a letter to all the tenants of the building,

advising that management did “not consent or give permission to congregate in the lobby, hallways or common areas, ... for the purposes of holding meetings or discussions.” The tenants were told that they were welcome to hold debates off-site or in apartment units and that management reserved the right to serve participants with a “Form N7, 10 Day Notice to terminate a tenancy Early or Form N5, Notice to Terminate Early.”⁷³

The landlord then served the tenant with a notice to terminate their tenancy early allegedly due to the tenant's child(ren) screaming and running around in the courtyard without permission of the landlord.⁷⁴ It had come out in the witness testimony that it was in fact the superintendent's grandchildren making the noise and not those of the tenant. Some months later, the landlord then served another notice to terminate their tenancy alleging that the tenant had committed an illegal act for pulling a fire alarm in good faith.

This was one of the few decisions within the LTB case law resulting in a finding that the landlord acted in retaliation for a tenant's attempt to form a tenants' association. Absent these explicit and clear facts, the lines may be even more difficult to legally draw. For example, had the landlord actually filed the applications for the notices in good faith, the case might have been found in a different result.

⁷¹ *Eaton*, *supra* note 51 at para 79.

⁷² See: CET-34004-13 (Re), 2014 (ON LTB).

⁷³ CET-24221-12 (2013) ONLTB at para 6.

⁷⁴ *Ibid* at para 8.

Although the landlord did not file applications at the Board for the two notices, the adjudicator nevertheless found that the notices were served simply to instill fear into the tenant about the security of her tenancy. The landlord was found in breach of their obligations under section 83(3) as well as a finding of a section 233(h)(iii) offence for the landlord’s reprisal in the tenants’ associational activity. In a rare decision, the tenant was awarded \$3,000 damages for mental distress and a \$1,000 administrative fine was imposed to be paid to the Board.

5. Duty to Negotiate One-On-One or Collectively?

In 2020, an amendment was added to the *RTA* directing the LTB to consider whether or not the landlord attempted to negotiate a repayment plan for tenant arrears when hearing eviction applications.⁷⁵ This amendment came from the Ontario legislature at a time when unemployment and economic loss skyrocketed resulting from the COVID-19 pandemic. Rather than introduce a potential collective response to the need for rent relief, the government opted to give more weight to individually negotiated rent repayment plans.

When determining whether or not to process an eviction, this new section 83(6) amendment orders the Board to consider if the landlord had attempted to negotiate with the tenant. Two tenants in Toronto had the support of the Goodwood Tenants’ Union (GTU) when they attempted to negotiate an agreement for arrears with their landlord.⁷⁶ The tenants argued that the Landlord breached section 83(6) when it refused to meet or negotiate with the tenants and the GTU collectively. The tenants submitted that section 83(6) should void an eviction application where the landlord fails to negotiate collectively. The adjudicator rejected this interpretation. Instead, he read section 83(6) as simply a directive for decision-makers to consider whether or not negotiations were sought.⁷⁷

However, the adjudicator did emphasize that landlords cannot simply refuse to negotiate where a tenants’ association is involved:

There is no provision in the Act which allows landlords to refuse to engage in negotiations with tenants simply because the latter are members of a tenants’ association. In fact, the Act contemplates that tenants may form tenants’ associations and contains specific provisions which prohibit landlords of retaliating against tenants for engaging in such collective action [see subsections 83(3)(d), 94.12(3)(b), 94.17(1)(a)(iii), 233(h)(iii)].⁷⁸

This decision implies that landlords have discretion over who they conduct negotiations with so long as they do not discriminate against a tenant simply for being a part of a tenants’ association. Given that the two obvious choices of negotiations are on an individual basis or with a collective, it seems reasonable to

⁷⁵ *RTA*, *supra* note 3, s 83(6): Without restricting the generality of subsections (1) and (2), if a hearing is held in respect of an application under *RTA*, s 69 for an order evicting a tenant based on arrears of rent arising in whole or in part during the period beginning on March 17, 2020 and ending on the prescribed date, in determining whether to exercise its powers under subsection (1) the Board **shall consider** whether the landlord has attempted to negotiate an agreement with the tenant including terms of payment for the tenant’s arrears. 2020, c 16, Sched 4, s 17 (3).

⁷⁶ TSL-15976-20 (17 March 2021), Ontario (Landlord and Tenant Board) [*GTU decision*].

⁷⁷ *Ibid* at para 33.

⁷⁸ *Ibid* at para 50.

believe that landlords would choose the former over the latter. Absent an explicit duty to negotiate collectively, tenants' collective representations are not given support through the legislation.

Section 2(d) of the *Charter* ensures that collective bargaining protects more than simply making representations.⁷⁹ It requires that both parties engage in meaningful discussions of representations in good faith. The majority of the Supreme Court in *Fraser* held that "individuals have a right against the state to a process of collective bargaining in good faith, and that this right requires the state to impose statutory obligations on employers... If workers are incapable of exercising their right to collective bargaining, they may only bring a *Charter* claim against the government and not their employer, and they must show a state action."⁸⁰ If tenants' ability to engage in collective bargaining was rendered unattainable through the statutory scheme of the *RTA*, the legislation could be found in contravention of the right to freedom of association.

It is worth noting the differences between *Fraser* in the labour context and that of the tenants. The impugned legislation in *Fraser* specifically excluded agricultural workers out of employment standards legislation, and created a separate legislative scheme meant to address agricultural associational rights.

In contrast, the *RTA* does not provide specific exemptions for tenants' associations, nor does it elaborate much of anything on their permitted activity. Legislatures do not have an obligation to enact law governing private interference with 2(d) rights, although they must ensure that the *RTA* cannot be wielded to limit tenants' 2(d) rights. The lack of positive protections to associate could "substantially interfere" with 2(d) rights.⁸¹ In these cases, the state would need to extend protective legislation to unprotected groups.

Bastarache J wrote for the majority in *Dunmore* that, "underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms."⁸² In order to find an infringement for under-inclusion, the claim needs to be grounded in the interference with the freedom to associate, not in the lack of access to particular statutory rights.⁸³

Whether or not the *RTA* infringes the freedom of association is open to interpretation of how much the Ontario government has interfered with associational activity through its legislative scheme. Where tenants might be forced to negotiate individually, one could argue that the *RTA* impedes tenants' purposive activities that strengthen their power against landlords which are protected by section 2(d) of the *Charter*.

In the most recent interim decision at the LTB regarding tenants in Crescent Town, the adjudicator was asked to determine if the *RTA* extended protections to collective negotiations.⁸⁴ The adjudicator held that the,

Tenants' *Charter* freedoms include the freedoms to organize and join associations and to negotiate collectively with the Landlord. However, the Legislature has only chosen to enact statutory protections for the Tenants' freedom to organize and join associations, not for

⁷⁹ *Fraser*, *supra* note 54 at paras 2, 40, 51, 54, 90, 92, 106.

⁸⁰ *Ibid* at para 73.

⁸¹ *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 22 [*Dunmore*].

⁸² *Ibid* at para 26

⁸³ *Ibid* at para 66

⁸⁴ *TSL-15749-20-IN3 et al* (7 July 2021), *Ontario (Landlord and Tenant Board)* [CTTU Interim 2].

their freedom to negotiate collectively. The *Charter* does not obligate the Legislature to protect the Tenants’ freedom to negotiate collectively, and such protection cannot be read into the *RTA*.⁸⁵

Emphasis was placed on the fact that the *Charter* does not govern relations between private individuals, such as the tenants and the Landlord in this case. Instead, *Charter* protections are only engaged where there is state action. Where the *RTA* is silent on tenants’ right to negotiate collectively, the adjudicator determined that, “the *Charter* does not obligate the state to take any positive steps to protect or enforce *Charter* freedoms. It only prohibits the state from interfering with *Charter* freedoms.”⁸⁶ Applying both *Dunmore*⁸⁷ and *Fraser*,⁸⁸ the adjudicator determined that the landlord in this case did not have an obligation to negotiate collectively with the tenants’ association, nor did it need to consider their collective representations.⁸⁹

As there was no recognized right to negotiate collectively, the adjudicator did not find that the eviction applications were brought for tenants enforcing their legal rights under section 83(3)(c). He did conclude however that the Landlord negotiated arrears settlements differently with those who were in the tenants’ association as opposed to those who were not.⁹⁰ As the Landlord took a more rigid approach to settlements with tenants’ association members, the actions of the Landlord fell afoul with section 83(3)(d). Those in the tenants’ association successfully challenged their eviction on this basis.

When interpreted with a purposive approach in mind, the adjudicator still did not expand the protection of section 83(3)(d) to collective negotiations and instead concluded that the “role of subsection 83(3)(d) in the statutory scheme is to protect association members and organizers from being selectively evicted.”⁹¹

With regards to collective negotiations, the jurisprudence at the LTB seems to be unfavourable. The Crescent Town Tenants’ Union [CTTU] interim decision shows that differential treatment towards tenants’ association members can cause a finding of retaliation on the part of the landlord, even where there is no duty on the part of the landlord to negotiate collectively. At the same time, the GTU decision signals to landlords that they may not altogether refuse to negotiate with tenants in an association simply due to their membership in collective actions. It is unclear how future adjudicators will tailor these outcomes.

5. Illegal Withholding of Rent or Valid Strike Action?

Another matter to consider is how tenants might lawfully strike. In order to give meaning to their position as a collective, union members use strike action as an essential element of the collective bargaining process where negotiations break down. This has been recognized by the Supreme Court of Canada in *Saskatchewan Federation of Labour v Saskatchewan*.⁹²

⁸⁵ *Ibid* at para 5.

⁸⁶ *Ibid* at para 28.

⁸⁷ *Dunmore*, *supra* note 81.

⁸⁸ *Fraser*, *supra* note 54.

⁸⁹ *CTTU Interim 2*, *supra* note 84 at para 37.

⁹⁰ *Ibid* at para 7.

⁹¹ *Ibid* at para 40.

⁹² *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 75.

Withholding rent is generally not permissible under the *RTA*.⁹³ There are only two sections that do permit the withholding of rent. Section 12.1(6) of the *RTA* allows a tenant to withhold one month's rent if the landlord does not respond within 21 days to a request for a standard form lease and section 12(4) allows the withholding of rent where the landlord does not provide their name and address for the purposes of serving documents. Outside of these specific contexts, the Board generally does not see the withholding of rent as a valid exercise of tenant rights. At the LTB, withheld rent is not forgiven and the tenant would be ordered to pay the amount in arrears owing.

One 1991 case before the Superior Court of Justice featured a group of 70 tenants who had withheld rent for alleged breaches of landlord obligations.⁹⁴ Hoilett J wrote,

Concerning the propriety of a tenant's right to withhold rent, that right appears to find some support in the following two decisions of the courts: *Pajelle Investments Ltd. v. Chisholm* (1974), 1974 CanLII 721 (ON SC), 4 O.R. (2d) 652, 49 D.L.R. (3d) 21 (H.C.J.)...*Quann v. Pajelle Investments Ltd.*, *supra*, per O'Connell Co. Ct. J. ...Hughes J., speaking for the Divisional Court in *Blatt Holdings Ltd. v. Stumpf* [went on to say that the case] points to the dangers of tenants willy-nilly withholding rent "on grounds either real or fancied", but the court did not go so far as to say there are no circumstances when withholding of rent may be sanctioned. Given the history of the disputes between the applicants and the respondent, if there are any circumstances when the withholding of rent is justified, then the present circumstances qualify.⁹⁵

However, the outcome was qualified in a subsequent decision where eight tenants faced eviction. The Judge found that tenants could not raise maintenance breaches as a defence to arrears applications.⁹⁶ The repealed *Rent Control Act* of 1992 did not expressly allow for rent withholding either and the judge relied on this fact.

Today, tenants are meant to file an application at the Board to resolve issues with their landlord, wait months for their hearing date, all so that the Board may issue an abatement of rent after-the-fact if a finding against the landlord is made. Where tenants are at risk of eviction for rent arrears, tenants may raise any issues related to the breach of landlord obligations to reduce the arrears under section 82. For tenants' associations, this process at the LTB does not address many tenants' immediate concerns. Mounting a challenge takes resources, time, and much of the outcome can depend on the representation of counsel to navigate the procedural complexities.⁹⁷ Decisions can be made on seemingly insignificant findings of

⁹³ SWT-83466-15 (Re), 2017 CanLII 48793 (ON LTB); TSL-56119-14 (Re), 2014 CanLII 78360 (ON LTB); TSL-62554-15 (Re), 2015 CanLII 74227 (ON LTB).

⁹⁴ *Tagwerker v Zaidan Realty Corp*, 1991 CanLII 7190 (ON SC).

⁹⁵ *Ibid* at 42.

⁹⁶ *Gulati v Evon*, 1993 CanLII 8464 (ON SC).

⁹⁷ 60% of tenants were self-represented before the LTB: David Wiseman, "Further Research Update: Paralegals, the Cost of Justice and Access to Justice: A Case Study of Residential Tenancy Disputes in Ottawa" (June 2016), online: CFCJ <<https://cfcjfcj.org/sites/default/files//Paralegals%2C%20the%20Cost%20of%20Justice%20and%20Access%20to%20Justice%20-%20A%20Case%20Study%20of%20Residential%20Tenancy%20Disputes%20in%20Ottawa.pdf>>.

fact. Absent knowledge of how the *RTA* and the LTB function, orders against landlords can be difficult to attain.

Rent is a significant powerful tool that tenants have over their landlord. It is well understood that the threat of a strike is one of the key elements providing unions with leverage in negotiations.⁹⁸ It would make sense then for tenants’ associations to withdraw their rent in concert, just as workers do their labour.

6. Organizing as the Initial Reason for Retaliation or a Reason?

Tenants face a high burden of proof when arguing that the landlord interfered with their associational activity. Section 83(3)(d) of the *RTA* outlines that the LTB may refuse a landlord application where “the reason for the application *being brought* is that the tenant is a member of a tenants’ association or is attempting to organize such an association.” Applications for eviction would then only be denied when one could prove that the landlord used the eviction process as direct retaliation for organizing, as opposed to ‘*a reason*’ for organizing.⁹⁹

This is a higher standard to meet than in the *Labour Relations Act [LRA]*, where a decision-maker only needs to find that management’s actions interfered with union associational activity.¹⁰⁰ To determine if an employer had interfered with organizing, the onus is on the employer to prove on a balance of probabilities that the,

employer's actions were not *in any way* motivated by anti-union sentiment... The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct... the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the

⁹⁸ See Majority in *Saskatchewan Federation of Labour v Saskatchewan*, *supra* note 92 at para 54: “The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.”

⁹⁹ CEL-60174-16-RV (Re), 2016 CanLII 88018 (ON LTB).

¹⁰⁰ Labour Relations Act, SO 1995, c 1, Sched A at s 70: *Corporation of the City of Thunder Bay*, [1983] OLRB Rep May 781 at para 59: “Section 70 of the Act prohibits any interference with the rights of individuals under the Act amounting to compulsion by means of intimidation or coercion. Without exhaustively defining the meaning of those terms it appears to the Board that at a minimum they must relate to conduct which, directly or indirectly, deprives an individual of his free choice in the exercise of his rights under the Act. While that might include acts or threats which are physical or economic, the section is aimed at preventing interference with an individual's rights by some form of pressure or force that removes their ability to choose.”

employer following upon his knowledge of trade union activity, previous anti-union conduct and any other "peculiarities."¹⁰¹ [emphasis added]

Consequently, the *RTA* forces tenants to meet a high burden of proof that has only been successful in a few of the reported cases at the LTB.¹⁰²

However, the meaning of section 83(3)(d) was examined further in the most recent interim decision with the Crescent Town Tenants' Union [CTTU]. The landlord argued that the phrase "being brought" implied that only actions prior to the filing of the eviction application could be examined and the landlord's actions after filing could not be scrutinized under this section.¹⁰³ In contrast, the tenants argued even where the landlord did not *initiate* the proceedings as retaliation, the phrase "being brought" signals an ongoing act. Considering the purpose of the subsection in the context of the *RTA*, the adjudicator found that "after the Landlord had filed these applications, the reason it continued to bring them is that the Tenants were members of the CTTU."¹⁰⁴

For CTTU members, negotiated repayment plan proposals explicitly stated the members' involvement in the tenants' association. As a result, the Landlord ought to have known during negotiations which members were involved with CTTU:

On the evidence before me, I am satisfied that the Landlord took one negotiating stance with tenants not known to be CTTU-affiliated, and a different stance with tenants who had made their CTTU affiliation clear. In his negotiations with non-affiliated tenants, Mr... did not require supporting documents regarding financial circumstances, was willing to consider arrears waivers, and did in fact agree to some arrears waivers. In his negotiations with CTTU-affiliated tenants, Mr... required supporting documents and was not willing to consider arrears waivers.¹⁰⁵

Due to the differential treatment, those tenants involved with the CTTU were entitled to protection and their eviction applications were dismissed. To clarify, the tenants did not have the heavy onus of proving that the case would have settled but for their involvement in the tenants' association for, "it would be impossible to prove the speculative outcome of a hypothetical scenario, and requiring such proof would rob subsection 83(3)(d) of any effect."¹⁰⁶ As a result, this decision shows that where a landlord settles with non-tenants' association members and continues to seek eviction of tenants' association members, retaliation may be recognized. This interpretation may open the way for the *RTA* to start incorporating more of labour law's stronger protections against anti-union animus.

¹⁰¹ *Teamsters Union Local 1000, v Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep 299 at paras. 4-5.

¹⁰² Examples of success include SWL-18321-18 (Re), 2018 CanLII 141513 (ON LTB); CET-24221-12 (2013) ONLTB.

¹⁰³ *CTTU Interim 2*, *supra* note 84 at para 61.

¹⁰⁴ *Ibid* at para 73.

¹⁰⁵ *Ibid* at para 88.

¹⁰⁶ *Ibid* at para 93.

IV. WHERE THE LAW HAS LACKED CLARITY, HOW HAVE TENANTS ADDRESSED THEIR CONCERNS COLLECTIVELY?

Without adequate legal remedies, tenants’ associations have organized to confront the severe inequality of bargaining power tenants face in relation to their landlords. Since the COVID-19 pandemic broke out, unemployment has increased.¹⁰⁷ Rent has become a major concern for tenants all around.

In the beginning of the pandemic, the Premier of Ontario, Doug Ford, claimed that residents should not have to choose between paying for rent and putting food on the table.¹⁰⁸ This statement spoke to the fears that many tenants held. While the pandemic wore on, the attitudes of politicians changed. On March 19, 2020, the Attorney General of Ontario applied for a moratorium on evictions which was granted by the Superior Court.¹⁰⁹ When the province lifted the evictions moratorium on July 31, 2020, and the LTB began issuing eviction orders online in a highly inaccessible manner,¹¹⁰ tenants could no longer rely on the rhetoric of Parliament.¹¹¹

Refusing to disclose to the public, the sheriff’s office has made it unclear how many evictions are pending enforcement.¹¹² What was clear was that “in January and February [of 2021], the LTB issued 2,049 orders for Toronto eviction cases alone, 1,378 of which were concerning rent arrears — though not all orders greenlight an eviction, with some solely requiring repayments.”¹¹³

Though the government of Ontario instituted a provincial rent freeze for the year 2021,¹¹⁴ above-guideline increases and vacancy decontrol are still allowed. As such, the provincial rent increase freeze could not fully address the severe financial difficulties tenants face.

While the financial pressures exacerbated by the COVID-19 pandemic mounted, and eviction applications continued to be filed at an increasing rate, the insufficiency of the current legal framework became apparent to more and more tenants. With long delay times, high costs, and no substantive legal recourse except for a potentially unmanageable payment plan, tenants began bargaining with landlords collectively.

¹⁰⁷ Canadian Press, “Women, youth bear the brunt of January job losses, unemployment rate hits 9.4%” *CTV News* (5 February 2021), online: <<https://www.ctvnews.ca/business/women-youth-bear-the-brunt-of-january-job-losses-unemployment-rate-hits-9-4-1.5296869>>.

¹⁰⁸ Statement from Premier Doug Ford on March 26, 2020: “If you have a choice between putting food on your table or paying rent, you’re putting food on your table. The government of Ontario will make sure that no one gets evicted. We stand by that and we’re gonna make sure we take care of those people.” M Miller, “Doug Ford just told tenants in Ontario they don’t have to pay rent if they can’t afford it” *blogTO* (26 March 2020), online: <<https://www.blogto.com/city/2020/03/doug-ford-tenants-toronto-dont-have-pay-rent-if-cant-afford-it/>>.

¹⁰⁹ *Attorney General for Ontario and Persons Unknown* (19 March 2020), *Ontario CA, Superior Court of Justice* (application).

¹¹⁰ For more information on the inaccessibility of online tribunal hearings, see Advocacy Centre for Tenants Ontario, *supra* note 46.

¹¹¹ Ali, *supra* note 39 at 13.

¹¹² V Gibson, “‘It’s not all about the bottom line, all of the time’: As many in Ontario struggle to make rent under COVID 19, one landlord is actually offering its tenants relief” *Toronto Star* (7 March 2021).

¹¹³ *Ibid.*

¹¹⁴ Ontario, Ministry of Municipal Affairs and Housing, *Residential Rent Increases* (Queen’s Printer for Ontario, 2012–21: 2021).

The following subsections highlight three major campaigns that organizers have taken up in Ontario. Through a rent strike, eviction defence, and a targeted social media campaign, tenants have strategized to get landlord to the bargaining table outside of the LTB. Absent a fulsome legal regime, tenants have turned to means outside of the law in order to give themselves more leverage and enforce agreements with landlords.

A. Hamilton

The Hamilton Tenant Solidarity Network [HTSN] organized in 2018 to launch a seven-month rent strike against their REIT landlord, InterRent.¹¹⁵ The strike aimed to pressure the landlord to drop an AGI application and make repairs. HTSN carefully planned the strike in full recognition that the withholding of rent was not legally sanctioned,

We made it clear to tenants from the beginning that ‘going on rent strike’ means setting rent money aside and not spending it. Once the strike ends, or to avoid court-ordered eviction, tenants must be prepared to pay the rent they owe...For those tenants who received a shelter allowance as part of their social assistance payments, we coordinated with social workers to ensure they were aware that these folks were part of the rent strike and saving the money. When a landlord schedules a hearing at the LTB, they must pay a filing fee of CA\$175 or CA\$190...As we did not want tenants to be financially penalized for participating in the strike, we launched an online fundraiser for a rent strike defense fund. Sympathetic Hamiltonians made donations, union locals sent cheques in solidarity, we sold hot dogs at community events, and the local labour council organized a car wash fundraiser...We raised over CA\$20,000 from a range of supporters; almost all of which was needed to pay LTB filing fees on behalf of striking tenants.¹¹⁶

Strategic tactics were employed alongside the strike through media campaigns, social events, and political actions. For example, the tenants disrupted the landlord’s open house for prospective tenants “by holding their own open house. They set up an information table, gave speeches, and provided tours of their units to the media to share the truth about the conditions of the buildings.”¹¹⁷

In the end, repairs were completed.¹¹⁸ Through the use of a wide array of tactics, tenants exerted pressure on their landlord. It was still not enough to stop the above-guideline-increase from being implemented. Once tenants come before the LTB, only the law applies and there is little room in the law for this type of robust organizing to sway decision-making.

¹¹⁵ Power & Risager, *supra* note 26 at 81.

¹¹⁶ *Ibid* at 92-93.

¹¹⁷ *Ibid* at 94.

¹¹⁸ *Ibid* at 91.

B. Toronto

People’s Defence Toronto is a grassroots activist group that fights for tenant rights in Toronto. When a single-father faced the threat of eviction, People’s Defence successfully intervened.¹¹⁹ The father had collected as much rent as he could to pay his arrears, but the sheriff’s order was already processed to evict. On April 2, 2021, 26 police cars with 50 officers arrived to evict the father and his two young children. People’s Defence posted a request on social media for as many people across the city to attend as possible to stop the eviction,

When the tenant was allowed to return to his unit to gather his belongings, his supporters arrived in numbers and demanded the landlord regularize his tenancy. In response, the landlord called the police. At least 26 Toronto Police Services vehicles attended the call. A standoff between tenants and police ensued, in which two tenants were briefly detained before being released without charges. A few days later, the police and the landlord were forced to concede the issue and agreed to the tenant’s demand to remain in his home.¹²⁰

Dozens of supporters showed up and demanded that neither the landlord, the police, nor the sheriff could evict the family. The collective power of the group was enough to stop the eviction from being carried out. Later, the father was able to sign a new lease with his landlord, allowing him and his family occupancy of his home.

The usage of eviction defence is rising as more and more evictions are processed. As long as the statutory requirements are met, evictions are legally sanctioned. Despite this fact, the actions of the People’s Defence combined with community support were able to stop the eviction and help the tenant retain occupancy in the face of 50 police officers.

C. Scarborough

In Scarborough, many tenants raised issues with their heating during the winter of 2021 across buildings owned by CAPRIET, Canada’s largest REIT. The East Scarborough Tenants Union [ETSU] organized to investigate the concerns.¹²¹ While the legal minimum requirement for a landlord to maintain in tenants’ homes is 21 C, tenants had experienced some temperatures as low as 13 C in their units. Many had to buy and use space heaters, driving up their own utility costs for their landlord’s negligence.

The issues were longstanding, so the union launched an online campaign which highlighted the failure of the landlord to maintain the vital services across their properties.¹²² Hundreds of angry tenants

¹¹⁹ PeoplesDefenceTO, “COMMUNITY WINS IN FIGHT TO KEEP SINGLE DAD IN HIS HOME! THREAD (1/7): On Good Friday, 33 Gabian Way was overrun by 23 police cruisers and fifty officers. Toronto Police lies aside, this was all to conduct the eviction of one single father and his young children.” (6 April 2021 at 15:13), online: *Twitter* <https://twitter.com/Peoples_Defence/status/1379512572576202766>.

¹²⁰ C Webber, “Doug Ford Is Using The Pandemic To Criminalize Tenant Organizing” (21 April 2021), *Passage* online: <<https://readpassage.com/doug-ford-is-using-the-pandemic-to-criminalize-tenant-organizing/>>.

¹²¹ M Miller, “Toronto tenants accuse property manager of freezing them in their apartments” *blogTO* (February 2021) online (blog): <<https://www.blogto.com/city/2021/02/toronto-tenants-accuse-property-manager-freezing-apartments/>>.

¹²² *Ibid.*

commented on Instagram, many of which CAPREIT deleted. As a direct result of the campaign, CAPREIT raised the heat and distributed a letter to tenants recognizing the complaints.

Even so, the issue resurfaced after a few weeks passed. Tenants continued to complain about the cold in their units. Had they filed at the LTB, each tenant would have had to pay a filing fee in order to have the matter heard months later when the weather would have improved. The current tribunal system does not protect the gains made in tenant organizing, forcing associations to continue to strategize outside of the law.

V. WHAT COULD BE LEARNED USING A WHOLE-WORKER ORGANIZING APPROACH

Tenants have been fighting against landlord power through collective action. Tenants, however, are not just tenants: most, if not all, are also workers. “Whole-worker organizing” stems from the recognition that organizing is class-based and there are many facets of life in which an individual is exploited.¹²³ Without a class-based analysis, divisions across healthcare, labour, and housing can often seem individualized, rather than deeply intertwined; a change in one realm can have a profound impact on the other. The gains made in one area of organizing may not be fully realised absent this awareness. When a worker gains a wage increase through membership in their labour union, they may simultaneously find themselves facing a rent increase from their landlord.

As labour unions have lost much of their radical potential through their legal recognition, tenants’ associations have opened the door to rethinking new ways to organize, pushing the parameters of the law. With this in mind, labour unions must learn, support, and organize with tenants’ associations.

Jane McAlevey in her book, *No Shortcuts: Organizing for Power in the New Gilded Age*, argues that the failure of labour unions to address this interwoven relationship has become one of the major reasons for their decline.¹²⁴ Labour unions recently have often opted to remain conservative in their approach to organizing, focusing solely on issues that directly relate to working conditions at the worksite. Much of this has to do with the passage of the very laws that gave unions their formal recognition.

Labour unions established themselves far before the law in Canada imposed a requirement upon employers to recognize them. For some critics, the legal recognition of labour unions, enshrined through Council PC 1003, in fact did not present as a celebratory victory.¹²⁵ Rather, it was seen as a difficult compromise and diminished much of the power that unions had built up over the decades.¹²⁶ Eventually, union members were forbidden from participating in job actions and strikes during the lifetime of the collective agreement. In exchange, unions could grieve through the arbitration process in order to address their concerns. Where labour arbitration was intended to be an informal avenue to tackle grievances

¹²³ E Schirmer, “Jane McAlevey’s Vision for the Future of American Labor” *New Yorker* (10 June 2020), online: <<https://www.newyorker.com/books/under-review/jane-mcaleveys-vision-for-the-future-of-american-labor>>.

¹²⁴ J Hutt, “Water & Whole-Worker Organizing”, *Our Times* Spring 2018 (17 May 2018), : online: <<https://ourtimes.ca/article/water-whole-worker-organizing>>.

¹²⁵ L Panitch & D Swartz, “Towards Permanent Exceptionalism: Coercion and Consent in Canadian Industrial Relations” (1984) 13 *Labour / Le Travail* Spring 133, online: <<https://www.jstor.org/stable/25140404?seq=1>>.

¹²⁶ For poignant, hilarious, and sharp analysis of how the legalization of Wagner-style unionism in the United States affected organized labour, see: Thomas Geoghegan, *Which Side Are You on?: Trying to Be for Labor When It's Flat on Its Back* (Revised Edition July 26, 2004: New Press)).

quickly and efficiently, the introduction of lawyers has caused the process to be drawn out and expensive. Now, it is common for arbitrations to take years to come to an end. In addition, solidarity strikes, including general strikes, were forbidden, diminishing the unity amongst workers across broad industries.

Prior to the formalization of labour unions into the law, there was arguably a broader battleground over the rights of workers. With the advent of formalized collective bargaining and institutionalized union structures, management rights no longer became the locus of union struggle. Instead, they demarcated a line which unions would not cross. Rather than risk the power they already have, unions must follow the rule informally known as, “obey now grieve later.”¹²⁷ If an employer acts contrary to union interests, there is an extensive legal process available to address concerns. Arduous fines are imposed upon unions that decide to take matters outside of the statutory framework.¹²⁸

Certainly, there are numerous benefits of legal recognition. Employers have a legal obligation to recognize the union and listen to their representations in good faith. Unions have a grievance mechanism to ensure the rights of workers are respected. Both small and large employers alike are subject to this regime. However, through this legal recognition, the priorities of unions have changed over time. Gaining standing before the courts in the hopes of advancing the freedom of association some odd five years later may take priority over organizing the unorganized. Statistics are bleak. In the private sector where almost 75% of workers are employed, 15.8% of Canadian workers belonged to a union in 2020.¹²⁹

McAlevy compares the priorities of “business-unionism” to those of whole-worker organizing, which confronts the multitude of barriers that workers face in their lives, including housing struggles. Some labour unions have attempted to negotiate using a whole-worker organizing approach. In the United States, the Bargaining for the Common Good [BCG] network joins community groups, activists, and labour unions to advance collective interests in the areas of: racial justice, education, immigration, housing, climate justice, finance, privatization, and public services.¹³⁰ Some labour unions within BCG have brought proposals to their employers to stop foreclosures on families with school-aged children during the academic year,¹³¹ use certain taxes to fund affordable housing,¹³² and increase services for rent-burdened and homeless families.¹³³ Even though it was not passed, the Chicago Teacher’s Union proposed an affordable housing provision in their contract negotiations.¹³⁴

¹²⁷ *Re: Canadian Postmasters and Assistants Association and Canada Post Corporation* (January 14, 2015), unreported (Arbitrator: Oakley).

¹²⁸ For example, see G. Layson, “Judge fines Unifor \$75K, orders end to strike at GM supplier NemaK in Ontario” *Automotive News Canada* (13 September 2019) online: < <https://canada.autonews.com/suppliers/judge-fines-unifor-75k-orders-end-strike-gm-supplier-nemak-ontario>>.

¹²⁹ Statistics Canada, “Private Employees Statistic” (2020), online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410002701>>. “Union status for Private Employees Statistic” (2020), online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410013201>>.

¹³⁰ Rutgers School of Management and Labour Relations, “Concrete Examples of Bargaining for the Common Good” (2019), online: https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CIWO/ciwo_bcg-memo.pdf.

¹³¹ Saint Paul Minnesota Federation of Teachers, AFT Local 28/NEA.

¹³² Chicago Teachers Union, AFT Local 1.

¹³³ United Teachers of Los Angeles, NEA/CTA/AFT.

¹³⁴ C Shropshire, “CPS teachers want an affordable housing provision in their contract. It’s among the new topics starting to land on bargaining tables.” *Chicago Tribune* (9 October 2019).

Within Hamilton, the HTSN marched in a Labour Day parade alongside workers in Hamilton. The organizers of the parade sought out the tenants' association to lead the last part of the march, "an honour usually given to whichever union is on strike in a given year."¹³⁵ Rent-strikers led labour-strikers with an acknowledgement that they were one and the same.

Without much explicit in the law, tenants' associations have the advantage of learning from the struggles and failures of the labour movement. Simply developing tenants' associational rights into the current *RTA* would likely lead the tenants' movement to face many of the same issues that labour unions face today. Instead, a whole-worker organizing approach has far more hope to illuminate the transformative potential of collective action.

VI. CONCLUSION

There is much left unanswered when asking how tenants' associations fit into tenant law. In a time when more and more people are worried about housing, more and more tenants' associations have mobilized to protect tenants' interests. How much of tenant associational activity will be upheld before the LTB is an open question.

The right to collectively bargain has been enshrined in the *Canadian Charter of Rights and Freedoms* under the freedom of association. Where there is already a recognized inequality of bargaining power between employers and their employees, the relationship between tenant and landlord necessitates robust associational protections.

Harry Arthurs, in his piece *Labour Law after Labour*, questions how labour law would have looked like if it had developed from a different narrative,

If we were to look beyond the workplace to asymmetries of wealth and power in other economic relationships (lenders/borrowers, landlords/tenants, agribusiness/farmers) and beyond conventional union strategies (strikes and picketing) to other modes of resistance (voting, demonstrations, boycotts, petitions, cultural representation, consumer cooperatives) 'labour law' might have been subsumed into 'the law of unequal economic relations' or 'social law', a term widely used in Europe. However, this did not happen because it seemed neither natural to scholars nor useful to practitioners to shape the boundaries of a legal field around the meta-structures of social ordering such as state, markets, class or culture... Instead, labour law has focussed on one site of interaction (the workplace), one set of actors (unions, workers, and employers), and one set of responses (conflict and negotiation) [emphasis added].¹³⁶

An enshrined right to withhold rent, more fulsome protections for tenants' association negotiations, and secure use of common spaces for associational meetings would unquestionably lead to more bargaining

¹³⁵ Power & Risager, *supra* note 26 at 94.

¹³⁶ H Arthurs, "Labour Law After Labour" (2011) Comparative Research in Law & Political Economy Osgoode Hall Law School Research Report 15, at 17-18.

power for tenants. However, focusing solely on a version of tenants’ associations in silos risks a further separation of concerns that should be considered more seriously as interrelated factors.

As evident by the trajectory of labour unions in Canada, incorporation into the formal confines of the law can often limit the goals that unions once had. Tenant organizing provides an opportunity to re-examine the vision of collective bargaining from both a legal and broader social framework. The whole-worker approach has the potential to interrogate the compounding issues that tenants face in their everyday lives such as poor living conditions, low wages, police surveillance, and underfunded schools. Short of this focus, both tenants’ associations and labour unions alike risk tunnel-vision in organizing.