Buried Alive:
The Human Rights Implications of Compulsive Hoarding in the Landlord-Tenant Context

Lauren Blumas*

Introduction

A fire displacing 1,200 Toronto Community Housing Corporation (TCHC) residents late 2011 was described by Fire Chief Stewart as "one of the hottest fires his crews have ever fought".[1] The six-alarm fire began in apartment filled with combustible material, the resident a suspected hoarder. As many as two hundred residents were forced into temporary shelters, some not able to return to their homes for months, sparking litigation which culminated in the certification of an $80 million class-action lawsuit against TCHC.[2]

Compulsive hoarding is a condition in which the primary arena of impairment is within the home, posing health and safety concerns for tenants, housing providers and the community at large. With an incident rate estimated at 5 percent of the population[3], compulsive hoarding raises difficult social and legal questions, which require careful consideration of competing rights of landlord and tenant. For housing providers, the distinct unsanitary conditions and accumulation of hazardous material associated with compulsive hoarding pose serious liability risks. With landlords increasingly turning to courts and adjudicative tribunals for relief[4], hoarding tenants are vulnerable to eviction and compromised mental health.

The difficulties that arise in housing compulsive hoarders engage the fundamental principles of anti-discrimination law. Compulsive hoarding arguably meets the definition of disability within the meaning of anti-discrimination legislation, triggering housing providers' duty to accommodate. Relief in the form of eviction will only then be available where housing providers are able to satisfy decision makers that the threshold for undue hardship has been reached. Clearly, this raises difficult question for both decision makers and advocates;

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* JD, Osgoode Hall Law School.

[1] John Musselman, "Fire officials worried about hoarders in highrises" *CTV News* (6 October 2010), online: < http://toronto.ctvnews.ca>.

[2] *Ibid.*

[3] Christiana Bratiotis et al., "Hoarding Fact Sheet" *International OCD Foundation* (8 December 2009), online: International OCD Foundation <http://www.ocfoundation.org>.

[4] Speaking with community legal clinics, this has been recognized as an increasingly common issue among landlords and tenants.

when is excessive clutter a disability attracting legislative protection? And at what point does a housing provider's duty to accommodate cease?

This paper will attempt to outline housing providers' obligations to hoarder tenants and will unfold in three parts. Part I will summarize the psychological research on compulsive hoarding and argue for its legal recognition as a disability. Using the social model for understanding disability, this section will delineate the threshold for defining eccentric collection or unkemptness as a disability. Part II frames compulsive hoarding as a novel legal concern in which decision makers have struggled to address. Drawing on Ontario Landlord Tenant Board (OLTB) jurisprudence, inconsistencies with respect to the application of anti-discrimination principles will be explored. The purpose of doing so is to highlight the relevancy of this paper in the current legal climate and flag the potential stumbling blocks for advocates and decision makers going forward. Finally, Part III will flesh out the duty to accommodate as informed by undue hardship and provide guidance with respect to the obligations on both housing providers and hoarding tenants in the accommodation process.

Part I: Hoarding is a disability within the meaning of anti-discrimination legislation

a. What is Hoarding?

Compulsive hoarding is a chronic disorder, which has become the recent subject of legal, social and psychological interest. [5] Characterized by the inability or difficulty discarding items of little or no value[6], compulsive hoarding has been framed by mainstream media as a Western phenomenon having its genesis is materialism.[7] Reality television has begun to cash in on the surge of interest in hoarding behaviour, eliciting strong reactions from the public at large.[8] While mental illness is cloaked in deeply ingrained prejudice and stereotype, compulsive hoarding appears to attract a distinct breed of stigma related to the unsanitary qualities commonly associated with the disorder.

In a study conducted by Stephen Kellet of the Centre for Psychological Services Research, University of Sheffiled, hoarding participants expressed feelings of stigmatization describing societal reaction to their condition as one of "shock" and "horror".[9] The language used by participants in Kellet's study would

[5] See Deborah M Todd, "Hoarding Patterns from Clutter to Calamity: Psychological Disorder of Hoarding Getting More Attention" *Pittsburgh Post Gazette* (December 2, 2010) online: <http://www.post-gazette.com>.
[6] Randy O. Frost & Tamara L. Hartl, "A Cognitive Behavioral Model of Compulsive Hoarding" (1996) 34 Behav Res and Therapy 341 at 341.
[7] *Todd, supra* note 5.
[8] *Ibid.*
[9] Stephen Kellett et al "Compulsive Hoarding: An Interpretative Phenomenological Analysis" (2010) 38 Journal of Behavioural and Cognitive Psychotherapy 141 at 148.

appear to indicate that compulsive hoarding is a rare condition. Recent studies however suggest a prevalence of up to 5% of the population and twice that of Obsessive Compulsive Disorder (OCD).[10]

Despite evidence that compulsive hoarding affects a significant percentage of the population, the understanding of its epidemiology, etiology and treatment is still in its formative years. In the current Diagnostic and Statistical Handbook for Mental Disorders (DSM IV), compulsive hoarding is recognized as a behavioral manifestation of OCD and is one of the eight diagnostic criteria used to diagnose OCD personality disorder.[11] In recent years, clinicians have reconceptualized compulsive hoarding as a stand-alone disorder with its own set of diagnostic criteria, which does not reliably respond to traditional OCD treatment.[12]

The recognition of compulsive hoarding as a distinct disorder is slated for DSM-V, where it will be incorporated into the list of identified psychological disorders and subject to rough diagnostic criteria.[13] While a clear set of diagnostic criteria has yet to be established, psychiatrists have generally accepted that compulsive hoarding is characterized by the following:

> (1) the acquisition of, and failure to discard, a large number of possessions that appeared to be useless or of limited value; (2) living spaces sufficiently cluttered so as to preclude activities for which those spaces were designed; and (3) significant distress or impairment in function caused by the hoarding.[14]

Emerging research suggests that compulsive hoarding may develop as the result of traumatic life events, which create the conditions that foster the development of hoarding behaviour.[15] Hoarding has been described in the literature as following "a chronic course, with only a minority reporting remission of symptoms and most describing a worsening of symptoms across their lifespan".[16] The condition often results in the precarious stacking of accumulated objects leaving only a narrow "goat path"[17] to navigate the home and may take

[10] Christina Gilliam & David Tolin, "Compulsive Hoarding" (2010) 74(2) Bulletin of the Menninger Clinic 93.
[11] *Diagnostic and Statistical Manual of Mental Disorders,* 4th ed (Washington: American Psychiatric Association, 2000).
[12] Mirene E. Winsberg et al., "Hoarding in Obsessive-compulsive Disorder: A report of 20 Cases" (1999) 60 Journal of Clinical Psychiatry 591 at 596.
[13] Caroline Cassels, "DSM-5 Gets APA's Official Stamp of Approval" *Medscape News* (2 December 2012), online: < www.medscape.com>.
[14] *Frost & Hartl, supra* note 6.
[15] *Kellett, supra* note 9 at 150.
[16] *Gilliam & Tolin, supra* note 10 at 93.
[17] "Goat path" is a term commonly used in literature on compulsive hoarding which refers to the narrow trails hoarders will use to navigate through their homes.

on a "distinct unsanitary element".[18] In Kellet's study, five broad categories of hoarded items were identified and included: (1) information - magazines, books, newspapers; (2) household waste; (3) household objects; (4) collectables; and (5) clothes and garments.[19] Animal hoarding has also been identified in the literature as a variant of compulsive hoarding. However, it is beyond the scope of this paper to include a discussion on the implications of this category of hoarding due to the unique health and legal concerns involved.

Research has shown that hoarders acquire objects for two central purposes: potential use value or sentimental value.[20] When objects are collected for their potential use value, hoarders perceive objects as having some degree of future utility. The fear of waste, in combination with a distorted view of utility, results in an intense attachment to objects and the aversion to discard. Objects hoarded for their sentimental value are perceived as "containing key memories and affects".[21] Compulsive hoarders collecting for sentimental purposes experience strong emotional attachment to their accumulations and often view the objects as an extension of self.[22]

Though a more thorough understanding of the genesis of compulsive hoarding is beginning to emerge, the absence of a clear set of diagnostic criteria poses a challenge to decision makers and advocates when dealing with hoarder tenants. The clinical uncertainty surrounding diagnosis translates to a legal difficulty in defining compulsive hoarding as a disability within the meaning of anti-discrimination legislation. The pertinent legal question then becomes when is it appropriate for the law to recognize hoarding behaviours as a disability, imposing legal obligations on housing providers?

b. What constitutes a disability under human rights legislation

The SCC has recognized the special nature of human rights legislation, describing it as "quasi-constitutional" and taking supremacy over other legislation.[23] Decision makers in landlord tenant disputes must then give consideration to human rights principles of accommodation when a disability is alleged. In so doing, judges and adjudicators are faced with the difficult task of discerning whether a tenant has a true disability, which attracts legal protections.

Dianne Pothier has stated that "disability as a prohibited ground of discrimination is noteworthy for its immense diversity".[24] "Physical disability" as a

[18] Keith P Ronan, "Navigating the Goat Path: Compulsive Hoarding, or Collyer Brothers Syndrome, and the Legal reality of Clutter" (2011) 64 Rutgers Law Review 235 at 240.
[19] *Kellett, supra* note 9 at 145.
[20] *Ronan, supra* note 18 at 238.
[21] *Ibid.*
[22] *Ibid.*
[23] *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145.
[24] Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic

prohibited ground of discrimination under human rights legislation was first recognized in the 1976 amendment to New Brunswick's *Human Rights Act*.[25] Since this initial recognition, the scope of disability has been steadily broadened and is now understood to encompass mental disabilities.[26] The legal definition of mental disability is necessarily bound up with medical diagnosis, making the DSM both an important medical *and* legal tool. To illustrate the legal import, the DSM has been cited in over 5,500 decisions in the US and is considered "objective medical evidence" in determining disability.[27] The absence then of compulsive hoarding from the DSM poses a difficulty for both advocate and decision maker in discerning whether hoarding is a disability within the meaning of anti-discrimination legislation, requiring accommodation. It is worth noting that although the next edition of the DSM set for release in late 2013 will include compulsive hoarding as a discrete disorder, the burden of proving it meets the legal definition of disability will not be absolved. Legal scholarship has pointed to the provisional nature of the proposed diagnostic criteria and the American Psychiatric Association's announcement that it is not able to provide treatment guidelines as a potential stumbling block.[28]

The lack of a DSM listing does not however preclude compulsive hoarding from attracting protection. Under various pieces of human rights legislation, persons with a mental health disability are entitled to be free from discrimination.[29] In order to discern whether compulsive hoarding is included within the ambit of mental disability, and thus afforded protections under the *Code,* the definition of disability must be closely examined.

The conventional understanding of "disability" in Canada is rooted in the biomedical model of disablement.[30] The biomedical perspective understands health as contingent on the freedom from disease and impairment.[31] Disability is conceptualized through this framework as an entirely physical occurrence in which "impairment is a genuine and intrinsic dimension"[32] and exists independent of social constructs. Focusing in on the impairment experienced by an individual, the bio-medical model is concerned with curing or fixing an individual such that they can operate in society as is[33], reinforcing able-bodied norms. Since this

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Approach"(2010-11) 4 McGill J.L. & Health 17 at 18.
[25] *Ibid.*
[26] See for example *Human Rights Code*, RSO 1990, c H-19 s 10(1) [*Human Rights Code*].
[27] Ralph Slovenko, "The DSM in Litigation and Legislation" (February 2011) 39 J Am Acad Psychiatry Law 1 at 6.
[28] *Ronan, supra* note 18 at 243-244.
[29] See for example *Human Rights Code, supra* note 26.
[30] *Ian B. McKenna*, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997-1998) 29 Ottawa L Rev 153.
[31] *Ibid.*
[32] *Ibid.* at para. 14.
[33] *Pothier*, *supra* note 24 at 20-22.

perspective conceptualizes disability as a function of some medical problem causing illness or physical impairment, only those conditions medically recognized are considered a disability. [34] Under the biomedical model, the exclusion of compulsive hoarding from the DSM could be fatal to its legal recognition as a disability. Fortunately, the SCC has moved away from this more limited understanding of disability to one which recognizes and challenges the role social constructs play in disabling individuals; the social model.

The social model for disability views disability as a social construct in which persons with impairments are not disabled by those impairments, but by the ableist construction of world around them. As opposed to providing curative measures allowing for conformity to ableist norms, the social model is concerned with altering the environment and accommodating impairments such that persons with a disability are not precluded from participation in society.[35] As stated by the HRTO:

> The [social model] promotes legislation and public policy where rights and responsibilities are shared between citizens and the state, focusing on building a country based on the principles of inclusion, equity, affordability and justice. While the aim of [the social model] is not to make a person "normal" in a physical or mental sense, the movement emphasizes the value of people with disabilities to have ordinary life experiences by providing community-based, consumer-controlled services, supports, resources and skills training to enable people with disabilities to live an "ordinary life" in the community.[36]

In *Eaton v Brant County Board of Education,* in determining the constitutionality of a provision of the *Education Act 1990* allowing for separate education for special needs students, the SCC signaled a move to the social model approach for understanding disability, recognizing that:

> …exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access…. it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation[37]

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[34] *Debora Diniz et al,* "Disability, Human Rights and Justice" (2009) 11 Int'l J on Hum Rts 61 at 61.
[35] *Ibid.*
[36] *Hinze v Great Blue Heron Casino*, 2011 HRTO 93 at para. 20 [*Hinze*].
[37] *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at para. 35.

The SCC went further to enforce the social model for understanding disability in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal City* (*City of Montreal*). In that case, the SCC recognized that the definition of disability extends to individuals *perceived* to have a disability.[38] In so doing, the SCC squarely addressed the definition of disability, emphasizing obstacles to societal inclusion as the crux of "disability" rather than the actual condition of the individual. Following from that, where a condition is subject to negative bias and operates as an obstacle to full participation in society, it falls within the ambit of disability as conceptualized by the social model.[39]

The HRTO in applying the social model has held that a finding of disability requires only the "inability to do something others can normally do and substantial and ongoing limits on one's activities".[40] Compulsive hoarding has a profound negative impact on those afflicted. The extensive accumulation of clutter which "preclude(s) activities for which living spaces were designed" has been recognized in the scholarship as one of the fundamental pillars of the disorder. [41] Deterioration of living conditions causes embarrassment contributing to a cycle of social isolation and withdrawal, not dissimilar to other legally recognized mental disabilities. Further still, hoarding behaviours have been found to contribute to "significant work impairment exceeding that found in most anxiety or depressive disorders and comparable to that reported by individuals with psychotic disorders".[42]

Emerging research on compulsive hoarding and the limitations exhibited by individuals affected certainly indicates that it meets the definition of disability as prescribed by the SCC. Practically however, without consensus in the medical community, physicians may be unwilling to provide a diagnosis and even in the event diagnosis is achieved, its credibility may be questioned.

The social model allows for a broader understanding of disability, which is not confined strictly by medical diagnosis. Consistent with this model, the HRTO has held that a diagnosis of a DSM recognized disorder, while cogent evidence of a disability, is not always necessary.[43] This means that for hoarders, the exclusion of a DSM listing or the inability to achieve a diagnosis of "compulsive hoarding" is not necessarily fatal to gaining access to the protections of anti-discrimination legislation. Diane Pothier has recognized that even a "normal

[38] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal City*, 2000 SCC 27 at para.s 72-81.
[39] *Ibid.* at para.s. 20-22.
[40] *Hinze*, *supra* note 36 at 23.
[41] *Gilliam & Tolin, supra* note 10 at 95.
[42] *Ibid.*
[43] *Crowley v Liquor Control Board of Ontario*, 2011 HRTO 1429 at para. 63 [*Crowley*].

ailment" which "has detrimental consequences… [it may be] acceptable to invoke disability discrimination".[44] While medical evidence will continue to be an important element informing legal analysis, absence of a distinct diagnosis will not conclude it. This then raises two interrelated practical questions that adjudicators and advocates will face in eviction proceedings against a hoarder; (1) what kind of evidence is required for a finding that a tenant has a disability; and (2) what is the threshold for classifying behavioural indicia of compulsive hoarding a disability?

In part, the latter question is answered in the discussion on the social model for understanding disability. The confines of "disability" with a view to the social model understanding must be considered. But what does this really require in practice? Not unlike hoarding, stress, anxiety and depression fall on a continuum that ranges from mild to debilitating. In these cases, decision makers have been able to draw a line distinguishing a condition that constitutes a disability from one that does not attract protection by looking to medical evidence of symptoms.

In *Re Skytrain and CUPE, Local 7000* (*Skytrain*)[45] a labour arbitrator dealt with whether stress constituted a disability within the meaning of human rights legislation. In that case, a griever submitted medical documentation that she was "under stress".[46] The arbitrator, in rejecting that the griever had established that she had a mental disability, reasoned that:

> There is no doubt that stress can be disabling. On the other hand, most people live with some degree of stress and so it can be reasonably assumed that stress is not in the normal course, a disabling condition… For these reasons I have some difficulty in finding that "stress" by itself is cogent evidence of a medical disability…[47]

The labour arbitrator went on describe the generality of the language included in the medical documentation as one of the chief failings in demonstrating that the stress experienced constituted a disability. [48] In the absence of a diagnosis of a DSM recognized mental illness, the arbitrator in apparent consideration of the expansive understanding of disability reasoned that it may be sufficient to point to some "other compelling evidence of mental illness".[49] The HRTO gave further guidance which helps to answer our two

[44] *Pothier*, *supra* note 24 at 20.
[45] *Re Skytrain and CUPE, Local 7000 (Olsen)*, 2009 CLB 11377 at para.. 57 [*Re Skytrain*].
[46] *Ibid.*
[47] *Ibid.* at paras. 68-69.
[48] *Ibid.* at para. 69.
[49] *Ibid.* at para. 57.

remaining question in *Crowley v. Liquor Control Board of Ontario* (*Crowley*). In *Crowley,* the HRTO considered whether the applicant had a mental disability. The applicant provided medical documentation, which described the symptoms experienced at the material time as "stress resulting in significant psychological disability, manifesting as stress, anxiety, [and] alterations in sleeping patters".[50] The HRTO ultimately rejected the applicant's assertion, reasoning that the evidence was insufficient to support a finding of a disability in the absence of an "articulation of clinically-significant symptoms from a health professional".[51]

Borrowing from the caselaw on stress, which on its own is not a recognized disorder in the DSM, hoarders will have to provide medical documentation that states s/he has a disabling condition accompanied by a detailed description of symptoms and the clinical significance of those symptoms. The issue is essentially one of detail. Without DSM recognition of compulsive hoarding, those afflicted will have a greater burden to produce medical evidence that outlines the disabling nature of the condition in the form of symptoms and corresponding limitations. Compulsive hoarders will need to provide medical evidence, perhaps from a specialist, which clearly outlines his/her limitations and provides a link between those limitations and the symptoms of compulsive hoarding.

With compulsive hoarding arguably a disability within the meaning of anti-discrimination legislation, it is important to examine how Courts and Tribunals in Canada have so far addressed this novel legal issue.

Part II: How has compulsive hoarding been addressed at the Landlord Tenant Board?

Tenants who compulsively hoard have become the recent subject of heated discussion amongst lawyers, particularly in the community legal setting. With few cases making their way to adjudication on the merits thus far, there is little guidance for landlords, advocates and decision makers on the application of human rights legislation. Those cases that have been decided come only from the Ontario Landlord Tenant Board and are inconsistent with respect to remedies granted and the application of human rights principles.

In 2010, the LTB dealt with three applications to evict tenants that were identified as compulsive hoarders, ordering disparate remedies, which account for the *Ontario Human Rights Code* to various degrees. In LTB file SOL-07404-10, the landlord (O.L) applied for an order to terminate the tenancy and evict the tenant (R.S.) for substantially interfering with the reasonable enjoyment of the

[50] *Crowley, supra* note 43 at para. 48.
[51] *Ibid.* at para. 64.

landlord and another tenants.[52] The landlord testified that the unit had a mass accumulation of clutter, which prevented access to the tenant's heating unit, stove and oven. Consistent with typical hoarding behaviour, the unit was unsanitary and had begun to emit an odor that caused disruption to other tenants.

O.L. attempted to provide supportive interventions to assist in de-cluttering the unit. In addition to numerous warnings regarding health and safety concerns, O.L. contacted the Assertive Community Treatment Team in a bid to mitigate those concerns and preserve the tenancy. R.S rejected the proposed interventions as well as the de-cluttering support offered by his mental health support workers. R.S. in response gave evidence that he had been trying to gain entry to a treatment program offered by St. Joseph Mental Health Hospital, which would enable him to manage his disorder, urging the LTB to exercise its discretion pursuant to s 83(1) of the *Residential Tenancies Act* and grant relief from eviction.

The LTB chose to exercise its discretion, preserving the tenancy subject to the condition that the unit be cleaned *to the satisfaction of the landlord* within 30 days of the date of the hearing. In so doing, the adjudicator found that the tenant had a "hoarding problem"[53] and that the condition of the unit posed a health and safety risk. Despite the recognition of unsafe living conditions the adjudicator took special note of the difficulty in treating compulsive hoarding and the likelihood of continued deterioration without treatment. The decision to exercise discretion pursuant to s 83(1) of the *RSA*, relieving the tenant from immediate eviction was rooted in the tenant's active pursuit of rigorous one to one treatment at St. Joseph Mental Health Hospital.

The LTB presumably, without stating in the decision, reasoned that if the tenant failed to adequately de-clutter the unit *to the landlord's standard*, the threshold for undue hardship would be reached allowing termination of the tenancy. The LTB would appear to have taken into consideration the recurrent nature of the tenant's condition and the efforts by the landlord to provide supportive interventions. What remains unclear from this decision is why the threshold for undue hardship is dependent on the landlord's perception of cleanliness, rather than on the statute mandated considerations: health, safety and cost.[54]

In LTB file TSL-07237-10, under a similar fact scenario, that Board went slightly further in its analysis of the landlord's duty to accommodate a compulsive hoarder.[55] The decision discloses that the tenant had accumulated large amounts

[52] *SOL-07404-10 (Re),* 2010 CanLII 65631 (ON LTB).
[53] *Ibid.* at para. 9.
[54] See for example *Canadian Human Rights Act,* RSC 1985, c H-6 at 15(2).
[55] *TSL-07237-10,* 2010 CanLII 65617 (ON LTB).

of combustible material and created a "fire hazard and *ipso facto* seriously impairs the safety of other persons".[56] The landlord subsequently delayed pursuing eviction to allow the tenant an opportunity to purge the clutter. After relapse of the conditions, the landlord sought an order to terminate the tenancy.

The adjudicator acknowledged that the tenant was a hoarder and that she was likely unable to bring her unit to a state of "ordinary cleanliness" without support.[57] Instead of requiring that the hoarding tenant comply with the housing provider's subjective standard of cleanliness, the adjudicator ordered that the tenant reduce the clutter in her unit "to the point where the state of the unit is not a fire hazard".[58] The tenant was given 30 days to comply, barring which the landlord would presumably be considered to have exhausted all efforts to accommodate.

This decision suggests a careful consideration of the landlord's duty to accommodate. The adjudicator, in contrast to the other decisions rendered, incorporated a degree of tolerance into the landlord's duty to accommodate. The order rendered is a compromise, which seeks to address the health, and safety issues at play and that requires some tolerance of clutter on the part of the landlord.

The last of the trilogy of hoarding eviction cases heard by the LTB in late 2010 took a markedly different approach. In SOL-09065-10[59], the LTB ordered the eviction of a 90-year-old hoarder who had amassed paper and garbage in her unit. The adjudicator found that the tenant's unit had attracted insects and posed a fire and health risk. In this case, the tenant's daughter confirmed the evidence of the housing provider and testified that she was attempting to make alternative living arrangements for her mother. Without undertaking an analysis of the landlord's attempts to accommodate the tenant, the LTB ordered the tenancy be terminated at the end of the following month. Without detailed reasons, it is difficult to ascertain the analysis of the decision maker, but what is clear is that the written decision is devoid of any consideration of anti-discrimination principles. There is no indication in the written decision that the landlord produced evidence that preserving the tenancy would amount to undue hardship.

It is clear that these decisions disclose a degree of confusion with respect to striking the appropriate balance between the rights of landlord and hoarding tenant. Without explicitly recognizing compulsive hoarding as a disability, the LTB appears to apply an analysis consistent with consideration of human rights principles, but failed to apply them consistently to the accommodation analysis to discern the point in which a landlord's obligation ceases in the wake of undue

[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *SOL-09065-10 (Re),* 2010 CanLII 65548 (On LTB).

hardship. The remainder of this paper will be devoted to fleshing out some guidance as to when a landlord will be considered to have exhausted their duty to accommodate, allowing eviction.

Part III: Shaping the duty to accommodate

a. *Establishing a prima facie case of discrimination*

The accommodation relevant to hoarding tenants facing eviction is the preservation of tenancy despite breaches of the lease or health and safety standards. A finding of discrimination will follow where a hoarding tenant is able to make out a *prima facie* case of discrimination and the housing provider is unable to defend against the allegation by showing that accommodation has been provided up to the point of undue hardship.[60] Practically, for hoarding tenants this translates to a preservation of the tenancy until the combined accommodation efforts of landlord and tenant to preserve housing amounts to undue hardship for the housing provider. In eviction proceedings, adjudicators must consider whether a *prima facie* case of discrimination is established prior to canvassing the accommodation measures.

A *prima facie* case of discrimination will be made out where there has been differential treatment on an enumerated ground, which imposes a burden or withholds a benefit in a manner that perpetuates disadvantage, stereotyping or prejudice.[61] In most cases, it will not be required to adduce evidence of perpetuation of disadvantage, stereotype or prejudice. Rather, an inference of such will be made where a connection can be made between the identity of the claimant and a prohibited ground.[62]

Human rights law has recognized two broad categories of discrimination equally capable of establishing a *prima facie* case; direct discrimination and constructive discrimination. Most relevant to the context at hand is constructive discrimination, where a seemingly neutral rule, restriction or practice, has a disparate effect on a member of a group of persons identified by a prohibited ground.[63] Legally, the distinction between the two categories of discrimination is not crucial to establishing a *prima facie* case. However, an identification of how discrimination is likely to arise in the housing context is helpful for understanding the application of anti-discrimination principles. Translated to the scenario at hand, a seemingly neutral lease provision or health and safety standard will amount to a *prima facie* of discrimination where a hoarding tenant is unable to maintain the standard *as a result of his or her disability*.

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[60] See for example *Human Rights Code, supra* note 26 ss. 11(1)-(2).
[61] *Ontario (Director, Disability Support Program) v. Tranchemontagne,* 2006 SCC 14 at para. 90.
[62] *Hendershott v. Ontario (Community and Social Services),* 2011 HRTO 482 at para. 45.
[63] *Ontario (Human Rights Commission) v Simpsons-Sears Ltd* (1985), 23 DLR (4th) 321.

Once a prima facie case is established, the burden will shift to the housing provider to establish a defence justifying the rule or standard which gave rise to the eviction proceedings. Available to housing providers is the defence that the rule or standard is *bona fide* in the circumstances; the rule or standard is reasonably necessary to accomplish its purpose.[64] For example in the context of housing a compulsive hoarder, the housing provider is likely to argue that the fire safety standard or lease provision is necessary for preserving its interest and the safety of other tenants. Necessarily bound up with the *bona fide* defence is the duty to accommodate. The duty to accommodate requires the party raising it to adjust the rules or standards to meet the needs of the individual found to have a disability.[65] In order to demonstrate that the rule or standard is reasonably necessary to the accomplishment of its purpose, it must be demonstrated that it is impossible to accommodate a claimant without imposing undue hardship on the defendant.[66] Ultimately, for a housing provider to succeed that a violated lease provision or health and safety standard necessitates eviction of a hoarder tenant, it must adduce evidence that efforts to preserve housing have been exhausted and the rules or standards cannot be curtailed without imposing a degree of hardship that is undue.

Prior to examining the threshold in which efforts to accommodate a hoarding tenant may be considered undue, it is necessary to explore when a housing provider's obligation to accommodate is initiated.

b. *When is the Duty to Accommodate Triggered?*

The duty to accommodate is comprised of both a substantive and procedural component.[67] The substantive duty to accommodate is triggered when a housing provider becomes aware that a tenant has a disability[68]. Most often, the way in which a housing provider becomes aware of a tenant's disability is through direct disclosure accompanied by a substantive request for accommodation. For example, a tenant with mobility restrictions may request a ramp or a first floor apartment for example. Tenants with mental health disabilities, such as hoarder tenants, may be less than forth coming about their need for accommodation. Circumstances may arise where a hoarding tenant is unwilling to disclose their disability to his or her landlord or may even be incapable of doing so. In such circumstances, does a housing provider have any obligation to accommodate?

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[64] *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Re Meiorin)*, [1999] 3 SCR 3, 176 DLR (4th) 1 at para.. 54 [*Meiorin*].
[65] *Ibid.*
[66] *Ibid.*
[67] *Lane v ADGA Group Consultants Inc.,* 2007 HRTO 34 [*Lane*].
[68] See *Wall v Lippé Group*, 2008 HRTO 50 at para. 80 [*Wall*].

The Human Rights Commission has described the duty to accommodate as existing for "needs that are known"[69]. However, it has been recognized that where there has been *indirect* disclosure of a disability, a failure to make a formal request for accommodation will not be sufficient to extinguish the duty to accommodate.[70] The test recognized by the HRTO is not whether a person with a disability has indicated he or she has a disability, but whether a service provider, housing provider or employer *ought reasonably* to have known as much.[71] It is possible then that verbal, visual or behavioural cues of a mental disability will initiate at least the procedural component of the duty to accommodate.

Caselaw suggests that decision-makers have generally taken a narrow approach in applying when a service provider, housing provider or employer (herein collectively referred to as providers) *ought* reasonably have known about a disability. The cases in which indirect disclosure has been at issue, decision makers have tended to focus less on the actual indicia of mental illness and more on marked *changes* in behaviour as capable of triggering the duty to accommodate.[72] In *William v Elty Publication Ltd*[73] for example, the British Columbia Human Rights Tribunal was unwilling to find that an employer's duty to accommodate had been initiated by emotional outburst of an employee that were ultimately found to be linked to an addiction. The Tribunal reasoned that the employer could not have been expected to know the behaviour was linked to the employee's disability because there had been no escalation in the workplace, noting that the complainant was known to be "irritable" and emotional outbursts were "a fairly common occurrence".[74] Without any notable changes in behaviour, the Tribunal resisted imposing a duty on the employer where it was found that the behavioural indicia may have only been obvious "to those who have had previous experience with the disability".

While the majority of indirect disclosure cases concern the workplace, the principles can be extrapolated to the landlord tenant context. It is clear from the caselaw that decision-makers are concerned with balancing the rights and interests of providers with that of complainants. From the perspective of providers, the concern has been summed as a "worry that, in complying with the indirect disclosure rule, they will be required to factor in elements that they cannot see, are not trained to understand and cannot know" without risking the

[69] Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (2000, revised in 2009) at 20.
[70] *Wall, supra* at note 68.
[71] *Ibid.*
[72] Nathalie Kalina, *To Know of to Ought to Have Known: Indirect Disclosure, Mental Health and the Interests of Employers and Employees* (JD, Osgoode Hall Law School, 2012)[unpublished].
[73] *Williams v Elty Publications Ltd*, [1992] BCCHRD No 25 at para. 36.
[74] *Ibid.* at para. 83.

privacy of complainants.[75] The focus on changes in behaviour as potentially attracting a duty to accommodate distances the obligation on providers from potentially dangerous inferences that may themselves be rooted in prejudice or stereotype.[76]

Mental illness is a particularly difficult issue when considering disclosure because of the pervasive stigma attached. However, a balance must be struck and providers as laypersons cannot be expected to possess the expertise required to recognize clinically significant symptoms. Decision makers adjudicating eviction proceedings against compulsive hoarders must carefully weight the rights and interests of housing providers and the limits of their expertise when determining whether the procedural duty to accommodate has been triggered.

c. *Procedural Duty to Accommodate Compulsive Hoarders*

Assuming that a housing provider has either been put on notice directly by a hoarding tenant or indirectly through behavioural changes, the procedural duty to accommodate must be discharged. The procedural component of the duty to accommodate imports an obligation to undertake an investigation into the needs of a person with a disability and explore what steps, if any, may be taken to provide accommodation measures for meaningful access.[77] In *ADGA Group Consultant Inc v Lane,* the Ontario Superior Court described an employer's procedural duty stating:

> The procedural duty to accommodate involves obtaining all relevant information… at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery… a failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.[78]

Certainly, housing providers are likely to be concerned about infringing on the privacy interests of their tenants. Indirect disclosure likely requires a less intrusive investigation to fulfill the procedural element and may entail an observation of behavioural changes along with a general inquiry into the health of the tenant. A more robust investigation is necessary where a tenant has directly disclosed that s/he has a hoarding condition. But how far does this go?

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[75] *Kalina*, *supra* note 72 at 13.
[76] *Ibid.*; Ontario Human Rights Commission, *Minds that Matter: Report on the Consultation on Human Rights, Mental Health and Addictions* (2012) at 70 [*Minds that Matter*].
[77] *Ellis v. General Motors of Canada Ltd.,* 2011 HRTO 1453 at para. 6 [*Ellis*].
[78] *ADGA Group Consultant Inc v Lane*, [2008] 91 OR (3d) 649 (Sup Ct) at para. 106.

Jurisprudence in the employment law context appears to have drawn a line recognizing that while providers can request medical information as part of the procedural duty, they are not entitled to details regarding the actual diagnosis.[79] In the event that a housing provider fails to engage in conversation regarding the disability related needs of a hoarder tenant and how/if those needs can be addressed through curtailing rules or standards, eviction may fail as premature despite legitimate undue hardship concerns.[80]

In an effort to balance competing interests, decision makers have interpreted the undertaking of a conversation as a key element of the procedural duty, requiring reciprocal engagement by persons with disabilities. The HRTO has recognized that a person requiring disability related accommodation has his or her own "obligations and responsibilities, including the duty to cooperate with the accommodation process".[81] The Tribunal went on to described the procedural duty as a "collaborative process" in which both parties undertake an effort to identify limitations and accommodation measures.[82]

For compulsive hoarders, this may mean disclosing the state of their home to a housing provider and producing medical documentation that outlines the needs and limitations associated with their medically significant symptoms. It may even require disclosure of whether he/she is seeking psychological treatment for the condition, the prognosis, and the likelihood of recurrence. Again, the issue of stigma surrounding mental illness and the accompanying disincentive to disclose is raised. With a view to the delicate balance of rights, aversion to disclose or inability to recognize illness does not and cannot absolve the person afflicted from any responsibility in the accommodation process. As acknowledged by the Canadian Human Rights Commission, repeated refusal to acknowledge or deal with a mental illness may dissolve any duty to accommodate.[83]

Assuming that the procedural duty to accommodate is discharged, the question of when a housing provider will be considered to have incurred a degree of hardship that imposes an unreasonable burden, remains.

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[79] *Wall, supra* at note 68 at para. 80.
[80] See for example *Lane v ADGA Group Consultants,* 2007 HRTO 34 where the HRTO found that a failure to fulfill the procedural dimensions of the duty to accommodate is a form of discrimination in its own right.
[81] *Ellis, supra* note 77 at para. 29.
[82] See *Simpson v Commissionaires (Great Lakes)*, 2009 HRTO 1362 at paras. 35-36.
[83] *Canadian Human Rights Commission, Policy and Procedures on the Accommodation of Mental Illness*, (Canadian Human Rights Commission, 2008) at 6.

d. ***Substantive Duty to Accommodate Compulsive Hoarders***

The substantive duty to accommodate confronts ableist norms, requiring providers to engage in a process, which eliminates or lessens barriers to societal participation by disadvantaged persons.[84] For housing providers, this duty may entail curtailing standards, rules or practices that have a disproportionate effect on individuals with disabilities and may even go so far as assisting tenants in living with their disability and incurring associated costs. This obligation is not however limitless. A tenant's right not to be discriminated against must cede to undue hardship imposed on the housing provider. The balancing of rights imposed by undue hardship was captured in *Jansenn v Ontario* (*Milk Marketing Board)* when discussing the purpose of the *OHRC*, stating:

> ….[anti-discrimination legislation] is meant to foster a society which will allow diversity to flourish. It is designed to protect and accommodate the needs and interest of those who differ from the dominant majority group… [it] does not require that any individual or group accommodate others to the point of undue hardship, sever suffering, or disproportionate privation, it does conceive of inconvenience, and some degree of disruption and expense. Insofar as we want to make space within our communities for the comfortable co-existence of those who differ… there will be commensurate costs to be borne by all of us.[85]

The evaluation of whether a housing provider has discharged its duty to accommodate a hoarder tenant is circumstantial and grounded in fact. The SCC attempted to give some shape to the scope of the duty to accommodate in *Central Okanagan School District No. 23 v Renaud* (*Renaud*), when it stated the onus on an employer was to "show the impact [to the person with a disability] was considered, and there was no reasonable alternative short of causing undue hardship".[86] In other words, all measures short of some serious harm must be undertaken; that threshold shapes the substance of the duty.

The *Code* sets out three considerations for evaluating undue hardship with respect to accommodation: cost, outside sources of funding, and health and safety requirements.[87] In the context of accommodating a hoarding tenant, cost is a legitimate source of hardship rooted in the potential for the dwelling to fall into serious disrepair. The consideration of cost is highly fact specific and corresponds with the nature of the housing provider. In order to mount a

[84] Gillian Demeyere, *Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate* (2010) 36 Queen's LJ 299 at 299.
[85] *Jansenn v Ontario (Milk Marketing Board)* (1990), 13 CHRR D/397 (Ont Bd Inq) at para. 30.
[86] *Central Okanagan School District No. 23 v Renaud,* [1992] 2 SCR 970 at para. 13 [*Renaud*].
[87] *Human Rights Code, supra* note 26 s 17(2).

successful undue hardship argument on the basis of financial burden, objective evidence of substantial expense must be adduced, which demonstrates that absorbing the cost would result in serious financial harm.[88] The consideration of the degree of harm and whether a housing provider is capable of weathering the cost will depend on its resources, including whether it is publicly funded. The more difficult undue hardship analysis relevant to hoarder tenants is health and safety. For that reason, the remainder of the accommodation discussion will centre on health and safety considerations for establishing undue hardship.

Hoarding has been described as "incompatible with the legal obligations association with the occupancy of leased residential property".[89] The hallmarks of compulsive hoarding pose a number of difficulties for housing providers including increased fire risk, building code violations, and insect and rodent infestation.[90] Where competing rights are involved, the SCC has indicated, "the factors that will support a finding of undue hardship must be applied with common sense and flexibility".[91] At some point, a landlord's obligation to accommodate must yield in the wake of serious health, and safety concerns.

In order to defend against an accommodation request by a hoarding tenant to preserve occupancy, a housing provider must demonstrate that the violated rule or standard is reasonably necessary to ensure the health and safety of the tenants, and that staying eviction would unduly jeopardize that purpose.[92] Recently, the HRTO has shed some light on the health and safety issues surrounding compulsive hoarding and undue hardship in *Devoe v Haran*[93]*.* In that decision, the Tribunal found that the elderly female applicant was afflicted by a multitude of physical disabilities affecting her mobility and was a compulsive hoarder.

The application resulted after a refusal by the housing provider to accommodate the applicant's physical disability by providing a ground-floor apartment, reasoning that the unit was not suitable because of her hoarding behaviour. In essence, the landlord considered the tenant's limitations and pointed to the "health and hygiene and fire safety concerns" [94] stemming from her hoarding condition as amounting to undue hardship. It is significant to the position of the landlord that that a Fire Services Notice of Violation had been

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[88] *Renaud, supra* note 86.
[89] Tom Cobb et al, "Advocacy Strategies to Fight Eviction in Cases of Compulsive Hoarding and Cluttering" (2007) 41 Clearinghouse Review: Journal of Poverty Law and Policy 7 at 430.
[90] *Ibid.* at 427.
[91] *Gill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital general de Montréal*, 2007 SCC 4 at para. 15.
[92] See *Meiorin*, *supra* note 65 on discussion that a standard must be reasonably necessary to accomplish its purpose and how accommodation is included in this analysis.
[93] *Devoe v Haran,* 2012 HRTO 1507.
[94] *Ibid.* at para. 22.

issued against the applicant, citing four contraventions of fire safety legislation as the result of the excessive clutter. Instead of addressing the apparent mental health discrimination along with the undue hardship complications surrounding the blatant health and safety risk, the HRTO focused the analysis on the applicant's physical disabilities. The Tribunal ultimately held that the applicant had established a prima facie case of discrimination on the basis of her physical disability and that the respondent had not established undue hardship.

Without squarely addressing the obvious tensions compulsive hoarding poses for landlords and tenants, the HRTO gave some guidance regarding the duty to accommodate and undue hardship. Significantly, the HRTO in response to the respondents undue hardship justification, stated that the "Fire Services Notice of Violation… does not identify an immediate and irreversible health and safety risk to her and other tenants in the building".[95] This arguably supports the proposition that housing providers will not be able to point to health and safety bylaw infractions as conclusive evidence of undue hardship. This further implies a degree of risk tolerance is required on the behalf of the housing provider as part of the duty to accommodate. It follows that where the fire and safety risks are not *immediate or irreversible*, a hoarding tenant may be able to preserve tenancy through mitigation or reversal of the risk identified.

Gleaning from the employment context, the degree of the health and safety risk will be relevant in determining whether the threshold for undue hardship has been reached. In *Weins v Inco Metals Co.*[96], the Ontario Board of Inquiry considered the risk to fetuses, justifying a prohibition on women of childbearing age to work in a certain area of a plant to be minimal. The Board reasoned that the duty to accommodate had not been discharged by this blanket prohibition because the policy could be curbed and other measures implemented to address the minimal risk that existed. For housing providers, this translates to a consideration of the severity and probability of the health and safety risk posed by a hoarder tenant in relation to the measures proposed. If the risk to the health and safety of other tenants for example is minimal, eviction without other accommodation efforts will be premature and the housing provider will likely be considered to have failed in discharging its duty.

The Ontario Superior Court's (ONSC) decision in *Metropolitan Toronto Condominium Corporation No. 946 v JVM* (*JVM*)[97] further informs the undue hardship analysis by fleshing out the high watermark for accommodation efforts in the context of housing persons with mental disabilities. In *JVM*, the ONSC undertook a thorough analysis of the applicant condo corporation's (MTCC 946)

[95] *Ibid.*
[96] *Wiens v Inco Metals Co* (1998), 9 CHRR D/4795 (Ont Bd Inq).
[97] *Metropolitan Toronto Conduminium Corporation No 946 v JVM,* [2008] OJ No 5412.

duty to accommodate a resident and owner of a condominium unit. The facts detail a pervasive, and cyclical history of psychotic episodes over a period of 15 years, which rendered the respondent unable to take care of herself and her apartment. The apartment episodically fell into a critical state of disrepair and became the source of major health concerns for neighboring residents. On at least fourteen occasions over the course of the respondent's tenancy, the apartment became overrun with clutter, insects and rodents, feces, urine and other biohazardous material that spilled into common use areas and caused significant distress to other tenants.

On each of those occasions, the respondent had to be forcibly removed from her unit and the condo corporation provided Funeral Sanitation Services along with pest control services in order to restore the apartment to acceptable health and safety standards. Additionally, Fire Safety Assessment Reports conducted during the period also concluded that the respondent's unit contained a significant combustible load, which "must be viewed as a serious safety concern". [98]

In response to its accommodation obligation, MTCC 946 worked closely with the respondent's mental health outreach worker, social worker, psychiatrist, and family, keeping each apprised when the applicant was displaying behaviour symptomatic of relapse. MTCC 946 worked with the respondent's psychiatrist to include regular inspections of the unit as part of a treatment plan, which rarely were facilitated by the respondent. After significant accommodation efforts and with little prospect of recovery, MTCC 946 brought a motion seeking to terminate the respondent's ownership interest. In defence against the application, the respondent submitted that that the applicant had a duty to accommodate her disability, and the forced sale of her unit constituted discrimination under the *OHRC*.

Justice MacDonald issued an order, which acknowledged the extensive efforts of MTCC 946 to accommodate the respondent's disability. Despite those recognized accommodation effort, Justice MacDonald gave the respondent a last chance to preserve her interest, issuing the order contingent on the respondent's failure to comply with the requirements of the *Condominium Act*, by-laws and condo rules going forward. The respondent ultimately failed to uphold those conditions, and the ONSC issued the order, holding that undue hardship had been reached.

While the disability and the property interest are distinguishable from the hoarding context this paper seeks to address, *JVM* serves as guiding the parameters of the duty to accommodate as informed by undue hardship. Clearly, this case is the high watermark in terms of a housing providers' duty to

[98] *Ibid.* at para. 63.

accommodate. By virtue of the special nature of an ownership interest, a landlord would not likely be considered to have failed in discharging its duty falling short of these measures. What this case clearly indicates is that the law is reluctant to deprive vulnerable persons, particularly those with mental illness, of stable housing. It is also indicative that the identity of the housing provider is material to the analysis; the greater the resources available, the more involved the accommodation measures must be prior to a finding of undue hardship.

The duty to accommodate does not however require perfect accommodation and housing providers cannot be expected to provide mental health services or provide care for their tenants. The line between accommodation and the provision of care is rooted in the requirement that the person afflicted by a disability be reasonable with respect to the housing provider's genuine efforts to accommodate his or her needs.[99] For a housing provider, this necessarily entails modifying provisions in lease agreements and tolerating a degree of unkemptness. The duty to accommodate may even entail contacting community supports for hoarding tenants, providing organization and clutter removal services (if agreed to), and short-term tolerance of moderate health and safety concerns. Accommodation will not however require a de facto forfeiture of property rights for landlords. Reasonableness denotes that a hoarding tenant will likely have a responsibility to mitigate the health and safety concerns and undertake to prevent recurrence through treatment.

Conclusion

Compulsive hoarding poses difficult challenges for both adjudicator and advocate. As this paper attempted to demonstrate, hoarding falls within the definition of disability as conceived by the SCC and decision makers must consider the principles of human rights legislation in the context of eviction proceedings against hoarder tenants. Flowing from that, decision makers are tasked with negotiating the balance between the rights of private housing providers and hoarder tenants.

Despite its private manifestations, compulsive hoarding is more accurately conceived as a public health issue in which there are multiple stakeholders. The legal issues bound up with compulsive hoarding cannot be neatly separated out from the broader social context. It is well documented that stable housing is an integral pillar of recovery for those living with mental illness.[100] Eviction poses a significant risk to those with psychiatrics disabilities and is compounded by the difficulty reacquiring housing in the wake of pervasive stigma and NIMBYism

[99] Zinn & Brethour, *The Law of Human Rights in Canada* (looseleaf) at 14-27.
[100] Meghan P. Carter, "How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness" (2010) 5 Nw JL & Soc Pol'y 118 at 119-120.

surrounding mental illness. While this paper was intended to assist in providing guidance on the application of anti-discrimination legislation in eviction proceedings against hoarders, it leaves out one very important discussion; whether the adversarial system is the proper forum to address disputes over housing those with mental health issues?

The win or lose nature of the adversarial system is unable to address the broader social issue of the hard-to-house. The conflicts that arise between housing provider and hoarder tenant may be more appropriately dealt with using alternative dispute resolution techniques. Inherent in the duty to accommodate is a negotiation process in which a housing provider and tenant must work together to find some form of appropriate accommodation measures. Under anti-discrimination legislation, a landlord's obligation to participate in this process will dissolve when undue hardship is reached. In other words, when undue hardship is reached, eviction will be available. The incentive then for a housing provider seeking relief is to funnel its resources into accumulating evidence, which proves that this legal threshold has been reached, rather than achieving mutually tolerable solution, which keep those with mental illness housed.

If the formal process for mediating housing disputes with those that are hard-to-house as a result of mental illness was removed from the traditional adversarial system, more fulsome discussion may ensue. The negotiation-rich process of accommodation lends itself to techniques, which facilitate discussion, tradeoffs and solutions unavailable through legal orders. ADR processes may provide an avenue for creative collaboration between housing provider, tenant, and health care providers to keep compulsive hoarders housed, while also recognizing the limitations of housing providers and preserving their interest.

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