Knowledge IS Power

Solving the Human Rights Pitfalls of Residential Tenancy Applications

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The laws, rules, forms and legal procedures of residential tenancy applications, pre-screening and the so-called moral intent behind fair and unbiased residential tenancy applications are woefully confusing, convoluted and esoteric, all in the name of imposing a particular moral code that currently results in all housing providers being characterized by government by the lowest common denominator of slumlord.

This characterization has also led to some extremely obtuse and nebulous legal concepts such as a housing provider's “duty to accommodate to the point of undue hardship.”

Much of the conflict between tenants and housing providers is easier to resolve than many people might think. The legal pitfalls and other moral issues involved in the residential tenancy application process has already been solved for half (figuratively, not literally) of the housing market.

I recently had what I would term a moment of crystal clarity. After reading this you might say, "so what?" but for me it was a profound realization that brought about a deeper understanding of the causal versus symptomatic factors behind housing unaffordability and unavailability.

A residential tenancy application and a home buyer mortgage application serve the exact same purpose—to obtain credit. The basis of both transactions is essentially: “If you give me a home to live in, I promise to pay you the full amount that is due each month, on time and by the agreed-to method, as well as to take care of the property and respect my neighbours.” This is universally true for all tenants and home buyers just about everywhere.

What makes this realization profound is that the consequences of not paying a mortgage amount on time and by the agreed-to method are ingrained in society, in it’s legislation and even in its moral

foundation, but the failure to live up to an equally legally-binding residential tenancy agreement is mired in human rights issues, philosophical debates, supposed moral dilemmas and a raft of other "concerns" that do not arise with home ownership defaults.

There's a significant body of legislation and legal precedents that define the business relationship between the mortgagor-mortgagee (home buyer and lender respectively) and the duties and obligations each party has. Additionally, lenders have a highly-developed process for qualifying borrowers, based primarily on the borrower's financial capacity to meet the borrower's obligations, and which confidentiality and privacy of such sensitive financial information is also well-regulated.

Critically important, the consequences, and the precise administrative and legal processes, for not paying a mortgage are clearly defined, generally well-understood and have universally-accepted consequences in most Western societies. If a mortgagor doesn't, or can't, pay the mortgage amount due then the lender can either foreclose (lender legally seizes ownership and assumes all subsequent responsibility), which is rare in Canada, or undertakes a power of sale (lender takes possession, sells the property, recovers their mortgage balance and turns over proceeds to the owner), which is the common consequence in Canada.

In rare situations in Canada, a property owner might sign a "quit deed" where the owner walks away from the property voluntarily and the lender assumes all subsequent responsibility. This was prevalent in the 2008-2009 U.S. economic meltdown where tens of millions of homeowners walked away from their mortgages. Between 2009 and 2013 over 500 banks (not branches) failed in the U.S., mostly as a direct result of over-leveraged mortgages issued to under-qualified homeowners (sub-prime mortgages and collateralized debt obligations (CDOs)).

There's no discussion or even legal posturing about where the former home owner will live or whether the home owner should be permitted to stay in the home for six to 12 months without compensation to the lender while the former owner makes other living arrangements or simply holds out for a settlement to move out. The process is clear-cut and accepted without question.

For rental housing, even though the tenancy application "for credit" is essentially identical to home buying, the credit qualification process is left entirely to housing providers who almost universally have no formal training and worse, don't seek training or education so that they can fairly and objectively qualify a tenant. Worse still is that the majority of small-to-medium housing providers don't understand the math and economics of rental property ownership and management, while lenders generally do.

Worst of all, some housing providers fall back on their personal values, beliefs and life experiences to make an uninformed and unqualified business decision. A minority of these housing providers further compound these errors by injecting their biases, prejudices and discriminatory attitudes into what should be an entirely objective and unbiased business decision.

The Ontario Human Rights Commission (OHRC) attempted to inject some moral code into the rental application process but it only succeeded in turning a straightforward business decision into a wholly-unnecessary and complex body of law that few tenants or housing providers understand, and virtually no lawyers practice (there's no money in it).

The OHRC personifies this double standard. Its website states that, "*A lack of rental or credit history should not count against you.*" However, this is exactly the criteria that is used by lenders to qualify a home buyer.

The LTB's a mess. Many adjudicators apply their own sense of social justice rather than apply consistent, evolving legal precedents. For every LTB ruling that supports a particular value or viewpoint there is an equal and opposite LTB ruling that supports the diametrically-opposing view. The higher courts have frequently criticized and reversed LTB findings. The inconsistency of LTB judgements is so pervasive that the LTB's public reputation has become "no justice for all," so much so that the tribunal's name abbreviation has come to mean among some circles as "Loves Tenants Best," "Leave Tenants Be," "Licensed to Butcher," and a host of other derisive and uncomplimentary meanings. A profound sense of injustice and no respect for the law or law enforcement is almost always behind the actions of citizens who take the law into their own hands.

And why? The large majority of these cases can be traced back to the double-standard between credit given to a residential tenant versus a residential mortgagor. But on what moral, social or legal grounds does that dichotomy exist? I could not come up with an answer for that. In fact, my answer is that it shouldn't exist.

If politicians and lawmakers looked beyond the lobbying of one-dimensional, short-sighted (one elected term of office) solutions proffered by tenant advocates and populist politicians that only address housing crisis symptoms, they'd see that applying mortgage qualifications legislation to residential tenancies would be a big step toward finding permanent, sustainable win-win-win solutions for tenants, housing providers and government. It becomes self-evident that the body of mortgage laws, legal precedents, protections, and processes can be nearly equally applied to rental tenancy.

To clarify, this credit application equality would relate only to the tenant qualification process. The issue of the responsibilities of home maintenance wouldn't be the same for a mortgagor and a tenant. The Residential Tenancies Act (RTA) states that the housing provider is responsible for the maintenance, safety and security of the property. However, contrary to the understanding of most tenants, politicians and even by-law officers, the RTA does not say that the housing provider is responsible to pay for it all. After all, it's tenants who cause property wear-and-tear. This delineation of responsibility was clearly anticipated and intended by the authors of the RTA, upon which the Above Guideline Increase (AGI) is based.

The federal government, through CMHC, has already established a baseline residential tenancy debt service coverage ratio (DSCR). CMHC is ubiquitously quoted as stating that rent should not be more than 30% of a tenant's income. That's essentially the same as saying a tenant's income should be at least three times their rent rate. This is also the universal statistic applied to establishing "affordable" housing rates in new housing developments.

CMHC's website for determining the premium to be paid for a homeowner's mortgage default insurance premium states, *"Mortgage professionals use 2 main ratios to decide if borrowers can afford to buy a home: Gross Debt Service (GDS) and Total Debt Service (TDS).*" The website further states, "*GDS is the percentage of your monthly household income that covers your housing costs. It must not exceed 39%. TDS is the percentage of your monthly household income that covers your housing costs and any other debts. It must not exceed 44%.*

Housing providers have the exact same concern. Does the tenant have the financial means to pay for the rental of the property? However, once again the Ontario Human Rights Commission reinforces the unfair double standard. Its website states, "*Unless you are applying for subsidized housing, it is illegal for landlords to apply a rent-to-income ratio such as a 30% cut-off rule*."

If government applied the near-same rules of mortgage qualification to rent qualification then a great many issues related to RTA and human rights code violations would disappear. The LTB's caseload backlog would decrease substantially. The same rule set would establish a balanced, impartial and universal qualification for all housing, whether purchased or rented.

Perhaps equally important, government involvement (interference) to constantly compel "good" behaviour of housing providers and tenants would decrease. Rarely does anyone in government ever raise issues of bad borrower or lender behaviour.

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The 78 legal clauses I added to the Ontario Standard Tenancy Agreement, a compressed Word version of the standard lease agreement, separate guarantor and parking agreements, and the application form I use can be found here: www.standardlease.ca

My 330-page book, *Landlording in Ontario*, is a superset of what I teach in the course: www.landlordingbook.com

My second book, *The Dark Side of Residential Landlording*, is a no-nonsense, firsthand, in-the-trenches, occasionally irreverent, decade-long account and compendium of the perils, trials and abuses against residential landlords; www.darksidebook.com

I teach a 6-Saturday course (total 36 hours), ***Landlording in Ontario*****,** on *everything* from finding and properly assessing the value of an investment property to dealing with the "dark side" of being a landlord and adding value in uncommon ways. Full details, including extensive testimonials from past attendees, are here: www.landlordingcourse.ca. A high-resolution video recording of a past course session is here: www.landlordingvideo.com.

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