

PAJELLE INVESTMENTS LTD.V. HERBOLD. ON THE IMPORTANCE OF HAVING A CONVENIENT ENEMY[©]

BY BRIAN BUCKNALL*

In *Pajelle Investments Ltd. v. Herbold*¹ Parkdale Community Legal Services (PCLS) stormed the heights of the Supreme Court of Canada and triumphantly planted its flag. The case was the first serious review by the Ontario courts of the provisions of what was then section 96 of the *Landlord and Tenant Act* (the section dealing with the landlord's obligation to provide and maintain "the rented premises in a good state of repair and fit for habitation.") To this day, it is the only case under Part IV of the *Landlord and Tenant Act* to have reached the Supreme Court of Canada. The case was a fundamental vindication of the strength of what was then a new provision in landlord and tenant law. It was also, in a different way, a vindication of the role of legal aid clinics. It was all a bit of a frolic. It was all a bit of a fluke.

I started teaching at Osgoode Hall Law School in the fall of 1971. One of my major areas was first-year property law and the law of residential tenancies was a significant portion of that course. Landlord and tenant law, like many other aspects of property law, was a sort of vertical slice through the strata of legal history. You could go down, down, down, past doctrine after doctrine, each of which was explicable at its own time, each of which was a foundation for later doctrine, none of which could be reconsidered without major statutory change.

By the middle of this century, the old doctrines were millstones around the necks of tenants. The common law contained no obligation on the landlord to repair (except where life and health were in danger). *Caveat emptor* ruled—if the house was a wreck, the tenant should negotiate for a lower rent. The tenant's legal estate was seen to be quite separate from the contractual covenants which sustained the estate. A

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¹ [1976] 2 S.C.R. 520 [hereinafter *Pajelle*].

² R.S.O. 1970, c. 236, s. 96 [hereinafter *LTA 1970*]. This was the legislation under review in this case. Section 96 has been amended. In its current form it is R.S.O. 1990, c. L.7, s. 94.

breach by the landlord of a contractual obligation could be the subject of a suit for specific performance but not a ground for terminating the tenancy. Whatever sense these rules may have made in nineteenth century England, they gave no foundation for the relationships between corporate landlords and low income tenants in twentieth century Toronto.

By the time I started teaching, the first steps had been taken to repair the residential tenancy regime. *The Landlord and Tenant Act, 1968-1969*³ had been passed, adding Part IV. A new code was set out which specifically governed the rights and obligations of residential landlords and tenants. The new Part amended various aspects of the common law. Security deposits were strictly regulated, the right to distrain against a residential tenant's chattels was abolished, and contractual doctrines were imported into the landlord and tenant relationship. There was, of course, much more to come. Security of tenure, the regulation of notices of rent increase and the review of rent increases came forward half a decade later.⁴

Central to the new regime was section 96. Given the role which it would subsequently play, it is worth quoting *in extensa*

96. (1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.
- (2) The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him.
- (3) The obligations imposed under this section may be enforced by summary application to a judge of the county or district court of the county or district in which the premises are situate and the judge may,
 - (a) terminate the tenancy subject to such relief against forfeiture as the judge sees fit;
 - (b) authorize any repair that has been or is to be made and order the costs thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off;

³ S.O. 1968-69, c. 58, s. 3, amending R.S.O. 1960, c. 206.

⁴ See the amendments to the *LTA, 1970*, *supra* note 2, including *The Landlord and Tenant Amendment Act, 1972* S.O. 1972, c. 123; *The Landlord and Tenant Amendment Act, 1973* S.O. 1973 (2d Sess.), c. 13; and the *Residential Premises Rent Review Act, 1975* S.O. 1975 (2d Sess.), c. 12.

- (c) make such further or other order as the judge considers appropriate.⁵

Subsection (1), of course, turned the common law doctrines on their heads. Subsection (2) was, in substance, a restatement of the law of “waste,” and subsection (3) was the procedure whereby the new regime was to be implemented. But what did it all mean?

So much for the legal context. The social context cannot be overlooked: PCLS was even younger than the amendments to the *Landlord and Tenant Act*. It had set itself down in a working class neighbourhood of Toronto in 1971 with an agenda to pursue and a mark to be made. One was never certain whether naked ambition was the servant of pious ideals or pious ideals were the vehicle for naked ambition. In this heady atmosphere, the law of residential tenancies was clearly a trump card. Most of those in the low-income community were tenants, most of the buildings were sub-standard, and most of the landlords fell below the new statutory threshold.

What was needed was a focus for all of this legal and strategic energy: an easily recognized enemy vulnerable to legal attack. What was needed, in short, was Phil Wynn and West Lodge Towers. West Lodge Towers was a complex of two high rise buildings incongruously established on West Lodge Avenue among the single family homes of the low-income area. Exactly why West Lodge Towers was unsuccessful as a housing development could itself be the subject of a study. It seems to have been built in accordance with relatively good standards. It was air-conditioned and had a sauna and swimming pool. Perhaps it had been intended to attract a clientele who, ultimately, were discouraged by the building’s surroundings. Perhaps, appearances notwithstanding, it had been cheaply built and was, correspondingly, disproportionately expensive to maintain. Perhaps it was incompetently managed.

West Lodge Towers had been developed by Phil Wynn and his various corporations. In the early 1970s, Pajelle Investments Ltd., a Phil Wynn company, was the owner. Phil Wynn was not an indifferent or distant landlord. His relationships with the tenants at West Lodge Towers were, whether hostile or cordial, very personal ones. He even had his supporters among the tenants. Some tenants would call him, with apparent honesty, “the best landlord they ever had.” I never met Mr. Wynn. I suspect that he was one of those people who could be generous where favours were begged and implacable where rights were demanded. For whatever reason, he was a highly convenient enemy, a

⁵ *LTA 1970, supra note 2.*

sort of Saddam Hussein to the PCLS Bill Clinton. At one point, the PCLS staff, students and community members were led by Fred Zemans (the member of the Osgoode Hall Law School faculty who was at that time the director of PCLS) on a demonstration picket in front of Phil Wynn's Forest Hill home (shades of Saul Alinsky).

The enemy was established. (Phil Wynn was, after all, pinioned to Parkdale by his investment in West Lodge Towers.) Now what was needed was a stick with which to beat him. Enter Lillian Herbold.

I never met Mrs. Herbold either, though we talked on the telephone from time to time. I took the case up after the trial had been completed. By the time my part of the drama was well under way, she had moved out of West Lodge Towers and had established herself on the other side of the city. I had the impression that the continuation of her lawsuit long after she had lost interest was baffling to her.

Mrs. Herbold and her daughter Margaret had been looking for an apartment in early 1971. She saw an advertisement for West Lodge Towers and visited the premises. The advertisement made it clear that there was a swimming pool and sauna and that the buildings were air-conditioned. A large sign in front of the buildings offered the same amenities. She took an apartment in one of the towers in April of 1971, but soon found that things were not as they had initially seemed. In the cold months the heat was fitful and irregular; in the hot months the air-conditioning was virtually non-existent. The sauna was never operative and the swimming pool was closed and ultimately drained of water. Mrs. Herbold lost her patience. She wanted to get out. She sought the help of PCLS. In May of 1972 an application was brought under section 96 to permit her to terminate the tenancy, the relief contemplated by section 96(3)(a). The matter came before Judge MacRae of the county court. Fred Zemans led on behalf of Mrs. Herbold.

Phil Wynn was a convenient enemy, possibly not a wise one but definitely not a weak one. He retained his usual firm of lawyers: Rosenberg, Smith, Patton and Hyman, to defend the action. Ted Matlow, later himself a judge of the county court, appeared on behalf of Pajelle. The trial, which I regret I did not attend, was fierce, lengthy

(four days of testimony and argument), and by some accounts, chaotic.⁶ The decision was reserved.

After a couple of weeks, the answer came back: Pajelle was in breach of its obligations under section 96 insofar as the building and, in particular, the air-conditioning and the swimming pool were in a state of disrepair. Mrs. Herbold was to have an abatement in her rent of twenty dollars a month for six months. (But termination was the relief requested. No one had asked for, or argued the propriety of, a rent abatement. Section 96 allowed a judge to make a “further or other order” but no one had thought this would include an abatement.)

While the county court decision was a victory of sorts, it left much room for clarification. Mrs. Herbold’s fairly simple request: “He didn’t give me what he advertised and I want to leave,” bristled with problems. Was the advertisement relevant? Did Mrs. Herbold see the advertisement before or after she entered into her tenancy agreement? Mrs. Herbold had signed a lease which made no reference to the swimming pool, sauna, and air-conditioning. Could the advertising amount to an implied covenant? The advertisement promised a swimming pool and a swimming pool was, in fact, in place—should the court be called upon to order and enforce hours when it was in operation? The building did have air-conditioning—was it appropriate for the court to attempt to set standards of maintenance?

The contractual issues lay on top of some thorny questions of statutory interpretation. What, in fact, were the “rented premises” for the purposes of section 96(1)? Mrs. Herbold had rented a suite, not a swimming pool. The defective air-conditioning unit was deep in the bowels of the building, nowhere near the apartment. What was the physical extent of the landlord’s obligation to keep the rented premises in a good state of repair? It also had to be noted that the term “rented premises” appeared in subsection (2) as well as subsection (1). Perhaps the landlord’s obligation under subsection (1) extended to the whole building. Did the tenant’s obligation under subsection (2) go as far? Alternatively, did good statutory construction require that the same words in subsection (1) have an extended meaning and in subsection (2) have a restricted meaning?

⁶ The motion was heard on 15, 16, 19, and 20 June 1972. Four days on a landlord and tenant application is unusual. Part of the problem lay in establishing what was meant by “a state of good repair.” Tenants were called to complain about numerous matters. The tenants were cross-examined and then other tenants were called by the landlord to contradict the evidence—and they were cross-examined. A spectacular set of photographs demonstrated that heaps of rotting garbage could be found around the buildings. MacRae J. disregarded the evidence on the basis that the photographs had been taken during a municipal garbage strike.

Finally, of course, there was the procedural issue—did subsection (3) give a county court judge power to grant an abatement? Were the “further and other orders” permitted under subparagraph (c) to be of substantially the same nature as the orders permitted under subparagraphs (a) and (b)? If an abatement was to be granted, could it be retrospective (arising as of time disrepair was identified and unaddressed), prospective, (running from the date of the judgement until the date repairs were effective), or both? If an abatement was to be granted, how large should it be? What evidence should guide a court on the amount of an abatement? Is the award of a retrospective abatement a species of damages not within the scope of the legislation?⁷ And, when all of those hurdles had been crossed, was it fair and equitable for the judge in the first instance to grant relief that the applicant hadn’t claimed and the respondent hadn’t considered?

An inconvenient enemy might, at this point, have assessed the county court decision as being from too junior a court and too particular in its facts to represent a dangerous precedent. There was a good chance that it might never be reported.⁸ The most inconvenient result for the purposes of PCLS would have been acquiescence. Fortunately, where Phil Wynn was concerned, there was no danger of such a result. An appeal was brought before the divisional court.

The decision of Judge MacRae came down in July of 1972. The appeal was, I presume, duly launched, and there the matter languished. The transcripts from the four day trial proved difficult to prepare, and were in the end, seriously incomplete. Someone, and I’m not sure who, suggested that I should handle the appeal since I had been teaching and arguing about the new provisions of the *Landlord and Tenant Act* for a couple of years. The only problem was that, although I had done a period of articles and had served as a clerk in the Supreme Court of Canada, I was not a member of the bar. I applied for the “Academic Call,” ordered my tabs, waistcoat and barrister’s robe and, in October of 1973, presented myself at the Law Society’s convocation room to be called to the bar and enrolled as a solicitor.

I and the PCLS staff and students prepared as best we could for the Divisional Court appeal. As noted above, the transcripts were poor. The evidence was almost as difficult to assess as the legal argument.

⁷ Oddly enough, Judge MacRae’s decision, “\$20.00 per month for six months,” could have been either prospective or retrospective.

⁸ In fact, the decision was not reported. The most extensive quotations from it are in the Supreme Court of Canada decision, *supra* note 1 at 523-24; and see *Reference Re Residential Tenancies Act, 1979* [1981] 1 S.C.R. 714 at 740 [hereinafter *ReRTA*].

Undaunted, I packed my robe and attended, with some colleagues from the clinic, at the Divisional Court to do battle with Ted Matlow. The hearing, in my recollection, was relatively perfunctory and the appeal by Pajelle was dismissed. The decision, which was never reported, did not offer any significant advance on Judge MacRae's reasons. It was, however, my first court appearance and it was a success.

As previously mentioned, Mrs. Herbold by this time was living happily elsewhere. In an odd way, the court proceedings were thereby made more urgent. At some point, this new green shoot of judicial analysis might be blasted by the cold breath of a higher court, with costs against the unsuccessful party. The potential for such an award, which neither Mrs. Herbold nor the clinic could easily sustain, was the practical threat in the succeeding litigation. Our convenient enemy had at least one potentially inconvenient claw.

From the Divisional Court, the next step was the Court of Appeal though, since the decision under appeal was itself an appeal to the Divisional Court, leave had to be obtained. The motion for leave was duly brought by Pajelle and I packed my robes once more. The application for leave, at which Arnup J.A. presided, was the first instance in which some of the more technical difficulties of the case were aired. As counsel for Mrs. Herbold, of course, I urged that no appeal was appropriate or necessary. The court disagreed and gave leave. I was disappointed, on behalf of PCLS and Mrs. Herbold, but intrigued at the possibility that another hearing might bring real clarity to the law.

Ted Matlow and I met again in May of 1974. The Court of Appeal bench consisted of Schroeder J.A. presiding together with Brook J.A. and Estey J.A. They were a formidable group. My one vivid recollection is of an intervention by Schroeder J.A., a jurist who was famous as a curmudgeon. Ted Matlow was arguing on behalf of Pajelle and the issue of the advertisements was under consideration. "You mean, Mr. Matlow, that when a landlord advertises an apartment with a doorman on duty, he's not obliged to keep that person in place?" Doormen were probably not plentiful in Parkdale apartment buildings. I was told later, however, that Schroeder J.A. had recently sold his house and moved into an apartment and had more than a passing interest in the reliance which could be placed on a landlord's words.

The Court of Appeal decision was written by Schroeder J.A. and was a very good and thoughtful assessment of both the case and the law. His particular focus was on the fact that an abatement had been granted for which one had not been applied. He ruled, in effect, that the county court judges who were designated as the people to hear actions under section 96 should not be confined in their interventions by the niceties of

pleading. These applications could go forward with a large discretion on the part of the bench. The further and other orders could be whatever would be most useful in the circumstances.

Mrs. Herbold was vindicated once more.

The Court of Appeal decision, which was reported,⁹ was a highly useful review of section 96. It came from an important bench of an appellate court and it materially enlarged the interpretation of the legislation and the powers of judges dealing with the legislation. In fact, PCLS had drawn blood from the convenient enemy. Had leave to appeal been denied, or had Phil Wynn given up after the Divisional Court appeal, the case would have been of very little significance.

From the Court of Appeal, Phil Wynn's road led to the Supreme Court of Canada, but the gates were strongly defended. Once again, leave to appeal had to be sought. At that time, however, leave could be sought from either the Ontario Court of Appeal or the Supreme Court of Canada itself. Pajelle went first to the Court of Appeal and requested leave to appeal a decision of one of its own benches. The tactic was a risky one. Convincing a panel of the Court of Appeal that their very senior brother Schroeder had erred, or was on ground at least sufficiently questionable to permit an appeal, demanded a very forceful argument. Moreover, the Ontario Court of Appeal, having spoken on a provincial statute squarely within an exclusively provincial area of jurisdiction, brought the relevance of a higher level of review in question. Once more I donned my barrister's robes—now feeling somewhat of an old hand. This time our submissions prevailed and the application for leave was unsuccessful.

Phil Wynn was relentless. He gave instructions that leave to appeal be sought from the Supreme Court of Canada itself. At that time, applications for leave were heard *viva voce* in Ottawa. Phil Wynn sent Alvin Rosenberg, Q.C., the senior partner in Ted Matlow's firm and later himself a judge of the Ontario Court of Justice (General Division), in quest of the further hearing. Once again, I represented Mrs. Herbold. My fifth appearance in court was to be my first before the Supreme Court of Canada.

We used the same arguments that had been presented to the Court of Appeal. The interpretation of a provision of a provincial statute unique to the province did not require further judicial intervention. If that argument failed, however, one more was to be considered. I noted that the practical risk in the entire enterprise was the potential for an order of costs. My submission was that if leave were

⁹ *Re Herbold et al and Pajelle Investments Ltd* (1975), 4 O.R. (2d) 133.

to be granted, it should be granted “with costs to the respondent in any event of the cause.” Such an order is, for obvious reasons, rare but it seemed appropriate in the circumstances. The court granted leave to appeal but gave Mrs. Herbold her costs no matter what the outcome. Our convenient enemy had been declawed. He, and his solicitors, were still formidable legal opponents but no practical damage could be done to PCLS or Mrs. Herbold.

The case was finally argued in October, 1975. By this time, Mary Hogan (now associate chief justice of the provincial court) was a staff lawyer at Parkdale in the landlord-tenant section and was associated with me as counsel. We went to Ottawa, together with Fred Zemans and some of the other staff members, to make the clinic’s first appearance in the nation’s highest court.

Even at this point, the case was not without its ironies. I took my by now well used robes over my arm and strode confidently into the “Barristers Robing Room” on the second floor of the Supreme Court building. My co-counsel searched for a similar facility for lady barristers. None such existed. She recalls that she was given the use of a small and only semi-private utility room for her court preparations.

The case was heard by the full bench of the Supreme Court of Canada. I recall the usual questions and repartee between the bench and counsel on both sides, though there was no indication of how the members of the Court were thinking about the issues. In the end, it was Spence J., the member of the Court for whom I had served as clerk five years earlier, who delivered the unanimous decision.

The reasons of Spence J. covered different territory than those covered by Schroeder J.A.¹⁰ Spence J. looked carefully at the provisions of section 96 and accepted our submission that while 96(1) covered the entire building, the provisions of 96(2) should be confined to the actual area exclusively leased to the tenant. Spence J. also concurred with Schroeder J.A. in his view of the nature and purpose of the *Landlord and Tenant Act*.

The final problem to be addressed, however, was the abatement in rent. Spence J. agreed that section 96(3)(c) was broad enough in its implications to permit an order for a relief of rent. He also agreed that this was the proper case in which to grant such an abatement. The difficulty, however, was that, since no one had sought an abatement, no evidence had been offered on the amount which would be acceptable. Under the circumstances, he found that it was appropriate to affirm the lower court’s decision except insofar as the amount of the abatement was

¹⁰ *Pajelle*, *supra* note 1.

concerned. The amount of the abatement should be referred back to be determined in accordance with evidence submitted. While the appeal was “allowed in part,” the reasoning in the Supreme Court of Canada decision, coupled with the reasoning in the court of appeal decision, was a firm foundation for a new line of analysis of the obligations of residential landlords, a foundation which, with some statutory changes, has lasted until this day.

The case was, obviously, a classic test case. Indeed, it was almost perversely classic. I do not believe that the reference to establish the amount of the abatement was ever pursued by either side. PCLS and Pajelle may have come to some understanding on the amount; \$120 was not worth a great deal more effort on either side. Even the order for costs was relatively empty. I had not charged PCLS or Mrs. Herbold for my services and, of course, PCLS had not charged its client. Our order at the application for leave protected Mrs. Herbold from loss but did not cost Pajelle anything. In any event, the practical consequence of the enterprise to the client was minimal. The legal consequence to the client *community* was enormous. As I said at the outset, however, there is a great deal about the case that looks like a fluke. With a less convenient enemy, particularly with an enemy of a practical turn of mind who was ready to cut his losses, the test case strategy would have gotten nowhere.

PCLS appeared at the Supreme Court of Canada again when, acting on behalf of the Federation of Metro Tenants Association, it successfully argued that the *Residential Tenancies Act* should be struck down.¹² At a far more practical level, PCLS has appeared in a host of courts and tribunals on behalf of countless clients and has both won and lost in the representations it has put forward on behalf of the community and the members of the community. In the long run, the contribution of PCLS to the development of law, and law in low-income communities, can be assessed under a variety of headings. It was a pioneer in Canada in the recognition of the rights and needs of low-income clients, it served as a model for the manner in which clinical legal services can be provided, it demonstrated a new mechanism for integrating students into clinical work and introducing them to the issues of low-income law and it was an inspiration for generations of young lawyers who even now look out from their Bay Street windows and remember that law touches all of our world.

¹¹ S.O. 1979, c. 78.

¹² *Re RTA*, *supra* note 8.

I hope that *Pajelle v. Herbold* is a part of the PCLS contribution to law for low-income communities, though I am certain it is not the most important part. Even today, I harbour a lingering suspicion that Phil Wynn, by being the convenient enemy, has made as much of a contribution to the law of residential tenancies as I have.