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RESIDENTIAL TENANCIES

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The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

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PREFACE

In February 1974 the Institute undertook a study of the law relating to tenancies of residential premises, which is the part of the law of landlord and tenant which is most urgently in need of reform. This report is the result of that study and of our consideration of the problems disclosed by it. It contains recommendations for changes in the law, and a proposed Part 2 of the Landlord and Tenant Act is attached to it as Appendix B.

Much work has been done on the subject in recent years, and there have been legislative changes or recommendations for change in Ontario, Manitoba, British Columbia and New Brunswick. Commencing with the new Acts and recent studies, and amplifying them with our own research where necessary, we arranged for the preparation of a series of "background papers" which, together with a series of questions arising from them, formed the basis of our consultation with the public. The publication of the background papers, and the attendant publicity, resulted in the submissions listed in Appendix G and in meetings which we held with interest groups, the Landlord and Tenant Advisory Boards, and a committee of the Alberta Branch of the Canadian Bar Association, all of which helped us to reach a better understanding of the problems of landlords and tenants. Because the comments we have received have been so extensive that further consultation seems unnecessary, and because of the urgency of reform, we have decided to issue a final report now rather than a working paper or draft report.

A subject which has become of urgent concern since the commencement of our study is that of rent control. During

the summer of 1975 the Minister of Consumer and Corporate Affairs asked us to include that subject in our study, and we agreed to do so although we had reservations arising from the magnitude of the task and from the substantial social and economic questions involved. However, with the introduction of the federal government's anti-inflation program and the provincial government's decision to introduce the Temporary Rent Regulation Measures Act, the Minister withdrew his request and we discontinued our study of the subject. Our report accordingly does not deal with the subject of rent control.

Another controversial subject is "security of tenure". Under a system of security of tenure the law would be changed so that a landlord would no longer have the power to terminate a residential tenancy except for cause. Our report includes for consideration a plan which would provide for security of tenure, but, for two reasons, we have come to the conclusion that we should not make a recommendation as to whether or not that plan should be adopted. Our first reason is that the plan raises serious social and economic questions which we are not able to answer. Commissioning studies to answer these questions would greatly expand the scope of our project and would cause considerable delay in issuing our report. The second reason is that a decision relative to security of tenure may have an effect upon the supply of rental accommodation, and we think that it would not be wise for us to make recommendations on something which is only one part of a complex and interrelated problem.

The rental of sites for mobile homes is also part of our project. It is dealt with by the existing Landlord and Tenant Act and there are some basic similarities between the tenancy of a mobile home site and of more conventional residential premises. We had intended to deal with the subject in this report, but at a late stage concluded from

our discussions that we need further consultation with those who would be affected by any new legislation. We will therefore issue a working paper on the subject of mobile homes.

Accordingly, this report will deal with the respective rights and remedies of landlords and tenants of residential premises as between themselves, and will make substantial recommendations for reform. It will also put forward for consideration, but without recommendation for acceptance or rejection, a plan for security of tenure.

I
PRESENT SITUATION

1. Existing Law

The relationship between landlord and tenant is governed by common law rules which had their origin in the feudal and agrarian society of England as it existed before the development of contract law. Land was the principal source of wealth and status, and the primary element in the landlord-tenant relationship was the vesting of a leasehold estate giving exclusive possession of the land to the tenant in return for a rent paid to the landlord in money or by a share of the produce of the land. Possession of the land for the growing of crops or the raising of cattle was the main interest of the tenant; houses and other structures were of secondary importance. We will deal with the common law rules further in Chapter IV.

The main interest of the residential tenant today is comfortable living quarters. In the usual case neither the tenant nor the landlord wants a fixed commitment to particular premises for a long term. In most cases the tenant rents an apartment which is only part of a building, and he is dependent upon his landlord for access through common areas and for other necessary services. Because the common law rules reflect their origin and are focused on the lease as an estate in land they are often inappropriate to residential tenancies, which are today substantially contractual. Although the courts have adapted many of the older real property rules, we think that legislation is required to give those rules a thorough overhaul.

There is already an Alberta Landlord and Tenant Act, but it deals only with limited aspects of the relationship of landlord and tenant. These include termination procedures;

the delivery to the tenant of a copy of a written tenancy agreement; security deposits; the landlord's right of entry; notices of increase in rent or of conversion of the premises to condominium ownership; and recourse against retaliatory eviction of a tenant for pursuing rights under the Temporary Rent Regulation Measures Act. Otherwise it leaves the common law rules untouched.

Because the common law rules were framed on the theory that the basic element of the landlord-tenant relationship was the transfer of a non-freehold estate in land to the tenant, they imposed few contractual obligations. As early as 1843 the English courts did impose an implied covenant on the landlord that furnished residential premises would be reasonably fit for habitation at the commencement of the tenancy. They also imposed in all tenancies an implied covenant of quiet enjoyment, which, although originally intended to protect the tenant's title and possession, has been expanded by some recent decisions to prohibit the landlord from interfering with the tenant's actual enjoyment of the premises for the usual purposes of the tenancy. Moreover, in some situations, courts have required the landlord to repair premises under his control in order to refrain from interfering with the tenant's emjoyment. While those cases may project a trend in the common law, it remains uncertain what acts of the landlord will constitute an interference with enjoyment, and what maintenance and repair, if any, will be required as a consequence.

The landlord and tenant are in general free to regulate their relationship by contract, but in practice this freedom of contract usually works to the benefit of the landlord who is in a better position to dictate the terms of the tenancy agreement. There is not an equality of informed bargaining power, a problem which is especially acute when rental

accommodation is in short supply. It is our view that the law should be reformed to create a fair balance between the respective rights and obligations of the landlord and of the tenant, while protecting the interests of both.

2. Present Housing Situation

We should point out that although the effect of our recommendations will be significant, it will be limited by economic forces. Reform of the legal relationship of residential landlord and tenant is important; the basic law of the province affecting that relationship should be fair and soundly conceived. But reform will not of itself provide the people of Alberta with adequate living accommodation at rents which they can afford to pay.

The shortage of rental accommodation in the urban centres of Alberta today puts the tenant at a great disadvantage. A tenant who is desperate for a place to live may pay excessive rent. He may pay other substantial sums of money to the landlord, and these may not be refundable. He may accept bad repair. He may refrain from asserting his legal rights against the landlord if he fears eviction. In this environment, legislation conferring additional rights and remedies will still not place the tenant on an equal bargaining position with the landlord. Competition made possible by a reasonable vacancy rate will be necessary.

It has become obvious that the shortage of rental accommodation in the urban centres has produced hardship among tenants. It is not our function, however, to study the economic problems related to the supply and distribution of housing. All that we can do is to point out that the shortage of rental accommodation, especially in urban areas,

is an unresolved and very serious problem, and that it will constrain the effectiveness of our recommendations.

3. Nature of Current Problems

We have concluded that the law of landlord and tenant is based on notions of property law to a much greater extent than is justified in the great bulk of residential tenancies, where contractual relationships are more important than property relationships. In the course of this report we will identify specific problems arising from obsolete legal doctrine. We will also see that freedom of contract has enabled the great majority of landlords to solve, or at least to alleviate, these problems created by outmoded concepts; landlords have simply drafted tenancy agreements neutralizing common law rules which were adverse to their interests.

We also believe that there is another group of problems for tenants arising from what might be called socio-economic factors. Most landlords have a position of superiority in bargaining with most tenants; because they have more economic strength and greater access to legal advice, they are able to stipulate for contractual terms which will protect them against tenants. The superior position of the landlord is intensified if the demand for rental housing exceeds the supply, because the landlord can replace the tenant much more easily and with much less financial and emotional strain than the tenant can replace the rented premises. This imbalance in bargaining power prevents the tenant from using his freedom of contract to improve his position vis-à-vis the landlord. We are, of course, aware that there are landlords who are neither affluent nor experienced, and that any change in the law must take their situation into account.

It is important to bear in mind the distinction between the problems arising from obsolete legal theory and the problems arising from unequal economic power. The former can be rectified without too much difficulty; the latter require much closer attention. We can recommend statutory provisions to be implied in all residential tenancies, provisions intended to restore a fair balance between the rights and duties of the parties which landlords cannot contract against. We must remember, however, that the law must not impose unreasonable obligations which will discourage landlords of whatever means and experience from supplying rental accommodation, for that would worsen the position of tenants.

II
THE SCOPE OF REFORM

1. Definition of Residential Tenancies

When one who owns a possessory estate in land, a "landlord", transfers a right of exclusive possession to another, a "tenant", a tenancy relationship is created between the two with respect to the land in which the tenant has acquired an interest. The rights and duties of the landlord and tenant are reflected in the "tenancy agreement". If the "tenancy agreement" is in writing, it will usually be called a lease, and the landlord and tenant, respectively, will be called "lessor" and lessee". In this report, however, we will use the terms "landlord", "tenant", and "tenancy agreement", for purposes of simplicity.

We now turn to "assignments" and subtenancies". Suppose that landlord A rents his house to tenant B for a fixed term of 3 years. This produces a tenancy relationship between A and B as to the 3 year term. Tenant B may transfer all of his rights and duties in the 3 year term to tenant C, and this is called an "assignment". When this is done, a tenancy relationship arises between landlord A and tenant C as to the balance of the 3 year term. B remains contractually bound to A, but B is no longer a tenant of A.

However, suppose that, when 2 years of the fixed term remain, tenant B desires to rent the house to tenant C for a fixed term of 1 year. This may be done, and if it is, a new tenancy relationship arises as to the 1 year term between B as landlord and C as tenant. C becomes B's tenant, and B (the original tenant) becomes C's landlord. Although there is neither a contractual nor a tenancy relationship between A and C, the tenancy relationship between landlord A and tenant B as to the balance of the 3 year term remains in

effect. In describing this situation, we frequently say that tenant B (of landlord A) has made a sublease to C. It is useful to describe B as a sublandlord or sublessor, and C as a subtenant or sublessee, because one is immediately put on notice that B, although the landlord of C, is a tenant of someone else, in this example A. But as a matter of accurate legal definition, C is a tenant of B, (not a subtenant), and B is a landlord of C (not a sublandlord). For this reason, the term "tenant" in this report will include a subtenant unless the text indicates otherwise.

Any attempt to define "residential tenancy" is difficult. If one could define "tenancy", one would still be faced with the problem of defining "residential", which really involves an attempt to exclude "commercial" and "agricultural".

We begin with "tenancy", which is simply a term descriptive of the interest in land acquired by a tenant from his landlord. In the more technical language of a common law property lawyer, the tenant's interest in land is a "non-freehold estate". The meaning of this phrase has been developed through court decisions over centuries, and this process is continuing. We can attempt to distinguish "tenancy" from "easement" by saying that "tenancy" includes a right of exclusive possession, whereas "easement" refers to a non-exclusive right to use land. Thus, one could rent his neighbour's garage to park his car, and having obtained the right of exclusive possession, be a tenant. Or, one could acquire a right to park on his neighbour's driveway, and this would only be an easement, not a tenancy. The distinction between "tenancy" and "license" is even more elusive. One can take a motel unit for a night, or a week, or a month. The exclusive right to occupy the motel unit for the prescribed period is called a "license". Why not a tenancy? The answer of the courts is that it is unlikely

that the parties intended that one who has taken a motel unit for a night should acquire a non-freehold estate in the motel unit. Rather, he has acquired a mere contract right. But the answer might be otherwise if the motel unit included a kitchenette, and were "rented" for several months.

Drawing the line between a tenancy and some other legal relationship is, we believe, more properly a judicial than a legislative function. We give two reasons. One is that courts can resolve borderline cases with more flexibility and hence responsiveness to the needs of unique situations. The other is that any definition we might develop would be so complex that it might well create more problems than it would solve. We do not believe the proposed Act should attempt to define "tenant" or "tenancy".

The next definitional problem is the term "residential". Fortunately, this term involves economic rather than legal concepts. We propose to define "residential premises" as a self-contained dwelling unit, and "residential tenancy" as a tenancy of residential premises for primarily residential purposes. Our proposed Act is not intended to apply to a tenancy for primarily commercial or agricultural purpose. For example, an entire apartment building may be leased to a lessee under a "headlease". This lessee, as landlord, will make 50 subleases to residential tenants. We think it unlikely that a court would consider the apartment building as a self-contained dwelling unit, or the headlease as primarily for residential purposes. Rather, the headlease is primarily commercial, and the subleases are residential. We have included the word "primarily" in recognition of the reality that there are tenancies for multiple purposes, and that the primary purpose will depend on the circumstances. One might lease a store building with a small residential

suite at the rear. We think such a tenancy would probably be primarily commercial. One might lease land varying between 3 and 300 acres, including a house. Whether the tenant has a kitchen garden or is operating a farm is a question of degree. We believe that no amount of complex drafting could satisfactorily resolve these problems, and that they must be left for the courts.

2. Roomers and Boarders

The next question is whether roomers and boarders should come under the proposed Act. They are normally considered to be licensees rather than tenants, and to have a contractual right to occupy the premises rather than an interest in the premises themselves. Under such a relationship their only legislative protection is the Innkeepers Act. The "innkeeper" is liable only for loss caused by wilful or negligent conduct, or for the loss of goods deposited with him for safekeeping.

An argument can be made for giving roomers and boarders greater legal protection, especially because they include many of the poor and the elderly. Manitoba's landlord and tenant legislation applies if five or more persons receive board and lodging, and Saskatchewan's statute covers a case in which four or more rooms are rented. We do not think, however, that roomers or boarders should be included in the proposed Act. The roomer often shares facilities such as a bathroom with the owner and other roomers, and the arrangement is more personal than a tenancy. The boarder's arrangement is even more personal because his meals are supplied. Our conclusion is that the proposed Act would impose more rigidity upon such personal relationships than we think desirable.

3. Employees

It has been held that a janitor who occupied premises in order to more conveniently perform his duties occupies them as a servant rather than as a tenant. However, we think that such a person, and indeed any employee who occupies residential premises in the course of his employment, should have most of the protection of the proposed Act. To avoid doubt, the definition of "residential tenancy" should make express reference to such arrangements.

An employee-tenant should be treated differently in one case. If he is installed in an apartment in order to act as caretaker for the apartment building, or if he is living in premises supplied in order to attract employees, the landlord has a legitimate interest in requiring him to leave the premises when his employment is terminated. We will deal with that special situation at page 82 of this report in connection with our recommendations relating to the termination of tenancies.

4. The Crown as Landlord

The Crown in right of Alberta, and its agencies, are important landlords. Apart from any residential property which they may own and rent either to Crown employees or ordinary tenants, they supply much public housing and, in view of the demand for it, are likely to supply more in the future.

We see no reason why the Crown as landlord should not be bound by the proposed Landlord and Tenant Act. Tenants of the Crown or of a Crown agency are as much entitled to protection against the use of the superior position of the landlord as are the tenants of private landlords.

5. Recommendations

Recommendation #1

That the proposed Act contain the following definitions:

(1) "Landlord" includes a tenant who sublets, and "tenant" includes a subtenant.

(2) "Residential premises" means a self-contained dwelling unit.

(3) "Residential tenancy"

(a) means a tenancy of residential premises primarily for residential purposes, and

(b) includes an arrangement under which a landlord provides residential premises to an employee

(i) who provides services in respect of the property of which the premises are a part, or

(ii) in connection with the employee's employment,

and

(c) does not include a tenancy primarily for commercial or agricultural purposes.

Recommendation #2

That the proposed Act not apply to roomers and boarders.

Recommendation #3

That the Crown in right of Alberta be bound by the proposed Act.

III

THE TENANCY AGREEMENT

1. Form of Tenancy Agreement

A tenancy agreement may be oral or in writing. Under the Statute of Frauds, an unwritten lease for more than 3 years from its date is often unenforceable, but very few residential tenancy agreements are affected by it. No Canadian province requires that a residential tenancy agreement be in writing. Manitoba and Quebec legislation, however, provides that all such tenancy agreements are deemed to be in the standard form of lease included as a schedule to the legislation, and Saskatchewan legislation prescribes statutory conditions which are deemed to form part of all such tenancy agreements.

We have given thought to proposing that every tenancy agreement be written, with a copy delivered to the tenant to ensure that he has complete information as to his rights and obligations. We have also given thought to proposing that the written tenancy agreement be in a prescribed form which would include the rights and obligations imposed by law for the tenant's information.

We have decided against these proposals. Information as to the rights and obligations prescribed by law can better be given in other ways. Many people would not read a written tenancy agreement, particularly if it were long and complicated, and we do not think that the advantage gained would justify imposing upon the parties the inconvenience and cost of preparing a written tenancy agreement if they do not wish to do so.

We turn now to the ways in which we think information should be given to the tenant.

2. Notification of Tenant's Rights

We think that a commercial landlord should be required to deliver to a tenant, when he takes possession or earlier, a statement of his rights and obligations under the Act in concise and simple terms. A form of statement is included as Form C to the proposed Act. The form should be made readily available by the Department of Consumer and Corporate Affairs. So that there will be some sanction behind the requirement, failure to deliver the notice should be made an offence.

We do not think that such a duty should be imposed on a non-commercial landlord. We have in mind one who rents his home, or a suite contained in it, or the units of a duplex. Such landlords may have no more business experience or acquaintance with the law than many tenants.

Recommendation #4

(1) That a landlord of three or more residential premises be required to ensure that a notice in Form C of the proposed Act is delivered to the tenant at or before the time at which the tenant takes possession of the rented premises.

(2) That a landlord who contravenes subsection (1) be guilty of an offence and liable on summary conviction to a fine of not more than $100.

3. Obligation to Deliver a Copy of the Tenancy Agreement

There is a second step to be taken to ensure that the tenant is informed of his rights and obligations. Section 17 of the present Landlord and Tenant Act requires that the landlord deliver to the tenant a fully executed duplicate original copy of any written tenancy agreement within 21 days after its execution and delivery by the tenant. That provision

has proven satisfactory and we see no reason to change it. However, the second subsection of section 17 is somewhat unclear. It provides that where the copy is not delivered "the obligations of the tenant . . . cease", and the use of the word "cease" might be interpreted in either of two ways. It could mean that the tenant would never be obliged to perform the obligations which he would otherwise have to perform during the period of default, e.g., that he would never have to pay rent for that period. Alternatively, it could mean that the obligations of the tenant are merely suspended, and that the tenant would have to pay the arrears of rent when he received the copy of the agreement.

We think that the proposed Act should give effect to the latter interpretation. It is not reasonable that the tenant should live rent-free because of an omission which, in a particular case, may be inadvertent and which may do him no harm; and we think that withholding rent pending delivery will cause the landlord to deliver the copy, which is the purpose to be achieved. The landlord should be permitted to deliver the copy personally or by mail.

Recommendation #5

(1) That where a tenancy agreement in writing is executed by a tenant, the landlord be required to ensure that a fully executed duplicate original copy of the tenancy agreement is delivered to the tenant within 21 days after its execution and delivery by the tenant.

(2) That until a copy of the tenancy agreement is delivered in accordance with subsection (1) the tenant be entitled to withhold payment of all rent.

(3) That the landlord be permitted to deliver the copy of the tenancy agreement to the tenant as required by subsection (1)

(a) personally, or

(b) by ordinary mail addressed to the tenant

(i) at the rented premises if the tenant has taken possession, or

(ii) at any address provided by the tenant for delivery of a copy of the tenancy agreement.

IV

OBLIGATIONS OF LANDLORD AND TENANT

1. Landlord's Obligations

(1) Covenant for Quiet Enjoyment

The covenant for quiet enjoyment has its origin in the common law, and is implied from the relation of landlord and tenant. Its meaning is as determined by the common law though it may be altered by the lease. The name of the covenant, "quiet enjoyment", is misleading as to its original purpose and meaning. Consistent with the primary purpose of a lease as the transfer of a leasehold estate in land to a lessee, the primary function of the covenant was to protect the tenant's possession of the rented premises from interference by the landlord or persons acting under his authority. Consequently, the orthodox and still current view is that only conduct of the landlord, and those acting under his authority, which seems designed to physically interfere with the tenant's possession, i.e., to evict him, constitutes a breach of the covenant.

We will discuss two examples to demonstrate the difficulty courts have experienced in attempting to reach what we believe to be a just result within the orthodox interpretation of the covenant.

Suppose that, on the date when the lessee is entitled to take possession, the doors to the premises are bolted shut. Even if the lessor has locked the lessee out, he has not interfered with the lessee's possession because the lessee never had possession. Perhaps the former tenant of the landlord has failed to vacate on time, or a stranger has simply seen fit to occupy the premises. If so, the landlord

has not authorized the occupation of the premises by the former tenant or the stranger. For this reason, there is substantial authority in the United States that the lessee has no recourse against the landlord, and must bring an action to eject the person in wrongful possession. Modern cases in the United States have rejected this doctrine. It would seldom reflect the intention of the parties for they would not likely have contemplated that the lessee would have to bring an action to gain initial possession. Fortunately, this extreme result has not been the law of England since the case of Coe v. Clay (1829, 5 Bing. 440, 130 E.R. 1131 (C.P.). In Coe the court held that a lessor assumed an implied obligation that the leased premises would be available for entry by the lessee at the beginning of the term. There has been legal controversy as to whether the obligation is part of or independent of the covenant for quiet enjoyment. Historically, the covenant for quiet enjoyment was implied from the word "demise" in a written lease. In Coe the renting was oral, and the rule that the covenant for quiet enjoyment would be implied in an oral renting was not established until Markham v. Paget, [1908] 1 Ch. 697. This is the basis of the legal theory that the "Coe covenant" is independent of the covenant for quiet enjoyment. The modern view, however, is that the "Coe covenant" is incorporated in the implied covenant for quiet enjoyment. To clarify the matter, we recommend that the lessor's obligation to give his lessee actual possession be codified in a statutory covenant for quiet enjoyment.

For the second example, assume that the landlord has converted an old mansion into two residential suites, located respectively on the second and third floor. These are leased to tenants. Shortly after the tenants have taken possession, the lessor converts the main floor and basement into a discotheque, which operates raucously from 1:00 p.m. to 1:00 a.m. daily except Sunday. It is clear that the covenant for quiet

enjoyment is not a covenant that the tenant will enjoy the premises, but there is some modern authority that it is breached if the landlord or one acting under his authority substantially interferes with the tenant's ordinary, or reasonable, quiet enjoyment of the premises. The problem with the conventional analysis is that the interference will not be a breach of the covenant unless it can be construed as an actual attempt to interfere physically with with the tenant's possession. In order to give relief in this example the trial court must therefore strain to interpret the facts in order to find that the landlord has directly and physically interfered with the tenant's possession with the intention of dispossessing him. In the simple example given, a court could without difficulty hold that the tenant's quiet enjoyment was subject to substantial interference by the landlord's conduct. But how could it find an intention to evict the tenants? Where is the direct and physical interference with possession? While the court could find that noise consists of sound waves which physically invade the tenant's premises we do not believe that this should be required. We believe rather that the modern statutory covenant for quiet enjoyment should be based on two substantive independent elements: both the tenant's possession and enjoyment should be protected against interference from the landlord or anyone deriving authority from him. We recommend, therefore, a statutory covenant for quiet enjoyment giving effect to both elements.

We have given thought to the proposition that it should be a breach of the landlord's covenant for quiet enjoyment to one tenant (tenant A) if another tenant of the same landlord (tenant B) commits wrongful acts in tenant B's rented premises, a proposition which appears to have found favour with the Ontario Law Reform Commission in its report on Landlord and Tenant law, at pages 100-101. We have decided not to make a

recommendation which would give effect to the proposition. While a provision of that kind would add to the protection of a tenant, we think that it would be too onerous on the landlord to make him responsible at law for the acts of the other tenants in their own premises, and that it might well give tenant A a means of bringing unfair pressure on the landlord to get rid of tenant B on insubstantial grounds.

Recommendation #6

> *That in every tenancy agreement there be implied the following covenants between the landlord and the tenant:*
>
> *(1) that the rented premises shall be available for peaceful occupation by the tenant at the commencement of the term, and*
>
> *(2) that neither the landlord nor anyone having a claim to the rented premises under the landlord shall in any significant manner disturb the tenant's possession or peaceful enjoyment of the rented premises.*

(2) Covenant for Habitability and Repair

Under existing law, the respective obligations of the landlord and the tenant for maintenance and repair of rented premises and common areas are minimal. A landlord has no obligation that residential premises be habitable at the commencement of the tenancy unless the premises are rented furnished, and he has no obligation to maintain or repair rented premises during the tenancy. The only obligation applicable to a tenant is contained in section 98 of the Land Titles Act, which relates to a lease for a term in excess of 3 years. That section implies a covenant by the lessee, unless a contrary intention appears in the lease, that the lessee will leave the premises at the termination of the lease "in good and tenantable repair", damage from

fire, storm, and reasonable wear and tear excepted.

The parties are, of course, free to make whatever contract they wish on the subject of maintenance and repair. In practice the landlord, with superior knowledge and bargaining position, will generally prescribe the terms of any tenancy agreement. A typical clause is that contained in section 98 of the Land Titles Act referred to above. One might ask just what obligation such a clause does cast on the tenant. If the tenant need not repair damage resulting from fire, storm, and reasonable wear and tear, in a practical sense his net obligation is to repair damage caused by his wilful or negligent conduct and possibly that of third parties.

We believe that most landlords now provide premises which are habitable at the commencement of the tenancy, and maintain them in that condition. It is simply sound business practice for a landlord to protect his investment in buildings by a program of preventative maintenance and timely repair. Moreover, most landlords will prefer to undertake maintenance and repair work themselves. This practice permits the landlord to retain control of the appearance of rental premises and furnishings, and to ensure that equipment is kept in a uniformly adequate state of repair. Landlords of large apartment buildings will frequently have a maintenance staff, or firms under contract, and hence can have work accomplished more efficiently and economically than could a tenant. As a consequence, many modern tenancy agreements no longer include a clause in the form of section 98 of the Land Titles Act. Rather, the landlord assumes responsibility for maintenance and repair, and the tenant covenants to indemnify the landlord for damages caused by the tenant and persons invited on the premises by him.

Our conclusion is that, in view of the inequality in bargaining power of the parties, the law should impose upon all landlords the obligations now undertaken by many. Rented premises should be habitable at the commencement of a tenancy. A landlord should not be permitted to rent premises as a place to live if they are not fit for that purpose. We find support for this proposition in the analogy to the obligations of sellers of goods and services. Moreover, the landlord should be responsible for maintaining rented premises in good repair during the tenancy. If rent is based on the initial habitability of rented premises, it appears to us that fairness dictates that they be maintained in that condition. Most repairs will be required because of fire, storm, or reasonable wear and tear, and landlords will be able to recover, through rent, the expense of insurance premiums and these repairs. Later in this report we will make recommendations concerning the tenant's liability to the landlord for damages caused by him and persons on the premises with his consent.

We add that British Columbia, Manitoba, and Ontario now have legislation imposing obligations on landlords comparable to those we have recommended. Referring to the British Columbia legislation effective in 1970, the Law Reform Commission of British Columbia said in its 1973 report on Residential Tenancies that neither landlords nor tenants suggested that the new obligations were unreasonable or unsatisfactory. (Landlord and Tenant Relationships: Residential Tenancies, p. 112.)

We have considered the possibility of making an exception for premises which are not habitable at the beginning of the tenancy, when this fact is known to the tenant. A tenant may prefer substandard housing to more adequate housing. Indeed, if he cannot afford adequate

housing, and that standard is required by law, his alternative could be no housing. We recognize also that some landlords may be unwilling to upgrade and maintain premises now rented in substandard condition and that, to the extent that this is so, rental premises may be withdrawn from the current market. This problem is implicit in the imposition of new and higher standards on anyone, whether he be supplying goods, services, or rented premises: there will be a price for the removal of slum housing from the rental market. Our conclusion is that any exception for some substandard rental accommodation would render the protection we intend to provide tenants illusory. However, our recommendations will not prevent an arrangement under which the tenant would do maintenance or repair work at an agreed price or salary, with payment by set-off against rent.

Our recommendations relating to habitability and repair are not unlike the provisions of recent statutes in other provinces. The literal wording of those statutes, however, seems to place a landlord in default as soon as the disrepair arises, no matter what its cause, and even if the landlord has not had an opportunity to repair. While courts may well hold that such statutes only impose a duty to take reasonable steps to keep the premises in good repair, we think that our proposed Act should be expressly framed so as to bring about that result.

There is this closely related problem. Should the landlord's obligation to maintain the premises in a good state of repair extend to repairing damages caused by the tenant? We have already suggested that it should, and that the tenant should be liable to the landlord for such expenses. We will recommend an exception to the landlord's obligation if the damages occur in the rented premises, if they were caused by the tenant, and if the landlord is taking

appropriate steps to terminate the tenancy.

Other recent statutes impose a duty on the landlord to comply with health and safety standards, and we recommend that the proposed Act contain a provision to that effect.

The choice of language which will impose the obligations is not easy. Words like "a good state of repair", and "habitable" are imprecise, and they may be difficult to apply to particular cases. We do not think, however, that there is much to be achieved by providing elaborate definitions. Section 30 of the British Columbia Landlord and Tenant Act, for example, requires the landlord to provide and maintain the premises in "such state of decoration and repair as having regard to the age, character and locality of the residential building would make it reasonably suitable for occupation by a reasonable tenant who would be willing to rent it". We can see difficulties in the application of such a definition. A reference to locality might be taken to suggest that slum premises are acceptable if located in a slum area. We think that the best that can be done is to impose the duty in general terms, leaving it to the parties to apply the language to the myriads of different situations, and to the courts to adjudicate disputes when the parties cannot agree. We do not think that there is any magic formula which can avoid this problem.

Recommendation #7

(1) That in every tenancy agreement there be implied the following covenants between the landlord and the tenant:

(a) that the rented premises will be habitable and in good repair at the commencement of the tenancy, and

(b) that throughout the tenancy the landlord shall:

(i) take all reasonable steps to maintain the rented premises and common areas habitable and in good repair, and

(ii) comply with health and safety standards, including housing standards, prescribed by law.

(2) That subsection (1) apply whether or not a lack of habitability or state of disrepair existed to the knowledge of the tenant before the tenancy agreement was entered into.

(3) That subsection (1)(b) not apply if

(a) the tenant would be liable to the landlord for the expense of repair if made,

(b) the repairs would have to be made in the rented premises, and

(c) the landlord is in the process of terminating the tenancy.

(3) Privacy

In some situations, the landlord must have the right to enter the rented premises. However, the rented premises are the tenant's home, and the privacy of his home, whether he is physically "in residence" or not, must not be subjected to encroachments which are not manifestly necessary. The proposed Act must try to balance these legitimate, but sometimes opposing, interests.

Section 20 of the present Landlord and Tenant Act reads as follows:

> Except in cases of emergency and except where the landlord has a right to show the premises to prospective tenants at reasonable hours after notice of termination of the tenancy has been given, the landlord shall not exercise a right to enter the rented premises unless he has first given

> written notice to the tenant at least 24 hours before the time of entry, and the time of entry shall be during daylight hours and specified in the notice, except that nothing in this section shall be construed to prohibit entry with the consent of the tenant given at the time of entry.

The section does not give the landlord the right to enter, but rather regulates rights which he presumably acquires by contract. We think that the proposed Act should include rules which are reasonable to both parties, which will be the same in all cases, and which can be readily located. A balanced statute can satisfy these requirements.

It goes without saying that the landlord can enter with consent. We think, however, that the Act should clarify this by so stating and should allow the consent to be given by the tenant or anyone rightfully in the rented premises.

We believe we should start with the proposition that the landlord has no right to enter the rented premises, and carve exceptions where necessary. His right to enter in the exceptional cases should then be limited by a requirement that it be exercised with due regard to the tenant's right to quiet enjoyment so that in case of abuse the tenant will have recourse to the courts.

There are two situations in which the landlord should have a right to enter with neither the consent of nor notice to the tenant:

(a) Emergency. The landlord should have the right to enter in an emergency. Although such a provision is open to abuse, we think it necessary for the protection of the landlord and his tenants. We do not think that the proposed Act should attempt to define the term "emergency:. The circumstances in which the landlord may be required to enter

are so many and varied that a definition is unlikely to cover them all, and is more likely to prevent a responsible landlord from looking after the property in everyone's interest than to prevent an irresponsible landlord from abusing the right.

(b) Abandonment. We think that the landlord should have the right to enter the premises if he has reasonable grounds to believe they have been abandoned by the tenant. We will at page 58 deal with the rights of the landlord and tenant on abandonment of the premises, but must here confirm the landlord's right to enter to establish the fact of abandonment and take possession.

We now turn to those situations in which the landlord should have the right to enter after notice to the tenant. They are as follows:

(a) Inspection. The landlord should have the right to enter to inspect the state of repair. We recognize that this right is open to abuse. There are, however, two considerations which require our recommendation. One is that it is important for the landlord to be able to determine that his property is not being damaged. The other is that our recommendations will impose a duty on him to take all reasonable steps to maintain and keep the rented premises in good repair, and inspection will often be a necessary step in carrying out that duty.

(b) Repair. The landlord must have the right to enter to make repairs. As we have imposed a duty on the landlord to maintain the premises, he must be permitted to enter for this purpose.

(c) Prospective purchasers and mortgagees. The landlord

should be able to enter to show the property to prospective purchasers and mortgagees.

(d) Prospective tenants. The landlord should have the right to show the premises to prospective tenants after a notice to terminate a periodic tenancy has been given, or during the last month of a fixed term tenancy.

We must now consider the way in which notice should be given. Section 20 requires that it be a written notice given at least 24 hours before the proposed time of entry, and specifying that time. We think that these provisions are adequate, but that the requirement in section 20 that the time of entry be during daylight hours is unnecessarily restrictive. We believe that the requirement should be that the notice specify a reasonable time for entry.

Recommendation #8

(1) That except as provided in this recommendation, a landlord not be entitled to enter rented premises without the consent of the tenant or of a person rightfully in the premises.

(2) That a landlord be entitled to enter rented premises without consent or notice if he has reasonable grounds to believe that

(a) an emergency requires entry, or

(b) the tenant has abandoned the premises.

(3) That a landlord be entitled to enter rented premises without consent but upon notice

(a) to inspect the state of repair,

(b) to make repairs,

(c) to show the premises to prospective purchasers and mortgagees of the property, or

(d) to show the premises to prospective tenants

(i) after a notice of termination of a periodic tenancy has been given, or

(ii) during the last month of a tenancy for a fixed term.

(4) That a notice under subsection (3) must

(a) be in writing,

(b) be given to the tenant at least 24 hours before the time of entry, and

(c) name a reasonable time of entry.

(5) That the landlord be required to exercise his rights under this recommendation with due regard to the rights of the tenant under recommendation #6.

(4) Retaliatory Eviction

The recommendations made in this report will substantially increase the protection of the tenant; they will create a more equal balance between the rights and obligations of the landlord and tenant respectively. The objectives of the proposed Act will, however, be frustrated if tenants do not exercise their rights for fear of eviction.

Accordingly, we recommend that the proposed Act prohibit termination of a periodic tenancy by a landlord in retaliation for the legitimate exercise of his rights by a tenant. This recommendation reflects the same principle as does section 12.(1.1) of the present Landlord and Tenant Act. We recognize that this recommendation will not give complete protection, for the tenant will carry a difficult burden of proof. However, he will have an opportunity to contest a termination as retaliatory, with a chance of success in some cases. We do not think that our recommendation can be effectively applied to fixed term tenancies which terminate without the giving of notice. Because the

mere prohibition and setting aside of the notice are unlikely to constitute sufficient sanctions, we recommend that it be made an offense to attempt a retaliatory termination.

Recommendation #9

(1) That a landlord be prohibited from terminating a periodic tenancy for the reason that the tenant has

(a) taken steps to enforce a right granted to the tenant or an obligation imposed on the landlord by the proposed Act, or

(b) made a bona fide complaint to a municipal or governmental authority alleging that the landlord has violated a statute, by-law or regulation dealing with health, safety or housing standards.

(2) That a notice of termination given in contravention of subsection (1) be ineffective.

(3) That a landlord who contravenes subsection (1) be guilty of an offense and liable on summary conviction to a fine of not more than $100.

2. Tenant's Obligations

(1) Rent

(a) Obligation to Pay Rent

The obligation to pay rent is well understood and we do not think that it requires discussion or reform.

(b) Increases in Rent

The amount of rent is customarily agreed upon by the landlord and the tenant, and like any other term in an agreement, can be changed only by mutual agreement. In a tenancy for a fixed term, the landlord cannot increase the

rent during the term of the tenancy unless the agreement so provides, and his only recourse is to refuse to renew the tenancy at the end of the term unless the tenant agrees to an increased rent. In a month to month tenancy the landlord can give notice of termination if the tenant resists the increase; he can, therefore, in the absence of a statutory provision to the contrary, or of rent control, effectively increase the rent by a month's notice given before the end of a rental period, unless the tenant is prepared to move rather than pay the increased rent.

Section 21 of the Landlord and Tenant Act prohibits a landlord from increasing the rent unless he gives at least 90 days' written notice. That section represents a decision made by the Legislature in 1970, and we therefore do not recommend any change in principle. Section 21 reads as follows:

> 21. (1) A landlord shall not increase the rent payable under a tenancy agreement, or be entitled to recover any additional rent resulting from such an increase, unless he gives to the tenant a written notice of the increase in rent at least 90 days before the date on which the increase is to be effective.
>
> (2) Subsection (1) does not apply where the tenancy agreement provides for a period of notice longer than 90 days before the increase in rent is effective.
>
> (3) Any notice of termination of a tenancy of residential premises given by a landlord to a tenant is void if the landlord, either before or after giving the notice, initiates negotiations with that tenant towards an agreement to increase the tenant's rent effective as of a date prior to the expiration of 90 days from the date of giving the notice of termination.

This section appears to assume that the landlord can unilaterally increase the rent. As he cannot, we think that

the section should be redrafted to express the legal position accurately, i.e., that neither party can change the terms of an agreement without the consent of the other. Section 115 of the Ontario Landlord and Tenant Act deals with the problem by providing that a tenant who is notified of a rent increase is deemed to have accepted it unless he gives the landlord notice of termination, and we think that such a provision would provide a mechanism suitable to both sides. It expresses the reality of the situation, that a landlord can increase the rent under a tenancy agreement only with the tenant's consent, albeit obtained under threat of termination.

The protection given by subsection (1) would be nugatory if the landlord could terminate the existing tenancy agreement, and refuse to make a new one with the tenant unless he agreed to pay a higher rent. The landlord could effectively compel the tenant to pay higher rent within a much shorter period than 90 days. Subsection (3) now seeks to prevent this by providing that if the landlord initiates negotiations towards a rent increase, his notice of termination is void. This prevents the landlord from initiating rent increase negotiations. It does not stop him from giving a notice of termination and waiting for the tenant to do so. It does not appear to preclude his advising the tenant that the reason for the notice is that the rent is too low, which would surely give the tenant a broad hint that he should initiate negotiations by inquiring what rent the landlord would accept. Moreover, if the tenant fails to take the cue, the landlord can simply rent to a new tenant at the increased rate. Therefore, we think that the section should be changed to provide that the landlord is not entitled to demand or retain a higher rent for the premises from any tenant within 90 days of giving a notice of termination. By making any excess payment recoverable, the landlord's

financial inducement to circumvent the section would be removed.

Recommendation #10

(1) That a landlord be prohibited from increasing the rent payable under a tenancy agreement and from recovering any additional rent resulting from such an increase unless he gives to the tenant a written notice of the increase in rent at least 90 days before the date on which the increase is to be effective.

(2) That a tenant under a periodic tenancy who receives a notice under subsection (1) and who fails to give to the landlord notice of termination effective on or before the date of the rent increase be deemed to have accepted the same.

(3) That a landlord who gives a notice of termination of a periodic tenancy shall not, for a period of 90 days after the date the notice is given, be entitled to demand or retain any rent for the premises in excess of that payable under the tenancy agreement at the time of the notice.

(4) That a tenant who pays rent in excess of that permitted by subsections (1) and (3) be entitled to recover such excess rent from the landlord.

(5) That this recommendation not apply if the tenancy agreement provides for a period of notice longer than 90 days.

(c) Acceleration Clauses

A tenancy agreement may contain a provision that if the tenant defaults in paying rent or performing other obligations, the current and all future rent becomes payable immediately. Such a provision is valid under Alberta law unless it imposes an unenforceable penalty. Recent legislation, however, has changed the law in some other jurisdictions. The Ontario and Manitoba statutes provide for relief against

such provisions if the tenant pays the overdue rent or performs the obligation. The British Columbia and Prince Edward Island legislation makes such clauses void, and the Ontario Law Reform Commission has recommended that Ontario do the same. We are not aware that such clauses are a serious problem in residential tenancies in Alberta, but we think it desirable to ensure that they do not become so in the future as they impose undue hardship on tenants. We think that landlords will have sufficient remedies under the proposed Act, and note that the British Columbia Law Reform Commission said at p. 128 of its report on Landlord and Tenant Relationships: Residential Tenancies, 1973, that no landlord had complained to the Commission about the British Columbia provision.

Recommendation #11

> *That a term in a tenancy agreement that provides that, by reason of default in payment of rent due or in observance of any obligation of the tenant under a tenancy agreement, the whole or any part of the remaining rent for the term of the tenancy becomes due and payable, be void and unenforceable.*

(2) Use and Care of Premises

We have previously dealt with the landlord's implied obligations of quiet enjoyment and repair. We now turn to the corresponding obligations of the tenant with regard to his use and care of the rented premises and common areas.

(a) Disturbance of Possession and Enjoyment of Landlord and Other Tenants

The proposed Act should protect all parties entitled to possession and peaceful enjoyment of property in which rented premises are situated. Therefore, as the landlord

should be under an obligation not to disturb the possession and peaceful enjoyment of the tenant, so should the tenant be under a similar obligation in favour of the landlord and other tenants.

At the outset, we believe that the law must recognize that residential tenants usually live in much closer contact with neighbours than do persons occupying single family dwellings, and must, therefore, tolerate a degree of minor disturbance as unavoidable. For this reason the covenant we will propose will contain an initial qualification; it will only apply to conduct which disturbs others "in any significant manner".

A tenant could, of course, inferfere with the rights of the landlord and other tenants by an almost infinite variety of conduct. We will frame our recommended covenant in broad terms, and then refer specifically to certain categories of conduct which clearly should be encompassed by it. Acts which are illegal should be prohibited. This would include, by way of example, the use or sale of certain drugs, and prostitution. Acts which are dangerous should be prohibited. Storing inflammable chemicals would fall into this category. So would the conduct of a tenant who exercises his motorbike on sidewalks in common areas in a manner threatening to other tenants. Acts which are offensive should be prohibited. This would include conduct of a tenant which resulted in excessive odor and noise. The tenant will have exclusive possession of the rented premises, and will frequently have the right to use such common areas as entryways, halls, sidewalks, laundry rooms, and recreation rooms. It is only fair that he should be obligated to exercise his rights with reasonable care so as to avoid damage to the property of others, and injury to their persons.

On the question of liability for damage, however, we believe there should be a significant exception. Landlords customarily insure their property against loss by fire. Tenants seldom insure against their potential liability to a landlord or other tenants for damages resulting from a fire caused by their negligence. The landlord's insurance will usually not protect the negligent tenant, even though the landlord's insurance premium expense will be a cost of business recovered from the tenant through rent. Consequently, the tenant may be liable to the landlord for damages resulting from a negligently caused fire, and after indemnifying the landlord for his loss, the landlord's insurer may "step into the landlord's shoes" and sue the tenant. Certainly one of the primary purposes of insurance is to secure protection from the consequences of one's negligence. If a fire were caused by the landlord's negligence, he would be protected by his insurance. As the landlord's insurance will be funded, in large measure, from rent paid by tenants, we believe they should be given some protection. This can be accomplished by a provision that the tenant will not be liable to the landlord for fire damage unless the fire was intentionally caused by the tenant, or resulted from conduct of the tenant giving the insurer a defense under the landlord's policy which the insurer utilizes.

(b) Care of Rented Premises

The proposed Act will impose an obligation on the landlord to maintain the rented premises and common areas in good repair during the tenancy. We have just discussed the tenant's obligations to refrain from any conduct which might damage the rented premises and common areas. We think, however, that the tenant should have some affirmative duties with regard to the rented premises.

As the tenant will have exclusive possession of the rented premises and included furnishings and equipment, we believe that he should be obliged to maintain them in reasonable cleanliness.

The tenant will usually know of a condition of disrepair in the rented premises before the landlord. If the tenant notifies the landlord of the problem as soon as reasonably possible, the landlord will be able to have repairs made promptly so as to minimize damage to the property and avoid inconvenience to the tenant and himself. We believe that the tenant should be obliged to notify the landlord of conditions of disrepair known to the tenant as soon as reasonably possible.

We have not recommended that the tenant have any obligation to repair rented premises. However, if a window were broken, from any cause, we believe that a reasonable tenant would take such action as was possible under the circumstances to stop rain or snow from blowing into the premises until the landlord could effect more permanent repairs. The tenant could perhaps make an emergency repair with thumb tacks and a piece of cardboard or plastic. Examples of other emergency situations could be listed. We believe that the tenant should be required to take such emergency action as would be taken by a reasonable tenant, under the circumstances, short of permanent repair, to minimize damage to the rented premises from any cause.

(c) Tenant's Responsibility for Other Occupants and Visitors

A tenant will frequently share rented premises with such other occupants as members of his family, and he and the other occupants will often invite visitors to the rented premises or common areas. The tenant will usually be in a

better position to control the conduct of fellow occupants and visitors than will the landlord. For this reason, we believe that the tenant should assume some responsibility for the acts of such persons.

As the rented premises will be in the exclusive possession of the tenant, the landlord will have no control over acts committed there. Although the tenant may not have actual control over the conduct of persons in the rented premises in many situations, the fact that persons other than himself are there at all can be traced to his decisions. The tenant will choose his co-occupants, and he and those persons selected by him will invite visitors. To be sure, the tenant may not have selected his children, but he has more rights and duties regarding their supervision than anyone else. We believe the tenant should have the same responsibility for acts of other occupants and visitors in the rented premises as he does for his own acts.

However, acts committed outside the rented premises present different considerations. Again, the fact that other occupants and visitors are on premises of the landlord can be traced to decisions of the tenant. But as a practical matter, the tenant's ability to control the conduct of persons on common areas of the landlord's premises will be much more attenuated. We do not believe the tenant can be expected either to escort his guests to their cars at 3:00 a.m. on a Sunday morning after a party in order to supervise their conduct, or to supervise his children and their playmates on common recreation areas. Here the landlord, and other tenants whose rents will reflect the costs, will have to assume the risk of some damage. Our conclusion is that the tenant should only be responsible for acts of other occupants and visitors outside the rented premises if the tenant could reasonably have prevented them.

(d) Recommendations

Recommendation #12

(1) That in every tenancy agreement there be implied the following covenants between the tenant and the landlord:

(a) that neither the tenant, another occupant of the rented premises, nor a person invited to property of which the rented premises form a part by the tenant or another occupant, shall

(i) disturb, in any significant manner, the possession and peaceful enjoyment by the landlord or another tenant of their rights in property of which the rented premises form a part, or

(ii) damage such property

by any wilful or negligent conduct including, but not limited to, illegal, dangerous, or offensive conduct.

(b) that the tenant shall maintain the rented premises and included furnishings and equipment in reasonable cleanliness,

(c) that the tenant shall notify the landlord, insofar as reasonably possible, of any condition of disrepair in the rented premises known to the tenant, and

(d) that the tenant shall take such emergency action as would be taken by a reasonable tenant under the circumstances, short of permanent repair, to minimize damage to the rented premises from any cause.

(2) That the tenant not be liable under subsection (1)(a) for the conduct of another person other than in the rented premises unless the tenant could reasonably have prevented the conduct.

(3) That the covenant implied by subsection (1)(a) in favour of the landlord also benefit and be enforceable by any other tenant of the landlord affected by a breach thereof.

(4) That the tenant not be liable to the landlord under sections (1) and (2) for any damage sustained from fire, unless

(a) the fire was intentionally caused by the tenant, or

(b) the insurer under a policy of insurance in favour of the landlord is entitled to and does refuse to indemnify the landlord by reason of the tenant's conduct.

(3) Possession

There is no uncertainty in the law concerning the tenant's obligation to surrender possession of rented premises to the landlord at the termination of a tenancy. We need not discuss the court's power to grant relief against a forfeiture of rights, for if that power is invoked there has been no termination. When a landlord applies for an order for possession under the Landlord and Tenant Act (section 10), the court may give an order for possession if satisfied that the tenancy has expired or been terminated (section 12). In accordance with section 13, such an order shall direct the tenant to deliver possession by a specified date, or within a specified time. We do not believe that this procedure implies that the tenant had no obligation to surrender possession until the date specified by the court. Rather, we think it reflects the practical reality that a court cannot order the tenant to move his family and possessions so hurriedly as to be harsh. We do not recommend a change in the law.

3. Locks and Security Devices

The landlord will sometimes change the locks to exclude the tenant. If the tenancy has not been terminated, this will clearly violate the landlord's covenant not to interfere with the tenant's possession, and the tenant will have

a right to damages. But damages will be an ineffective remedy in most situations.

Although we are not sure of the magnitude of the problem in Alberta, we believe a potential problem of this kind should be eliminated if possible, and that the proposed Act, like the Ontario Landlord and Tenant Act, should prohibit alteration of locks by the landlord without the consent of the tenant unless the latter is immediately provided with a key to the new lock. Similarly, the tenant should be prohibited from adding or changing locks to prevent the landlord from exercising a legal right to enter, though not from adding a security device which is capable of being put into effect only while the premises are occupied and which can be installed and removed without damage to the premises. A breach of either prohibition should be made an offence so as to give an additional santion.

Recommendation #13

(1) That neither a tenant nor a landlord shall add to or change the locks on doors giving access to the rented premises or to the property of which the rented premises form a part, without the consent of the other party, or, in the case of a landlord, unless a key is made available forthwith to the tenant.

(2) That subsection (1) not apply to the installation by a tenant of a security device which is capable of being put into effect only while a person is inside the rented premises and which can be installed and removed without damage to the property.

(3) That a landlord or a tenant who contravenes subsection (1) be guilty of an offence and liable on summary conviction to a fine of not more than $100.

4. Transfer of Interests of Landlord and Tenant

(1) Right to Transfer

The present Landlord and Tenant Act does not deal with transfer, assignment, and subletting. Under present law the landlord can transfer his reversion and the benefit of any tenancy agreements and, except as to the disposition of security deposits which we will deal with at page 91, we think that the proposed Act need not regulate these rights. Under existing law the tenant can also assign or sublet, although he remains liable to the landlord for the performance of his obligations under the tenancy agreement. Most tenancy agreements, however, contain a provision prohibiting assignments and subleases either absolutely or without the landlord's consent, and in the latter situation it is common for the agreement to provide that the landlord's consent is not to be unreasonably withheld.

The landlord has a legitimate interest in controlling assignment and subletting. He may well have chosen a particular tenant on the basis of his personal qualities, his record as a tenant elsewhere, or his credit record. We can appreciate that a landlord would desire some control over who occupies his premises. On the other hand, members of our society are increasingly mobile, particularly for reasons connected with employment, and many tenants want to move elsewhere before their tenancy agreements expire.

We think that the tenant should have the right to assign or sublet. The landlord should be permitted to protect himself by a provision in the tenancy agreement requiring his consent as a condition, but the proposed Act should provide that his consent shall not be arbitrarily or unreasonably withheld. The landlord should not be able

to impede a tenant by remaining silent. Consequently, he should be held to have consented unless he replies within 15 days of a request for consent. We believe the landlord should be permitted to require that an assignee assume the obligations of the tenancy as a condition of consent. A provision requiring the landlord's consent should apply to subsequent assignment or subletting even if it does not expressly so state.

We have considered whether the proposed Act should expressly authorize the landlord to make a charge for his consent to cover his reasonable expenses. We think that such a provision would likely result in charges being made automatically, and should not be included in the Act. If a landlord demands a fee as a condition of consent, and the parties cannot agree, the court will ultimately have to decide whether the consent is being unreasonably withheld.

We think that special provision should be made for the assignment or subletting of rental housing which is available under provincial or federal legislation for special classes of tenants, such as low income families, students and the elderly. The landlord, be it a government agency or a private owner, should be entitled to withhold consent on the grounds that the proposed assignee or subtenant does not have the special qualifications required for occupancy.

Recommendation #14

(1) That a tenant have the right to assign or sublet.

(2) That if the tenancy agreement so provides, the right to assign or sublet be subject to the landlord's consent, but the landlord shall not withhold his consent arbitrarily or unreasonably.

(3) That unless a contrary intention is expressed in the tenancy agreement, a provision requiring

the landlord's consent to an assignment or subletting apply to a subsequent assignment or subletting.

(4) That if the landlord does not answer a request for his consent to an assignment or subletting within 15 days from the date of the request, he be deemed to have consented to the assignment or subletting.

(5) That notwithstanding subsection (2) a landlord may withhold his consent if

(a) the premises are by law available only to tenants with special qualifications, and

(b) the assignee or subtenant does not have the special qualifications.

(2) Obligations After Transfer

We will now consider whether and to what extent a purchaser of the landlord's interest and the tenant's assignee should acquire the rights and assume the obligations of the landlord and of the tenant respectively.

Under present law the landlord remains liable to the tenant for any breach of the landlord's obligations after he has sold the property. Similarly, the tenant remains liable to the landlord for any breach of the tenant's obligations after he has assigned the tenancy. That is because there is "privity of contract", a direct contractual relationship, between the landlord and the tenant.

If the tenant assigns his interest in the tenancy agreement, there is "privity of estate" between the landlord and the tenant's assignee while they hold their respective interests in the leasehold estate. While he retains his interest in the leasehold estate, the assignee tenant is entitled to the benefit of and subject to the burden of all

implied and express covenants that "run with the land". Generally, the covenants which "run with the land" are covenants which "touch and concern" the land, though if the burden of an express covenant relates to something not in existence at the time of the agreement it will run with the land only if the original tenant covenanted for himself and his assignees. The distinction between covenants which "touch and concern" the land and covenants which do not is rather difficult and complex.

If the landlord sells, there is "privity of estate" between the purchaser and the tenant or the tenant's assignee, i.e., the purchaser is entitled to the benefits and subject to the burdens of all covenants which "touch and concern" the land. If he accepts rent from the tenant it appears that he is bound by all the terms of the tenancy agreement: Protective Holdings Ltd. v. M & P Transport Ltd. (1969), 70 W.W.R. 591 (App. Div.).

We think that the law which we have outlined is, in substance, satisfactory. We think, however, that the rights and obligations which pass to assignees and purchasers should be described as the rights and obligations "relating to the tenancy" rather than covenants "which touch and concern the land". Obligations to perform personal services and the like would be excluded from such a phrase, but the rights and obligations which are relevant to the relationship of landlord and tenant would be carried forward.

The whole discussion of purchase and assignment is, of course, subject to the provisions of the Land Titles Act. Nothing in the proposed Landlord and Tenant Act should upset the principles of registration of title to land. The provisions of the proposed Act should supersede those of an English statute, the Grantees of Reversion Act (1540), 32

Hen. 8, c. 34, which should be made inapplicable to the rights of a landlord under a residential tenancy.

Recommendation #15

(1) That, except as provided in Recommendation #27, a subsequent owner of property subject to a tenancy, while he remains owner of the property, have all the rights and be subject to all the obligations of the landlord relating to the tenancy.

(2) That an assignee of the interest of the tenant, while he continues to hold the interest, have all the rights and be subject to all the obligations of the tenant relating to the tenancy.

(3) That the Grantees of Reversion Act, 32 Hen. 8, c. 34, not apply to the rights of a landlord under a residential tenancy.

(4) That this recommendation be subject to the Land Titles Act.

V
REMEDIES

We have so far discussed the rights and obligations of the landlord and of the tenant. We now turn to discuss the remedies of each if the other fails to carry out his obligations, or if performance of the tenancy agreement is made impossible by a fundamental change in the state of things upon the basis of which the parties contracted.

1. Existing Law: Contract or Property Law: Independence of Covenants

At common law the lease was primarily a conveyance of an estate in land, and the covenants in the lease were viewed as incidental to the conveyance. For this reason, the law of landlord and tenant, which developed comparatively early in English legal history, emphasized property rather than contract concepts. This state of the law still has very important consequences. It is, for example, doubtful that the law of frustration of contracts applies to tenancies for even if buildings are destroyed by fire, the tenant retains his estate in land. As the law considers the estate in land to be the primary element of the bargain, there has been no "frustration", and there is support for the opinion that the tenant must continue to pay his rent. Another consequence is that the imposition of the burdens of covenants assumed by the landlord and tenant on their respective assignees is based on rules of property law, not contract law.

Perhaps the most serious defect of the property law approach is the doctrine of "independent covenants", which remains the orthodox rule in leasehold law. Because the covenants of the parties are viewed as independent, a breach by one party does not relieve the other party of his duty to perform. If the tenant fails to pay rent, the landlord must

bring an action to recover it; he cannot evict the tenant. If the landlord breaches a covenant, the tenant must sue for damages; he cannot make a deduction from his rent obligations and he cannot terminate the lease.

One significant erosion of the doctrine of independent covenants has infiltrated leasehold law through a fiction. The tenant's independent obligation to perform his covenants stems from his continued legal possession of the leasehold estate in land. If he is evicted from his estate by the landlord, the tenancy is terminated, and with it his obligations. The fiction which has developed is known as "constructive eviction". If the landlord breaches a covenant so as to seriously impair the tenant's normal and continued use and benefit of the premises, the court may draw the legal conclusion that the landlord "intended" to evict him. Under such duress, the tenant may consider himself evicted and abandon the premises. Although it is useful, the theory has serious defects. The tenant must promptly move out; if he dallies too long, he can hardly complain that he was evicted. If he does abandon the premises, he takes the risk that the landlord may still be able to hold him for rent unless he can satisfy a court, after the fact, that the landlord's breach was so material, and so apparently permanent, that he was forced out. The tenant has no option to continue in possession, with an abatement of rent in proportion with the magnitude of the landlord's breach.

How could a court resolve such a situation using contract law, rather than property law? The covenants of the parties would be described as "mutually dependent". Under contract law, parties bargain for an exchange of performances, not an exchange of promises. Unless the landlord should deliver substantial performance, the tenant would not have to perform

by paying rent. If the landlord were in substantial breach of his obligations, we would say that there has been a "failure of consideration" for the tenant's rent obligation, rather than a constructive eviction of the tenant. If the tenant were to abandon, he would take the same risk as under constructive eviction; the court might subsequently hold that there was no substantial failure of consideration. But he could stay put, and pay less rent, with reasonable assurance that when sued he can justify some abatement of rent based on the fair rental value of the premises in their defective condition.

The decision of the Supreme Court of Canada in Highway Properties Ltd. v. Kelly Douglas & Co. Ltd., [1971] S.C.R. 562 represents a significant advance in the development of the common law toward the application of contract principles. The court said that "it is no longer sensible to pretend that a commercial lease...is simply a conveyance and not also a contract" and "the full armoury of remedies ordinarily available to redress repudiation of covenants" should not be denied. The question in that case was whether, after a termination brought about by the tenant's abandonment of the premises, the landlord was entitled to prospective damages for breach of the tenant's covenants over the remainder of the term, and the court answered the question in the affirmative. The court did not, however, go on to say that tenancies are contracts and nothing more.

We believe the present law fails to recognize that the contractual aspects of a modern residential tenancy relationship are at least as important as the property aspects. The common law rules may prejudice either the landlord or the tenant, depending on the case. In practice, they operate more harshly on the tenant, because the landlord is more likely to have protected himself with a well-drawn lease

permitting him to terminate when the tenant has breached even a minor covenant. Any change in the law, however, must protect the interests of both parties.

Section 35 of the British Columbia Landlord and Tenant Act, S.B.C. (1970) c. 18, declares the relationship of landlord and tenant to be one of contract only. We question this blanket solution, as it may have undesirable consequences. How would a tenant protect his leasehold under the Land Titles Act if he had no estate in land, but merely had rights under contract? How would the burdens of covenants which under property law "run" with the respective interests of the lessor and lessee be enforced against their respective assignees of the reversion and the leasehold estate? We think the best approach is to examine the particular areas in which the existing law is unsatisfactory, and to recommend appropriate changes.

There are some models at hand. The Ontario Law Reform Commission, in its Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies, 1968, recommended that covenants in residential tenancy agreements be interdependent. That recommendation resulted in section 89 of the Ontario Landlord and Tenant Act, R.S.O. 1970 c. 236, which provides that "the common law rules respecting the effect of a breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements". That section was reproduced as section 10(1) of the British Columbia Landlord and Tenant Act, S.B.C. 1974 c. 45, but section 10(2) prohibits a tenant from refusing to pay rent by reason only of a breach by a landlord of a material covenant, and section 10(3) as amended by S.B.C. 1974 c. 109 merely gives him the right to treat the tenancy agreement as terminated for such a breach. In its final Report on Landlord and Tenant Law, 1976, the Ontario Law Reform Commission recommended that if the landlord breached

a fundamental term of the agreement, a tenant could apply to the court for either termination of the tenancy or abatement of rent, and could pay rent into court pending a decision on an abatement application.

We do not think it enough for the law to provide that the common law rules relating to breaches of covenants in contracts will apply to residential tenancy agreements; we think that the proposed Act should define the law and establish an appropriate mechanism to protect both parties. Ontario's s. 89 was described by the Ontario Law Reform Commission at p. 124 of its Report on Landlord and Tenant Law, 1976, as "rather cryptic and ambiguous" and the reported decisions and text-book commentaries, as well as our own analysis, support that opinion.

It appears to us that the proposed Act should describe the breaches by either party for which the other will have a remedy, and that it should go on to say what the remedy will be. We think that a mere reference to "common law rules" is not sufficiently precise or sufficiently informative. We will accordingly proceed to make recommendations which will effectively do away with the independence of covenants in residential tenancies.

2. Breach of Obligation by Landlord

(1) Breach Depriving Tenant of Benefit

If the landlord commits a very serious breach of his obligations, i.e., if his failure to perform an obligation deprives the tenant of a substantial part of the benefit of the contract, we think that the tenant should be entitled to treat the tenancy agreement as terminated. That would involve all the consequences of a termination by other means:

the tenant would not have to pay further rent, and he would have the right to recover the security deposit subject to any deductions which were proper under the circumstances.

A tenant who wishes to avail himself of that right of termination will be faced with what may be a difficult decision: if he treats the lease as terminated, and the landlord should afterwards satisfy the court that there was not sufficient cause for termination, he might be exposed to substantial financial loss. In order to give him a chance to minimize his risk without encouraging or requiring litigation, we think that a further proposal should be made. That is, the tenant should be entitled to give a notice to the landlord that by reason of the landlord's default (giving particulars) the tenancy agreement will terminate upon the expiration of 14 days following the giving of the notice unless the landlord applies to the court to set aside the notice. If the landlord does not apply to the court, the termination will be effective; if he does apply it will be for the court to decide whether the landlord failed to perform his obligations, and whether the failure deprived the tenant of a substantial part of the benefit of the contract. The court should also be able to allow an abatement of rent for the period following the breach and before termination, and should have power to give effect to all rights which accrue before termination. It should also have power to award damages to the tenant.

Recommendation #16

(1) That if a landlord's breach of obligation under the tenancy agreement or under the proposed Act deprives the tenant of a substantial part of the benefit of the tenancy agreement the tenant be entitled to

(a) treat the tenancy agreement as terminated and vacate the rented premises, or

(b) proceed under subsection (2).

(2) That the tenant be entitled to give the landlord a notice in writing

(a) specifying the breach, and

(b) notifying the landlord that the tenancy agreement will terminate 14 days after the giving of the notice unless within that time the landlord files and serves a notice of application to the court for an order setting aside the notice.

(3) That the court be required to set aside the notice unless it is satisfied that a breach described in subsection (1) has occurred.

(4) That if the landlord does not apply, it be conclusively deemed that there was a breach described in subsecection (1) and the tenancy be terminated.

(5) That if a tenancy be terminated under this section

(a) rent be payable to the date of termination, and no longer, at the rate provided in the tenancy agreement, with pro rata provision for a fractional rental period, and

(b) each party be entitled to enforce all rights which accrue to the time of termination, and

(c) the tenant be entitled to damages for the loss of the benefit of the agreement over the balance of the unexpired term.

(2) Other Breaches

Termination may be a useful remedy, but only in a limited number of cases; in a month to month tenancy, for example, it is likely to be simpler for the tenant to give a month's notice and avoid any risk of being sued by the landlord. Further, our recommendations would not permit the tenant to terminate the tenancy in a case in which the landlord is in default, but the default is not sufficiently grave.

Under the present law the tenant can sue for damages if the landlord fails to perform an obligation, for example, if he fails to supply sufficient heat or to keep the common areas clean. That remedy is often of little use to the tenant because of the expense, trouble and delay involved in legal proceedings. Because of the doctrine of independence of covenants the tenant has no effective way in which he can set off his damages or the cost of curing the landlord's default; he cannot make a deduction from rent without exposing himself to termination of his tenancy.

We think that, without disturbing the tenant's right to sue for damages if he wishes, the Act should give him a more effective remedy, a summary procedure by which rental money can be used to pay the damages or to pay the cost of curing the landlord's default. The Act should not, however, allow the tenant unilaterally to withhold the rent or some part of it; such a remedy would be open to abuse by tenants. We think that the way to balance the interests of the parties is to allow the tenant to file with the court a simple notice setting out the alleged breach, the alleged damage, and the estimated cost of rectifying the alleged breach. The court should have power, pending adjudication, to allow the tenant to pay into court and deduct from future rent whatever sum is necessary to cover the claim, if valid. When the court deals with the matter it should have the power to allow the tenant to make further payments into court from the rent, or, if the tenant has already expended money to make good the default, to deduct it from the rent. The court should have power to direct payment out of court to the landlord, the tenant, or to a third party who has performed services in order to rectify the default. The court should, of course, have the power to refuse all abatement of rent if the tenant does not make out his case. It should also have power to refuse relief to the tenant if the landlord's default was

insubstantial or not unreasonable, if it was beyond the landlord's control, if the landlord has rectified the default, or if the tenant has waived the default expressly or by conduct.

Recommendation #17

(1) That if a landlord commits a breach of an obligation under a tenancy agreement or under the proposed Act, the tenant have the right to apply for any one or more of the following remedies:

(a) damages suffered by reason of the breach,

(b) abatement of rent to the extent that the breach deprives the tenant of the benefit of the tenancy agreement,

(c) judgment for the cost of making good the landlord's default.

(2) That the court have the power:

(a) to make an order or give a judgment applied for under subsection (1),

(b) to direct that the tenant pay into court, pending and after disposition of the application, such amounts of future rent, if any, as the court deems appropriate to secure enforcement of any order applied for under subsection (1).

(c) to direct that any amount of rent paid into court be disbursed, as appropriate,

(i) to the tenant as damages,

(ii) to the landlord, the tenant, or a third party, for costs reasonably incurred in making good the landlord's default, and

(iii) to the landlord any remaining sums.

(3) That the court have power to refuse to permit the tenant to pay future rent into court upon being satisfied that

(a) there was no breach, or

(b) the breach

(i) was not significant,

(ii) was beyond the landlord's reasonable control, or

(iii) was expressly or impliedly waived by the tenant.

3. Breach of Obligation by Tenant

(1) Repudiation

We turn now to a discussion of the landlord's rights if the tenant repudiates the tenancy agreement during its term. The tenant may repudiate in so many words, or he may vacate the premises and fail to perform his obligations. These two courses of conduct amount to the same thing; as a matter of law, they constitute an offer from the tenant to surrender to terminate the tenancy relationship. However, the tenancy will not be terminated unless the landlord does something which can be construed as an acceptance of the tenant's offer to terminate.

We referred at page 51 to the Highway Properties case in which the Supreme Court of Canada held that the "full armory" of contractual remedies is available against a tenant who is in breach of a covenant in a commercial lease. We perceive no reason why the same conclusion should not be reached in the case of a residential tenancy.

Applying the doctrine of the Highway Properties case to a residential tenancy, we can summarize the present state of the law as follows. The landlord has two basic courses of action if the tenant offers to terminate:

(a) Accept the Tenant's Repudiation or Surrender

This will terminate the tenancy. The landlord has a right to recover any rent accrued, and any damages suffered by reason of the breach of other obligations of the tenant, to the date of termination of the tenancy. In addition, he may recover any damages he may have sustained by losing the benefits of the tenancy agreement. These damages would usually be the value of the unpaid future rent for the remainder of the period provided under the tenancy agreement, less the actual rental value of the premises for that period. Under this course, the landlord can bring his damage action immediately after the tenancy is terminated. He knows the rent stipulated in the tenancy agreement; he must satisfy the court, by evidence, as to the actual rental value of the premises for the unexpired period. In short, if he can convince the court that he had a favourable agreement, with a rent higher than the current rental value, he can recover estimated damages for losing the tenancy agreement, as well as damages accrued at the date of termination.

In a tenancy from month to month, the landlord will probably accept the tenant's repudiation or surrender and thus terminate the tenancy. The tenant's acts would certainly not constitute an effective statutory notice to terminate, but if the landlord attempted to hold the tenant to the tenancy, the tenant could simply give a proper notice and terminate the tenancy within two month's time anyway. As the landlord would probably not want to maintain a tenancy with this particular tenant, little would be gained by dragging out the affair. As a practical matter, the landlord will have lost the benefit of the tenancy from the date of termination to the earliest date when the tenant could have terminated it with a proper notice. Consequently, if the landlord does accept the tenant's repudiation or surrender and terminates the tenancy, we believe his damages should be

computed as though the tenancy had been terminated at the earliest date possible considering the repudiation or surrender as a proper notice.

However, in a tenancy for a fixed term, the landlord may not choose to agree to a termination. Suppose the landlord has rented his home to a tenant for a two year term, effective June 1. The tenant repudiates on October 1 following. In some areas, or at some times, the supply of housing will exceed the demand; the landlord may not be able to re-rent on terms as favourable as those provided in the outstanding agreement; and he may not want to accept estimated damages. He may prefer a second course of action open to him, which we now discuss.

(b) Hold the Tenant to the Tenancy Agreement.

This leaves both parties bound by the tenancy. The landlord may sue for each installment of rent as it falls due, and may recover any damages sustained from the breach of other obligations of the tenant to the date of each action. As a variant of this course, the landlord may simply wait until the expiration of the tenancy agreement, and sue for any damages and accrued rent in one action. The premises will stand idle, available for the tenant should he decide to return.

As an alternative, the landlord may notify the tenant that he is going to rent the premises on the tenant's behalf, and hold the tenant for any deficiency in rent received relative to that owed under the tenancy agreement. The landlord has no present legal duty to choose this alternative, although it has several advantages. It reduces the tenant's eventual liability for unpaid rent. It is socially useful to society as it avoids the economic waste of vacant rental

premises. It benefits the landlord because, as he has been able to collect some rent from a new tenant, his ultimate loss if he cannot obtain payment of his claim by the old tenant, will be lower.

We are satisfied with the law as stated above, with this exception. We think that a landlord who desires to hold the tenant to the tenancy agreement should have a duty to make reasonable efforts to re-rent the premises on behalf of the tenant. To be sure, one may question why the innocent party should be required to expend effort to bail out the wrongdoer. Our answer is that the law of landlord-tenant should be brought into harmony with modern contract law, that the innocent party is required to mitigate his damage under contract law, and that re-renting on behalf of the tenant will mitigate his loss. Technically, it is the tenant's liability for unpaid rent which is reduced, not a liability for damages, but we do not see this as a matter of substance in this context.

A collateral benefit is derived from this recommendation. A landlord who wishes to hold a tenant to the tenancy agreement, and re-rent on his behalf, must under existing law exercise great caution to avoid any conduct which could be construed as an acceptance of the tenant's surrender. The landlord must not exercise any possessory rights over the premises until he has notified the tenant of his intention to re-rent on his behalf. If the landlord has a duty to make reasonable efforts to re-rent, it is no longer necessary that he notify the tenant that he intends to perform that duty.

(2) Failure to Pay Rent

We will now turn to a discussion of a landlord's remedies

upon breach of a tenant's obligations not involving repudiation of the tenancy. While the payment of rent is only one of the tenant's obligations, we will discuss it separately because of some special considerations which apply to it.

(a) Suing for Rent

The landlord can sue for rent as for any other debt. No change in the law is needed.

(b) Distress for Rent

At common law, if a tenant did not pay the rent, the landlord was entitled to take any goods the tenant had on the premises, using force if necessary, and to sell them to secure unpaid rent. He was said to have the right to "distrain", and the process was called "distress". Some protection was customarily given the tenant by statutes which provided that certain goods necessary to sustain life and earn a living could not be taken, and such an Exemptions Act is in force in Alberta.

In Alberta the Seizures Act also gives some significant protection to the tenant. It provides that, unless otherwise ordered by a court, a seizure can only be made by a Sheriff or his officials, and only between the hours of 5:00 a.m. and 8:00 p.m. It is the Sheriff's usual practice to leave the tenant in possession of the goods until they can legally be sold. The tenant then has 14 days from the seizure in which to file a notice of objection to it, and if he does so, the landlord cannot proceed further without an order of the District Court obtained upon notice to the tenant. The judge will customarily allow the tenant further time to pay the rent before making an order for sale.

There are certainly disadvantages inherent in distress. From the landlord's point of view, the process involves expense, and time because the tenant can readily delay the procedure. Sales are seldom made, and even when they are, most of a tenant's possessions will be exempt. However, a tenant can be seriously prejudiced because if goods are sold, they will seldom fetch their reasonable market value. Hence distress is a real threat to a tenant.

For these reasons, many jurisdictions have concluded that a landlord is adequately protected by other remedies, and have abolished distress. On the other hand, landlords tell us that distress is useful; that in some situations its mere availability can be used to induce defaulting tenants to pay their rent, and that in other cases seizure and sale does result in recovery of rent which could not otherwise be collected.

On balance, we believe that the arguments for its retention outweigh those for its abolition, and we recommend accordingly.

(c) Termination of Tenancy for Non-Payment of Rent

A landlord can frequently recover unpaid rent from a security deposit. If that remedy is either not available or not fully effective, he can sue the tenant for rent, but law suits for rent are expensive, time consuming, and likely to produce a judgment which cannot be collected. The disadvantages of distress have just been discussed. If the landlord gives notice to terminate a month to month tenancy, or a fixed term tenancy which he has a contractual right to terminate for non-payment of rent, further rent will usually fall due before the termination date, and if the tenant does not move out in accordance with the notice, the

landlord will be faced with further time involved in court procedures for eviction, to say nothing of the expense.

Whether the lease is periodic or for a fixed term, it is not fair to the landlord that the law should allow a defaulting tenant to live in the premises without paying for them, and it is not fair to tenants who do pay their rent that the landlord's loss be passed on to them in addition to his other costs of doing business. We think that the landlord should be able to take immediate steps to terminate the tenancy while ensuring that the tenant will have both an opportunity to object and an opportunity to make good the default.

It seems to us that the best solution is as follows:

(1) To provide that the landlord may upon default in payment of rent serve notice of termination of the tenancy, whether periodic or for a fixed term, to have effect 14 days after service of the notice.

(2) To provide that if the tenant does not object the tenancy will terminate.

(3) To provide that instead of giving notice, or upon the tenant objecting, the landlord may apply to the court which will make an order terminating the tenancy if there has been a substantial breach, or deny the landlord's application if there has not.

(4) To provide that the notice will be ineffective if the tenant pays the arrears of rent within the 14-day period whether or not the landlord applies to the court.

That proposal would give the landlord an expeditious means of bringing about the legal termination of a tenancy

for non-payment of rent, and would allow him to come into court for an order for possession much more quickly than is now possible. On the other hand, it would give the tenant a reasonable opportunity to cure the default in rent without penalty; and, because our later recommendations will require a court order for possession if the tenant does not vacate, the tenant will still have the opportunity of persuading a court to give him time before he vacates. There would also remain in the background the power of the superior courts to grant relief against forfeiture.

(3) Breach of Other Obligations

A tenant may fail to perform other obligations under the tenancy agreement to such a serious extent that the landlord should have the right to terminate the agreement. The tenant may cause substantial damage to the rented premises or common areas; he may use the premises or common areas illegally, creating a danger to person or property; he may cause undue interference with the rights of the landlord or other tenants; or he may commit a series of breaches the cumulative effect of which is substantial.

We think that the landlord should be entitled to take the same steps to terminate the tenancy agreement for substantial breaches of other obligations that our recommendations would give him for non-payment of rent. We do not think, however, that it would be appropriate that the tenant should have the same right to make up his default. A mere default in payment of money is something which can be made good by paying it, but a breach consisting of offensive, illegal or dangerous conduct, for example, is not made good simply by allowing a period of time to go by without engaging in it.

(4) Recommendations

Recommendation #18

That distress for rent as regulated by the Seizures Act be retained.

Recommendation #19

(1) That if a tenant, by abandonment of the rented premises or otherwise, gives the landlord reasonable grounds to believe that the tenant has repudiated the tenancy agreement, the landlord may either

(a) accept the repudiation as a termination of the tenancy, or

(b) refuse to accept the repudiation and continue the tenancy.

(2) That a landlord who proceeds under subsection (1)(a)

(a) may recover any rent accrued, and damages suffered by reason of the breach of other obligations of the tenant, to the date of termination of the tenancy, and

(b) may recover damages for the loss of the benefit of the tenancy agreement

(i) if for a fixed term tenancy, over the unexpired period of the tenancy agreement, or

(ii) if for a periodic tenancy, until the earliest date the tenant could have terminated the tenancy if his acts of repudiation had constituted a proper notice of termination,

and

(c) is subject to a duty to take reasonable steps to mitigate his damage.

(3) That a landlord who proceeds under subsection (1)(b)

(a) may enforce the tenancy agreement, but

(b) is subject to a duty to take reasonable steps to rent the premises on behalf of the tenant to mitigate the tenant's liability for rent under the tenancy agreement.

Recommendation #20

(1) That if a tenant commits a substantial breach of obligation under a tenancy agreement or under the proposed Act, the landlord may give the tenant notice that the tenancy will terminate 14 days after the date of giving of notice unless within the said period of 14 days the tenant serves on the landlord a notice of objection to the termination.

(2) That a notice under subsection (1) be required to give particulars of the alleged breach.

(3) That without restricting the generality of subsection (1), "substantial breach" for the purposes of this recommendation includes

(a) a failure to pay rent,

(b) doing or permitting substantial damage to the rented premises or common areas,

(c) performing illegal acts, or carrying on an illegal trade, business, occupation or calling, in the rented premises or common areas.

(d) a breach which creates a danger to person or property,

(e) a breach which causes undue interference with the rights of the landlord or other tenants,

(f) a series of breaches the cumulative effect of which is substantial.

(4) That if the breach is a default in payment of rent, and if the tenant pays the arrears of rent within the said period of 14 days, the notice be ineffective whether or not the landlord applies under subsection (6).

(5) That except as provided in subsection (4) the tenancy terminate in accordance with the landlord's notice unless the tenant serves a notice of objection under subsection (1).

(6) That the landlord may

(a) instead of serving a notice under subsection (1), or

(b) if the tenant serves a notice of objection under subsection (1)

apply to the court for an order terminating the tenancy agreement.

(7) That upon an application by a landlord under subsection (6) the court

(a) if satisfied that the tenant has committed a substantial breach of obligation under the tenancy agreement or under the proposed Act, shall make an order terminating the tenancy agreement, or

(b) if not so satisfied, shall deny the application.

(8) That if a tenancy agreement is terminated under this recommendation

(a) rent accrued before the date of termination is payable, and

(b) the rights of the parties shall be determined as in the case of any other termination of a tenancy agreement.

4. Frustration of Contract

A contract ceases to have effect if the contemplated performance of the contract is, in the words of a recent writer, made illegal, or virtually impossible of performance, or virtually useless (Coté, An Introduction to the Law of Contract, 1974). The Frustrated Contracts Act gives the court the power to allocate between the contracting parties the loss caused by the frustration.

It is not clearly settled whether or not the doctrine of frustration can ever apply to a lease or tenancy, residential or otherwise, but even if it can apply it rarely does: Cricklewood Property etc. v. Leighton's Investment Trust, [1945] A.C. 221. That state of the law arose because of the notion that a lease involves an estate in land and that even if the premises on the land are destroyed, the land is still there and is subject to the lease. If the doctrine does not apply to residential tenancies, it follows that even if the premises are destroyed, the tenant must continue to pay rent. It seems unfair to the tenant that he should have to do so, and it does not seem unfair to suggest that the landlord is the one who is in the best position to protect himself by insurance against the destruction of the premises. We think that the law should make it clear that the doctrine of frustration and the Frustrated Contracts Act, apply to residential tenancies.

We think that the law should go even further. There may be a case in which every dictate of economic and social common sense will militate against repairing the damage to a building; for example, if a 50 year old apartment building is seriously damaged by fire, it may be possible to repair it, but it may also be that repairing it would be an uneconomic waste of resources. Nevertheless, under our previous recommendations, the landlord might well find himself under an obligation to repair, and the tenant might well find himself with an obligation to pay rent during an extensive period of repair. While the courts might find some flexibility in the doctrine of frustration to deal with hard cases, we think that the proposed Act should provide relief. It should provide that a tenancy agreement is frustrated if the rented premises, the common areas, or any property of which they form a part, are damaged to such an extent that a reasonable landlord would not repair the damaged property

or a reasonable tenant would not remain as a tenant.

Recommendation #21

(1) That a tenancy agreement be frustrated if

(a) the rented premises are destroyed, or

(b) the rented premises, the common areas or the property of which they form a part, are damaged to such an extent that

(i) a reasonable landlord would not repair the damaged property, or

(ii) a reasonable tenant would not be willing to remain as a tenant.

(2) That the Frustrated Contracts Act apply to a tenancy agreement which is frustrated.

VI
FAILURE TO GIVE POSSESSION

1. By Tenant

A tenant is under an obligation to give the landlord possession of the rented premises at the termination of the tenancy. What, however, if he does not? The tenant in this situation is frequently referred to as an "overholding tenant", and the term is useful, though it is not accurate, as the landlord-tenant relationship ceased to exist when the tenancy was terminated. This simple situation, unfortunately, is common, and gives rise to a series of complex issues. The landlord will want to recover possession of the premises, and may want to seek damages for the wrongful overholding.

At common law the landlord could attempt to obtain possession through self-help, and could use such force as was necessary to overcome resistance. He was, however, liable in damages for the use of excessive force. We believe that if the tenant refuses to surrender possession, the landlord should be required to apply to the court for an order for possession, and that self-help involving force should not be permitted by law. Section 99(b) of the Land Titles Act may be read as being in conflict with this recommendation and should be made inapplicable to residential tenancies.

The problem of the recovery of damages by the landlord is more difficult. As the tenancy has been terminated, the "overholding tenant" cannot be liable for rent in the technical sense. Rather, the overholding tenant became liable at common law for the rental value of the premises, usually on the basis of an implied promise to pay for use and occupation.

Such a recovery would often not indemnify the landlord for his actual damages, and to remedy this problem English statutes of 1730 and 1737 imposed a penalty on the tenant. Under the 1730 Act, which did not apply to periodic tenancies less than yearly tenancies, the tenant who held over wilfully became liable at a rate of double the yearly rental value of the land for the period of wrongful possession. The 1737 Act applied to tenancies which could be terminated by the tenant by notice. If the tenant, after giving an appropriate notice, failed to vacate, he became liable for double the rent payable under the tenancy agreement for the period of wrongful possession.

We do not favour the approach of these statutes. As they operate arbitrarily, they may penalize the tenant by permitting a recovery in excess of actual damages, or they may leave the landlord with a recovery of less than his fair damages.

Sections 9 to 15 of The Alberta Landlord and Tenant Act, virtually codify the common law. Section 9(1) declares that "a landlord is entitled to compensation for the use and occupation of premises after the tenancy has expired or been terminated". Section 11(1) allows the landlord, when claiming possession, to include a claim for compensation for use and occupation; and section 12(1) allows the court, where a claim for compensation is made, to give judgment "in such amount as the Court may determine as compensation for the use and occupation of the premises after the expiration or termination of the tenancy, having regard to the nature of the use and occupation and the rent payable during the tenancy". We believe these provisions are adequate as far as they go, and should be retained. We think also that the English legislation which we have mentioned should expressly be made inapplicable to

residential tenancies; it would probably be held that the provisions in the Landlord and Tenant Act are inconsistent with the old English legislation and override it, but that result is not entirely clear.

In addition to compensation for use and occupation by the overholding tenant as provided in sections 9 to 12 of the Landlord and Tenant Act, we believe the court should be authorized to award such other damages as the landlord may actually incur because of the overholding. The other damages we refer to arise in the typical situation in which the landlord has made a new tenancy agreement with an incoming tenant who is to take possession at the termination of the old tenancy. We will discuss this damage problem at page 76.

2. By Landlord

We will in this discussion call a lessee who has not yet obtained possession a "tenant", and his lessor a "landlord". That usage is not technically correct as the doctrine of "interesse termini", which we discuss below, says that the lessee is not a tenant and the lessor is not a landlord until the lessee obtains possession. It is, however, a more convenient usage, and we propose to recommend abolition of the doctrine of "interesse termini".

As we have said previously, the landlord is subject to an implied obligation that the premises will be available for occupation by his tenant on the day stipulated in the tenancy agreement. What are the rights of the tenant if they are not? The landlord may have repudiated the tenancy agreement and locked the tenant out. There may be an overholding tenant in possession, rightly or wrongly. Whatever the cause, the tenant is exposed to serious hardship, for he is likely to

have vacated his former premises, to have his own furniture in storage, and to have no place to stay. The information we received during our consultation with interested parties is that this problem is frequent, and is usually caused by a holdover tenant in wrongful possession. The situation is a difficult one, and although a perfect remedy is impossible, the law should clarify the rights and duties of the three parties usually involved as fairly as possible.

In the normal situation neither the landlord nor the new tenant is at fault in any moral sense. Nevertheless, unless he has contracted to the contrary, the landlord has impliedly covenanted to give his tenant actual possession. If the premises are not available to the new tenant, that covenant has been breached.

The new tenant is clearly entitled to recover damages from his landlord. The normal measure of damages would be the difference between the rental value of the premises, and the actual rent under the tenancy agreement if lower, for the period during which the new tenant was denied possession. Unless the rent payable by the new tenant is less than fair rental value, he will have no recovery on this basis. His real damages are likely to be special. He may have to secure temporary quarters in a motel and divert his household effects to storage. These damages the tenant can also recover if the court finds that they could reasonably have been foreseen by the parties as a consequence of breach of the covenant to give possession.

Before proceeding further with an analysis of the new tenant's rights, it is necessary to briefly summarize the doctrine of "interesse termini". Under this doctrine, a tenant has only contract rights under his tenancy agreement until he gains possession of the rented premises; only

upon entry is his non-freehold estate in land acquired. For this reason, none of the covenants of the tenancy agreement which are based on the acquisition of the leasehold estate can be enforced by either party, at least not until possession is open to the tenant. Thus for the period the premises are not available to the tenant, he has no obligation to pay rent. But the covenant to be put in possession is binding. Its breach by the landlord is considered a substantial breach under contract law, thus authorizing the tenant to repudiate the tenancy agreement.

We believe that the tenant should continue to have the option to repudiate the tenancy agreement and recover damages from the landlord for breach of the covenant to give possession. However, the tenant is quite likely to prefer to enforce his tenancy agreement and to obtain damages for breach of the covenant to give possession.

The question arises, can the tenant sue the landlord for possession; can he seek specific performance of the covenant for possession in equity? There are dicta in English cases, and express holdings in cases in the United States, that he can, unless superior rights of third parties exist as a bar. We believe the tenant should have that option available. Where the landlord has repudiated the tenancy agreement, and locked the tenant out, it would seem that equity, acting in personam, bolstered by contempt powers, could readily order the landlord to give possession. Suppose there is a holdover tenant. The termination of the previous tenancy is a matter between the landlord and the holdover tenant. There may be a legitimate controversy as to whether his possession is rightful, and the new tenant will not be in possession of the evidence. It seems to us that an equity court should have authority to order the landlord to bring the necessary action to evict the

holdover tenant (if such he is) and deliver possession to the new tenant. If the tenant in possession is there rightfully, obviously specific performance will not be feasible. But the remedy should be available in an appropriate case. For constitutional reasons it can be made available only in a superior court.

3. Overholding Tenant and New Tenant

We have mentioned the problem which arises when there is an overholding tenant and a new tenant who wants possession. We have not yet discussed its unique difficulty. When a tenant overholds the landlord has a right to possession and damages and these rights exist irrespective of the existence of an incoming tenant. When the landlord breaches his covenant to give possession, the new tenant may recover damages from him; he may repudiate the tenancy agreement; and he should be able to obtain specific performance of the possession covenant in an appropriate case; and these rights exist irrespective of the existence of an overholding tenant.

It is clear that the new tenant may bring an ejectment action against the overholding tenant, or anyone else with an inferior right to possession. But he can secure only possession, not damages for trespass. Here the conceptual problem is again "interesse termini". As the new tenant has no leasehold estate until he gains possession, the overholding tenant is not a trespasser as to him.

We have already stated that the landlord may recover damages from the overholding tenant, but the damages appear to be limited to compensation for use and occupation under sections 9 to 12 of the Landlord and Tenant Act. The landlord, however, will be liable to the new tenant, for

general damages if the rent reserved in the tenancy agreement is less than the rental value of the premises, and for special damages suffered by the new tenant, such as additional moving and storage expenses, if they could reasonably have been anticipated by the landlord and the new tenant. At common law, the landlord could recover from the overholding tenant the general damages the landlord was obligated to pay his new tenant. These will usually be nominal in a residential tenancy. Why should the landlord not be entitled to recover from the overholding tenant the more substantial special damages due the new tenant, if the overholding tenant has knowledge of the new tenancy and could reasonably foresee the damages which his overholding would cause? We believe that the overholding tenant should be liable to the landlord for any damages the landlord is required to pay the new tenant, if they could reasonably be foreseen as a consequence of the overholding. The alternative is to leave the landlord with loss caused by an overholding tenant, and it may be anticipated that this kind of loss will simply be passed on to all tenants in the form of increased rent resulting from increased operating expenses. That seems hardly just. The sensible answer to the problem is that the new tenant should be able to sue either his landlord, or the overholding tenant, or both, and should be able to recover both general and special damages.

In England the doctrine of "interesse termini" was abolished by the Law of Property Act, 1925. We believe that it serves no useful purpose and we recommend that it be abolished in Alberta.

We believe that the pattern of interrelated remedies we will now recommend is balanced, and eminently fair to all of the parties. Consequently, we do not believe the parties should be permitted to contract for different results.

Specifically, knowing his potential liability to an incoming tenant if he cannot deliver possession, a landlord might contract with all tenants for liquidated damages in the event of overholding in the amount of two or three months' rent. We see no valid reason to leave the tenant obliged to subsequently contest the validity of such a clause on the grounds that it provides for a penalty rather than a genuine pre-estimate of damages. Similarly, and again based on superior bargaining power, a landlord might contract to limit his liability for breach of his covenant to give an incoming tenant possession. We do not believe the landlord should be permitted to force the incoming tenant to assume the risk of recovering his damages from the overholding tenant, and that would be the practical result of such a contract provision.

4. Recommendations

Recommendation #22

That while an overholding tenant remains in possession of premises after the termination of the tenancy, neither the landlord nor a new tenant be entitled to obtain possession except by consent or under order of the court.

Recommendation #23

(1) That where a tenant overholds after the termination of a tenancy, the landlord have a right to recover from such tenant:

(a) compensation for use and occupation by the overholding tenant, and

(b) damages suffered by the landlord as a consequence of the overholding, including, but not limited to, indemnification for damages, general and special, for which the landlord is liable to a new tenant, which could reasonably have been foreseen by the overholding tenant as a consequence of the overholding.

(2) That where a landlord breaches his covenant to give a tenant possession of the rented premises at the commencement of the term, the tenant have the following rights against the landlord:

(a) to repudiate the tenancy agreement,

(b) to recover damages, general and special, which could reasonably have been foreseen by the landlord as a consequence of the breach, and

(c) to obtain specific performance of the covenant for possession in the discretion of the court.

(3) That where a tenant is unable to obtain possession of rented premises because they are wrongfully occupied by another, the tenant have a right to recover from the wrongful occupant:

(a) possession of the premises, and

(b) damages, general and special, which could reasonably have been foreseen by the wrongful occupant as a consequence of the occupation.

(4) That the doctrine of "interesse termini" be abolished.

(5) That except as modified by this recommendation sections 9 to 15 inclusive of the Landlord and Tenant Act be included in the proposed Act.

(6) That section 99(b) of the Land Titles Act; the Landlord and Tenant Act, 4 Geo. 2 c.28; and the Distress for Rent Act, 11 Geo. 2 c.19 s. 18 not apply to residential tenancies.

VII
TERMINATION OF TENANCIES

1. Termination by Agreement of the Parties

A residential tenancy, whether periodic or for a term certain, may always be terminated by agreement of the parties, and we see no reason to change this fundamental law. The automatic termination of a tenancy for a term certain at the time fixed by the parties in the tenancy agreement is merely an example of the operation of this general rule.

2. Termination of Periodic Tenancies

The unique characteristic of a periodic tenancy is that it contains no termination date, but continues indefinitely until terminated by mutual agreement of the parties, or by unilateral notice of termination by either of the parties. Sections 3 to 8 of the Landlord and Tenant Act contain detailed provisions governing unilateral termination of periodic tenancies by notice given by one of the parties. We believe these sections have been generally adequate, and subject to the following exceptions, should be retained.

Section 3(1) provides that "unless otherwise agreed upon, the notice", shall be given in accordance with the provisions detailed in sections 4 to 8. This would appear to permit the parties to contract against the statutory provisions. Given the high cost of housing, a tenant may live in many rented premises before he is able to purchase a home. He may have to give a "legal" notice to terminate a periodic tenancy frequently. If the method of giving notice set forth in the proposed Act is uniformly applicable, the tenant will be able to rely on a consistent rule anywhere in

Alberta. We believe that the notice provisions in the proposed Act are fair to both parties and that uniform fairness can be achieved if contracting out is not permitted. Hence, we will recommend that the notice provisions not be subject to contracting out.

Section 4(1) states that "A landlord or a tenant may give notice either orally or in writing, but a notice by a landlord to a tenant is not enforceable under sections 10 to 15 unless it is in writing". It seems rather incongruous to provide that a landlord may give notice of termination orally, but that if he does so, such a notice will not be enforceable under the sections (10 to 15) which provide remedies if the tenant refuses to surrender possession. We believe that the landlord's notice to terminate should be written to be valid, and that the section should so state. Moreover, we believe that the tenant's notice to terminate should also be written. If the basic reason for requiring written notice is to provide for adequate proof in cases of dispute, then both parties should be given the same protection.

There are two situations which must constitute exceptions to the periods of notice prescribed in sections 6 to 8 of the Landlord and Tenant Act. Section 21.1 provides that if the landlord desires to terminate a residential tenancy in order to obtain possession of the premises for purposes of sale as a condominium, he must give the tenant at least 6 months' notice. As this section reflects a recent (1975) legislative decision, we make no recommendation as to whether it should, or should not, be retained. However, as the section is solely concerned with the termination of residential tenancies, and is not related to substantive condominium property law, we believe the section should be continued in the Landlord and Tenant Act if it is to be retained.

Accordingly, we will include the section in our proposed Act.

The other exception occurs where the residential tenancy exists, in whole or in part, because of an employment relationship between the landlord and the tenant. The tenant may be providing janitorial or managerial services for his landlord-employer with respect to premises of which his apartment is a unit. Or, the tenant could be living in premises provided by his landlord-employer in order to attract and maintain employees--the company town situation. If the landlord-employer terminates the employment relationship, should he be able to terminate a periodic tenancy with less than the normal period of notice? It is, of course, as difficult for a tenant-employee to find another place to live as for any other tenant. On balance, however, we believe that the landlord's legitimate interest in regaining possession of the premises rapidly in order to make them available to a successor employee should prevail. We recommend, therefore, that in this situation the landlord should be able to terminate the tenancy with a one-week notice.

Recommendation #24

(1) That the parties not be permitted to contract out of the notice provisions relating to termination of periodic tenancies.

(2) That notices terminating periodic tenancies, whether by a landlord or by a tenant, must be in writing.

(3) That where a periodic residential tenancy has been entered into because of the tenant's employment by the landlord, and the landlord terminates the employment, either the landlord or the tenant may terminate the tenancy by giving a one-week notice to the other which shall in all other respects meet the notice requirements of the proposed Act.

(4) That except as provided in this recommendation, and in recommendation 33 , sections 3 to 8 be continued in the proposed Act.

(5) That section 21.1, if retained, be continued in the proposed Act.

3. Termination for Breach of Obligation or Frustration of Contract

In Part V, Remedies, we have made recommendations which would permit:

(1) a tenant to terminate a tenancy if a breach of obligation by the landlord deprives the tenant of a substantial part of the benefit of the contract, and

(2) a landlord to terminate a tenancy if the tenant

(a) repudiates the tenancy, or
(b) fails to pay rent, or
(c) commits a substantial breach of obligation,

and

(3) either party to terminate a tenancy under the Frustrated Contracts Act.

As these recommendations are fully discussed in Part V, they will not be repeated here.

4. Periodic Tenancies Created by Implication of Law at the Termination of a Prior Tenancy

(1) Acceptance of Arrears of Rent or Compensation for Use and Occupation After a Notice to Terminate, or Termination of a Tenancy

A landlord will frequently accept arrears of rent after

he has given notice to terminate a tenancy, and at common law this created a presumption that the landlord had waived the termination notice. Similarly, a landlord may accept arrears of rent and compensation for use and occupation from an overholding tenant after the tenancy has terminated. At common law this frequently created a presumption of reinstatement of the old tenancy, or the creation of a new tenancy.

Section 9 of the Landlord and Tenant Act reverses these presumptions. The relevant part of the section is as follows:

> 9. (1) . . . the acceptance by a landlord of arrears of rent or compensation after the expiration of the tenancy or after notice of termination of a tenancy has been given does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree.
>
> (2) The burden of proof that the notice has been waived or the tenancy has been reinstated or a new tenancy created is upon the person so claiming.

We believe this is sound legislation, and should be retained in the proposed Act.

(2) Acceptance of Rent After Termination of a Tenancy

If a landlord accepts payments tendered as rent for a period after the prior tenancy has terminated, a periodic tenancy will be created by implication of law. But what kind of a periodic tenancy? The common law rules remain confusing, and are often inconsistent. The older cases emphasized the duration of the prior fixed term. If it was for a year or more, a periodic tenancy from year to year was presumed. If the fixed term was for less than a year, a periodic tenancy from quarter to quarter, or month to month, or week to week was presumed, depending largely on the actual

duration of the fixed term. More recent cases have emphasized the periods covered by rental payments. Thus even if the fixed term was for one year, if rental instalments were payable monthly, a periodic tenancy from month to month would be presumed.

We believe that the new Act should provide statutory presumptions to clarify this area of law. The Ontario Law Reform Commission takes the view "that the length of the original term offers more guidance as to the expectations of the parties upon an overholding than does the manner in which rent was reserved". Following this view, the Ontario Commission recommends:

> . . . that where a periodic tenancy is created by operation of law, the nature of the implied tenancy, in the absence of any facts or circumstances indicating a contrary intention, should be as follows:
>
> (a) where the original term certain was for a year or more, a tenancy from year to year;
>
> (b) where the original term certain was for less than a year but for a month or more, a tenancy from month to month; and
>
> (c) where the original term certain was for less than a month, a tenancy from week to week.

We see no problem with parts (b) and (c) of this recommendation, for at most a tenancy from month to month will be implied. We are not convinced, however, that, in Alberta, the parties would likely have intended the creation of a yearly periodic tenancy after the termination of a tenancy with a fixed term of a year or more. To the best of our knowledge, tenancies from year to year are very rarely created by express agreement in this province, and thus to presume they were intended seems questionable here. We also

know that most form leases in use in Alberta contain a provision that if a tenant holds over after a fixed term for a year or more, a periodic tenancy from month to month shall be deemed to be created. But even if it were accurate to presume that the parties were more likely to have intended a year to year periodic tenancy in a hold-over situation after the termination of a tenancy for a fixed term of a year or more, the presumption would still be incorrect in many cases. Of course if the presumption produced a tenancy contrary to the actual intention of both parties, they could remedy the situation by a new agreement. But where a presumption produces an implied tenancy inconsistent with the actual intention of one of the parties, it seems to us that there is considerably more potential prejudice involved in implying a tenancy for a period longer than that actual intention, than one for a shorter period. On balance, we believe it is better that the law of Alberta limit the presumption of implied periodic tenancies to a maximum of a monthly tenancy.

Recommendation #25

(1) That the acceptance by a landlord of arrears of rent, or compensation for use and occupation of premises, after the expiration of the tenancy or after notice of termination of the tenancy has been given, do not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy, unless the parties so agree.

(2) That the burden of proof that the notice has been waived or the tenancy has been reinstated or a new tenancy created is upon the person so claiming.

(3) That where a periodic tenancy is implied by operation of law after the termination of a prior tenancy for a fixed term, the implied tenancy, in the absence of facts showing a contrary intention, be

(a) where the prior tenancy was for a fixed term of one month or more, a tenancy from month to month, or

(b) where the prior tenancy was for a fixed term of less than one month, a tenancy from week to week.

5. Security Deposits

(1) General

Section 16(1)(b) of the Landlord and Tenant Act gives a satisfactory statutory definition of security deposit. It reads:

> "security deposit" means money or any property or right paid or given by a tenant of residential premises to a landlord or his agent or to anyone on his behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition;

The security deposit helps protect the landlord if the tenant fails to pay the rent, or if he causes damage to the premises. Landlords also tell us that its mere existence is useful in that it deters the tenant from causing damage, and induces him to leave the premises in a satisfactory condition. The deposit is of course merely security; it must be returned to the tenant, subject to any deduction which the landlord is entitled to make under the tenancy agreement.

A security deposit requirement may be onerous for the tenant. He may have difficulty obtaining sufficient cash to pay it as well as a month's rent in advance in order to

obtain a tenancy, and his problem is compounded if he must pay a security deposit for a new tenancy before the return of his security deposit from a former tenancy. The tenant may also see it as a threat which the landlord holds over his head. Because the security deposit is a source of considerable concern, it is dealt with to some extent by all residential tenancy statutes in Canada. In Quebec the taking of any deposit is prohibited. In Ontario a deposit may be taken only to cover the last month's rent; no deposit can be taken as security for damage. The reasons for the latter prohibition were given by the Ontario Law Reform Commission in its Interim Report on Landlord and Tenant Law as follows:

> Evidence does not support the fear of the landlord that tenants will act irresponsibly if no security deposit is maintained. No doubt a very small minority of tenants act irresponsibly under any conditions and there does not appear to have been a marked decrease in damage attributable to tenants since security deposits became a feature of the landlord and tenant relationship.
>
> The landlords' relative strength, in case of legal confrontation, gives them advantages which require a balance of interests. The abolition of security deposits, against damage, would remove an oppressive element from a relationship which already has a sufficient basis for conflict.

However, we are not prepared to recommend the abolition of security deposits in Alberta. We think that a landlord should be entitled to take reasonable steps to protect himself against loss in the event that the tenant defaults in paying the rent or causes damage to the premises. There is little else that he can do; the law will not permit him to evict a tenant immediately upon default in payment of rent, and any claim which he may have against the tenant for rent or for damages may involve cost and trouble which are

excessive in relation to the prospect of recovery, which is likely to be illusory. We also think that a deposit will encourage a tenant to leave the premises in good condition, and, insofar as it provides the landlord with a fund to recover, at least in part, a loss which he might otherwise suffer, it will reduce the incidence of such business costs being passed on to tenants who perform their obligations. While we received many complaints concerning the administration of security deposits, we heard few serious representations in favour of complete abolition of them.

(2) Amount of Security Deposit

The next question is whether the law should impose a limit upon the amount of the security deposit which a landlord can exact. Our Board is divided on the question.

The following factors are emphasized by those against regulation. The information which we have received does not suggest that there is general abuse of the present unrestricted power to require whatever security deposit a landlord considers desirable. At the inception of our study the security deposit was usually substantially less than one month's rent, though we have heard recent reports of increasing amounts. At that level it may be said that it is unnecessary to regulate the amount. It can also be argued that a limit is undesirable, as any limit will inhibit full recovery of the landlord's loss, which will either be unfair to him, or to other tenants who will reimburse the loss through an increase in rent. It can also be argued that a maximum prescribed by law will likely be taken as the standard amount, so as to effectively increase the deposit by landlords who now require less.

There is also a position in favour of regulation. It may be argued that the law should prohibit unreasonable

deposits; that many tenants will have difficulty in raising the funds for a large deposit; that anticipated damage and cleaning costs should be recovered through monthly rentals rather than capital deposits; that the greater the security deposit the greater is the coercive effect of a threat by the landlord to refuse to pay it back or to make deductions; and that a limitation on the amount would at least limit the abuse of the deposit by those landlords who refuse to pay it back notwithstanding the present legal requirements to do so.

We are agreed that if there is to be a limit, it should be related to the rent, and not a fixed amount of money; that the appropriate amount should be one month's rent; and that the landlord should be prohibited from exacting any money from the tenant other than the security deposit and rent.

Upon an almost even division, we recommend that the landlord be precluded from requiring a security deposit in an amount in excess of one month's rent.

(3) Interest on Security Deposit

The present Landlord and Tenant Act requires the landlord to pay the tenant interest at 6% on a security deposit, unless there is an agreement to pay more. It has been suggested to us that in view of the high interest rates prevailing today, that amount is inadequate, and that the Act should either provide that interest be related to that paid by chartered banks from time to time, or be fixed by regulation rather than a statute. We are not inclined to agree. Under a monthly tenancy the landlord must be able to repay the deposit to the tenant on a month's notice, and a landlord who must invest small amounts of money on terms of that kind may have difficulty in realizing even the 6%.

In addition, the administration of the security deposit involves expenses which should be paid from the excess interest earned, if any. Further, we do not think that landlords should be required to keep up with frequent changes in regulations often made with little publicity. We think that the present provisions are satisfactory and should be continued.

(4) Disposition of Security Deposit on Sale of Property

If the landlord sells the property a question arises as to how the law should deal with any security deposits which he received. Who should be liable for the return of the deposit to the tenant, the original landlord, the new landlord who purchased the property, or both of them?

The present law is not clear. If the purchaser accepts rent from the tenant he is probably bound by all terms of the tenancy agreement, including the obligation to return the security deposit. If he did not accept rent, his duty would depend upon whether the covenant to return the deposit was held to be a covenant running with the land: Protective Holdings Ltd. v. M & P Transport Ltd. (1969) 70 W.W.R. 591 (App. Div.). There is some authority for the proposition that such a covenant is a personal obligation of the landlord who made it, and hence does not bind a purchaser of the property from him: Re Dollar Land Corporation and Solomon [1963] 2 O.R. 269, 39 D.L.R. (2d) 221 (Ont. H.C.).

At page 48 we recommended that the purchaser be subject to "all the obligations of the landlord relating to the tenancy." We think this will bind the purchaser to return the security deposit. That result would be unduly

harsh if the purchaser never received the deposit. We think that special provision must be made for the disposition of the security deposit at the time of sale.

The Landlord and Tenant Advisory Boards suggested that at the time of a sale the deposits be returned to the tenants, less any deductions appropriate at that time. That suggestion would protect all parties, but we think that it would cause a great amount of unproductive work, and result in an additional round of disputes. The landlord would have to assess the damage to the premises and other deductions, obtain agreement with each tenant or be prepared to go to court on each dispute, and pay each security deposit back to the tenant. The purchaser would then have to obtain new security deposits from the tenants. We think that a simpler mechanism will provide adequate protection.

We think that the purchaser should be entitled to demand from his seller a statement disclosing all security deposits and the interest accrued to date on each, and that he should be able to require that these deposits and interest be paid to him when he purchases the property. The purchaser should then be entitled to provide each tenant with a notice stating his account as disclosed by the landlord, and the liability of the purchaser should be limited to the amount stated in the notice. The tenant could then challenge the statement of account, and would remain free to take proceedings against the seller to recover any balance alleged due to him, which of course is the only remedy he would have if the proper amount of money were not returned to him at the time of the sale under the procedure suggested by the Landlord and Tenant Advisory Boards.

Under the above procedure the purchaser would be able to protect himself by taking the prescribed steps. The

tenant would be able to protect himself by taking immediate action against the seller. There is a risk that a seller might provide a fraudulent statement to the purchaser, and disappear or conceal his assets before the tenant could recover undisclosed sums owed to him. To guard against that, the notice to the tenant should be given 7 days before the completion of the sale.

(5) Return of Security Deposit

This aspect of security deposits is dealt with by section 19 of the Landlord and Tenant Act. The landlord is required to return the security deposit to the tenant within 10 days after the tenant delivers up possession of the premises. He may keep all or part of the deposit in accordance with the conditions agreed to by the tenant. If the landlord retains any amount, he must deliver a statement of account therefor, and return the balance to the tenant within the 10 day period. Where the landlord and tenant have agreed that the landlord may make deductions for repairs, but the landlord is unable to determine the correct amount, he may deliver an estimated statement of account and return the estimated balance within the 10 day period. The landlord must give a final statement of account and return a final balance within 30 days. The tenancy agreement is paramount in the sense that the landlord may make deductions only in accordance with it.

If the landlord withholds any money without authority the tenant's only remedy is to take proceedings under the Small Claims Act. Statutory schemes elsewhere provide various procedures where the landlord retains the whole or part of the security deposit without the consent of the tenant. The landlord must apply to the court for an order authorizing retention of the deposit (Ontario); he

must file a complaint under the Summary Convictions Act (Nova Scotia and Newfoundland); and he must pay the deposit into the Rentalsman's Office (Manitoba and Saskatchewan), awaiting resolution of the dispute. Under all of these schemes the onus is on the landlord to prove whether he should be allowed to retain the whole or part of the security deposit.

The return of the security deposit is one of the major causes of dispute between landlords and tenants. Many tenants are unwilling to take the time and trouble to commence court proceedings in order to recover what may turn out to be a small amount of money, many do not know how to proceed, and others are fearful of becoming involved with the costs of legal action. We have heard of cases in which landlords have taken advantage of this situation by withholding all or part of the security deposits without justification. Unfortunately, we are not able to make a recommendation for effective change which would not involve the creation of a substantial administrative establishment to look after security deposits, and we are not prepared to make such a recommendation at this time. Hence we recommend that the existing provisions of the Landlord and Tenant Act be carried forward into the proposed Act. We will, however, discuss a proposal which we think would merit further consideration.

(6) An Alternative for Administration of Security Deposits

We have given thought to an alternative proposal for dealing with security deposits. It is based partly on precedent elsewhere and partly upon suggestions made to us during our study. While we find the proposal rather attractive, we have not had an opportunity to consult those who would be affected by it. We will, therefore, outline

the proposal, but will leave it for consideration by others.

The proposal would be:

(a) That a municipal council be empowered to authorize a Landlord and Tenant Advisory Board established by it to receive and administer security deposits covering premises within the area under the council's jurisdiction.

(b) That within a council's area of jurisdiction, landlords be required to deposit all security deposits with the Board, to be paid out only by agreement of the parties or by an order of the court authorized to make such an order.

(c) That a Board which receives security deposits be required to provide an inspection service under which, in the event that a landlord and tenant do not agree on the amount to be deducted from the security deposit for damages to, or extra cleaning of, the premises, an inspector would attend at the request of either or both parties, view the damage, and make a report giving his opinion as to the proper amount of any deduction.

(d) That the inspector's report be admissible in evidence in a proceeding for return of all or part of the security deposit.

(e) That within a council's area of jurisdiction, interest no longer be payable to tenants on security deposits, and that the Board be empowered to use interest accruing on security deposits for its support.

The proposal would have a number of advantages, which we will now discuss.

(a) The security deposit would be safe. We are not aware of any cases in which tenants have been unable to recover security deposits because the landlord had disappeared or was insolvent, but the proposal would remove whatever risk there is.

(b) The landlord and tenant would be on equal footing with regard to the deposit. At the present time the tenant must initiate proceedings if he wishes to recover more of the deposit than his landlord wants to return. Under the proposal, neither of the parties would have access to the deposit without the other's agreement or a court proceeding. Although this procedure might increase the number of cases brought before the court, it would put pressure upon both parties to settle unless they had a case justifying the expense, in which case it would have the opposite effect.

(c) The problems created by a sale of the property would disappear as the security deposits would simply remain in the possession of the Board under the tenancy agreements.

(d) The availability of inspector's reports would be of considerable assistance to the courts in resolving such factual issues as, for example, determining the amount of damage caused by a cigarette burn on the carpet, or differentiating between damage caused by the tenant and deterioration resulting from ordinary wear and tear on the premises. The report of the inspector would be only evidence, and it could be controverted by other evidence, but if the courts come to have confidence in the inspection service they would be greatly benefited by having an independent opinion.

(e) It is quite possible that a good many disputes would be settled by the parties simply because of the

presence of an independent inspector available for conciliation. This function might be hampered by the fact that the inspector would be preparing an official report, and the parties might not want to speak too freely, but we would nevertheless hope that many legal actions could be avoided.

The effect of such a proposal on the Landlord and Tenant Advisory Boards would have to be carefully considered. It is obvious that the administration of security deposits and the provision of an inspection service would require a more permanent staff with professional qualifications which are not needed in the present work of the Boards. It appears likely that the advantages to be gained would justify some addition to the administrative staff of the Boards. We would expect that all or most of the cost would be defrayed by the interest to be earned on the security deposits, though we have not made any studies to determine either the income which might be expected, or the cost which might be incurred.

It may be that landlords would feel threatened by the proposal; that they would prefer to keep the security deposits in their own hands. As we have said, we have not had an opportunity to consult them, and we do not think that we should recommend the adoption of the proposal without doing so. For that reason, and because we do not think that we should delay our report for the additional time necessary to consult interested parties and consider their comments, we do not feel able to make a recommendation with regard to this proposal.

(7) Recommendations

Recommendation #26

(1) That a landlord be prohibited from exacting from a tenant

(a) a security deposit exceeding one month's rent under the tenancy agreement, or

(b) any sums of money exceeding the security deposit permitted by subsection (1)(a) and one month's rent in advance.

(2) That "security deposit" be defined in accordance with s. 16(1)(b) of the Landlord and Tenant Act.

(3) That sections 18 and 19 of the Landlord and Tenant Act be carried through into the proposed Act.

Recommendation #27

(1) That a person who becomes an owner of premises which are subject to a tenancy be subject to the obligations of the landlord with respect to a security deposit except as provided in subsections (2) and (3).

(2) That a purchaser of the property be entitled

(a) to demand from the seller

(i) a statement of account certified by the seller of all security deposits held by the seller at the date of the sale and of the interest accrued to date on each, and

(ii) payment to the purchaser of all such security deposits and interest, and

(b) to give to each residential tenant notice not less than 7 days before the completion of the sale of the statement of account of the tenant certified by the seller.

(3) That a purchaser who has complied with subsection (2) be liable to the tenant only for the amount stated in the statement of account.

(4) That upon paying a security deposit and interest to the purchaser under this recommendation the seller be discharged from all further liability for the amount so paid.

VIII
DISPOSAL OF ABANDONED GOODS

We are told that it is quite common for a tenant to leave goods behind when he gives up possession of rented premises. The goods are usually, though not invariably, of little or no value, but they create difficulty for the landlord who must deal with them in some way so that the premises can be used by another tenant.

Section 36.1 of the Judicature Act, which appears in Appendix F, provides a statutory scheme for dealing with goods and chattels found in premises by a Sheriff when he exercises a writ of possession. That section represents a 1974 decision of the Legislature, and presumably was thought to give adequate directions to a Sheriff in carrying out his duty. We do not propose changes in subsections (1) to (8) of section 36.1, which deal with cases in which the Sheriff is involved. We do not, however, think that subsection (9) gives sufficient help to a landlord faced with the problem of abandoned goods, and we will recommend a different plan for such cases.

We do not believe that an elaborate definition of abandonment will be helpful. We think that goods should be treated as abandoned if the tenant has abandoned the premises in breach of the tenancy agreement or has given up possession upon termination of the tenancy.

It is difficult to recommend a solution which will protect both parties without being unduly cumbersome. We believe our recommendations reflect an efficient compromise.

There may be instances in which a landlord will be uncertain as to the value of abandoned goods and as to an

appropriate manner of dealing with them. He should in such circumstances be able to apply to the judge of the provincial court for directions as to disposal of the goods, and as to the proceeds of any sale of them.

In some cases the goods may be subject to a chattel mortgage or a conditional sale agreement. We do not think that it should be incumbent upon a landlord to search for an encumbrance. Moreover, in many cases a normal search would not locate one. On the other hand, we see no reason why the encumbrancer's rights should be sacrificed by actions of the tenant which the encumbrancer cannot effectively control. We believe that a sale of goods under these recommendations should not affect the right of an encumbrancer to take proceedings to realize his security from the goods. If a sale will not include an assurance of title, the goods may be somewhat harder to sell, but that problem is faced at Sheriff's sales, and we think that it must be faced here. If an encumbrancer wants to enforce his claim while the goods are in the possession of the landlord, we think that he should first have to pay the landlord his costs incurred in storing and otherwise caring for the goods.

While we think that the plan we have proposed will be suitable to landlords and tenants, we see no reason why they should not be able to make other arrangements by contract if they wish, and we so recommend.

Recommendation #28

(1) That for the purposes of this recommendation "abandoned goods" be defined as goods left on residential premises by a tenant who has

(a) abandoned the premises in breach of the tenancy agreement, or

(b) gone out of possession of the premises upon termination of the tenancy agreement.

(2) That a landlord who believes on reasonable grounds that abandoned goods have a market value of less than $200 be entitled to dispose of the goods in any manner he chooses.

(3) That if subsection (2) does not apply, a landlord who on reasonable grounds believes:

(a) that the storage of the goods would be unsanitary or unsafe or would rapidly result in total or substantial depreciation in their market value, or

(b) that the cost of removing, storing and selling the goods would exceed the proceeds of their sale,

be entitled to sell the goods by a means and for a price which he believes reasonable.

(4) That if neither subsection (2) nor subsection (3) applies, the landlord

(a) be required to store or arrange for storage of the goods on behalf of the tenant until the expiration of a period of 60 days after the date of their abandonment, and

(b) thereafter be entitled to dispose of the goods by public auction.

(5) That a landlord may apply to the Provincial Court for directions as to the disposition of any abandoned goods, and upon such application the court may make any order which appears appropriate in the circumstances.

(6) That the landlord be required, upon payment of his proper costs of removing and storing the goods, to deliver the goods to the tenant or an encumbrancer claiming them.

(7) That the landlord be entitled to apply the proceeds of any sale

(a) to his reasonable costs of removing, storing, and selling the goods, and

(b) *to any judgment obtained by him against the tenant in connection with the tenancy.*

(8) *That the landlord be required to pay the balance of any proceeds of sale to the Provincial Treasurer who shall retain the same for one year on behalf of the tenant and thereafter, if the tenant has not claimed the same, pay the same into the general revenue of the Province, following which payment the claim of the tenant shall be extinguished.*

(9) *That this recommendation not apply if the landlord and the tenant agree to the contrary.*

(10) *That this recommendation not apply to goods and chattels on premises against which the Sheriff executes a writ of possession.*

IX
RESOLUTION OF DISPUTES

1. Adjudication

(1) Field of Choice

We have in this report recommended the creation of new legal rights. The new rights will be ineffective, however, unless the remedies which we have described are readily available. Because most disputes arising from residential tenancies involve matters of comparatively small economic importance, but of considerable urgency and importance to those involved, the remedies must be quick, easy and inexpensive.

In Alberta, the courts have jurisdiction to decide landlord and tenant disputes. In practice, the Provincial Court deals with disputes about security deposits under the Small Claims Act, though the jurisdiction of the Supreme and District Courts is not excluded; the District Court deals with sale of goods seized for rent; and the Trial Division of the Supreme Court deals with applications by landlords for possession of the rented premises. In addition to the courts there are in a number of urban centres municipally-appointed Landlord and Tenant Advisory Boards. The principal functions of these boards are to give information and advice to landlords and tenants, and to mediate disputes; they do not have any power to adjudicate.

There are a number of alternative ways in which landlord and tenant disputes could be handled. These fall into two general categories, one being a system of courts, the other a system of administrative agencies or tribunals at the municipal or provincial level.

Many administrative agencies or tribunals have been set up in recent years to deal with conflict resolution. It is expected, on the one hand, that an agency or tribunal will be able to deal with matters more quickly, easily and cheaply because of its informality; that it will be able to conduct its own investigations and not merely to adjudicate on evidence brought before it by litigants; and that it will acquire an expert knowledge of the particular field entrusted to it. It is thought, on the other hand, that court procedures are forbidding to the litigant, and that the cost of going to court is too great. The question is whether an administrative agency or tribunal would, in disputes arising from residential tenancies, provide the benefits which would be expected from it, and whether there would be disadvantages which would outweigh the benefits.

Recently Manitoba, Saskatchewan and British Columbia have created an administrative agency or tribunal with a "rentalsman", who provides an advisory and information service such as that provided by Landlord and Tenant Advisory Boards, and who also adjudicates disputes. The most extensive jurisdiction over disputes is that of the British Columbia rentalsman: he decides whether damaged premises should be repaired; he decides whether tenancies should be terminated; he holds security deposits and decides how they should be paid out; and he deals with chattels abandoned on the premises by a tenant. He does not have the power to deal with a claim for damages, and he is subject to review by the court on a question of law or jurisdiction, or on a manifestly incorrect finding of fact necessary to jurisdiction. We have received some representations in favour of the creation of a provincial rentalsman in Alberta.

Instead of creating a rentalsman, Alberta could confer the power to adjudicate upon the existing Landlord and

Tenant Advisory Boards. We have, of course, had extensive discussion with the Boards during the course of the project. Initially their view was that they should remain in their present function, but they later concluded that it would be desirable that they be given power to resolve some disputes.

(2) Reasons for Choice

We will first deal separately with the Landlord and Tenant Advisory Boards. For a number of reasons we do not think that they should adjudicate disputes. For one thing, we doubt that small voluntary boards could provide the man-power to perform such an extensive additional function; volunteers can hardly be expected to give much more time than members of the busier boards now give, and the boards would either have to become undesirably large or would have to be composed of full-time members, and in either case would have to change their nature. A second reason, which is of less importance, is that parties are less likely to be willing to disclose their positions to a body which may ultimately adjudicate, and we think that the conciliation function of the boards might therefore be compromised to some extent. The third and most important reason is that we do not think that the strengths of bodies appointed annually by municipal councils are those that are needed for adjudication of facts and law which, though often simple, may be so difficult and complex as to require the experience of persons with continuing experience in adjudication. Finally, it does not appear likely that Landlord and Tenant Advisory Boards will be established outside the major population centres, and, while that is where most of the problems occur, we think that there should be one system of

adjudication capable of providing service throughout the province.

We now turn to the considerations affecting the choice between a system of adjudication by an administrative tribunal or rentalsman and a system of adjudication by the courts. These appear to us to be as follows:

(a) Independent Adjudication According to Law

We think that adjudication by the courts gives the best assurance that landlord-tenant disputes will be decided, day in and day out, in an objective way and in accordance with law. Even if the legal independence of a rentalsman is guaranteed by legislation, he does not have the court tradition of judicial independence and objectivity behind him; and if he is also giving advice, dealing with complaints, and making investigations, he may well come to apply to his role as adjudicator policy considerations developed by him and not prescribed by law. We think that it is best that the adjudication function be kept separate so that the adjudicator will not through continued contact with the industry become more favourably inclined to one side than to the other.

(b) Availability of Service

The Provincial Court already sits throughout the province, and the services of the Supreme and District Courts are also available at many points. It seems to us that to give comparable service locally a rentalsman would have to have numerous offices throughout the province and a staff which would constitute an unacceptably large addition to the provincial civil service, to say nothing of the difficulty and expense of attracting officials competent

to adjudicate in so many different places. The alternative is a centralized office such as those of the British Columbia and Manitoba rentalsmen. We do not think, however, that landlords and tenants should be required to travel far from home to have their disputes adjudicated, and we do not think that a rentalsman could provide a sufficiently comprehensive circuit system without an unacceptably large staff.

The recommendations contained in this report would, if adopted, provide new legal rights and remedies and would therefore be likely to increase the number of disputes to be adjudicated. If that happens it will be necessary to provide the courts with additional resources, but we think that the cost in money and personnel would be small in comparison with the cost and additional personnel needed for comparable service by a rentalsman.

(c) Suitability of Procedures

A rentalsman could be provided with a staff who would give a litigant information about the procedures to be followed when the rentalsman adjudicates a dispute, and advice as to the filling out of the necessary forms. That may be thought to be an advantage to the establishment of a rentalsman. We think, however, that with proper training the staff of the Provincial Court, and the staffs of the Landlord and Tenant Advisory Boards can perform the function; indeed, the staff of the Small Claims Court already perform it to some extent. The resulting service would, we think, be more widely available than that of a rentalsman operating on anything less than an unacceptably massive scale.

A rentalsman could be provided with a staff who would investigate disputes and provide the results of their investigations to him when he adjudicates a dispute.

We think that arrangement inappropriate because, as we have already said, an adjudicator who performs other functions as well is likely to apply his own policy and his own pre-conceptions rather than the policy of the Legislature as laid down in the proposed Act. We have elsewhere in this report suggested for consideration an alternative plan under which a Landlord and Tenant Advisory Board could be empowered to inspect alleged damage and make a report which would be evidence before the court. We think this would be better than a centralized investigative function attached to the adjudicative function. Even if this alternative plan were not adopted we believe the benefits of the rentalsman are outweighed by other disadvantages.

A rentalsman could also provide informal procedures for adjudication. We think that it must be recognized that most landlord-tenant disputes will be perceived as being of too small economic consequence to justify retaining lawyers, and that tenants and small landlords are likely to be inhibited by formal court procedures. We think, however, that the adjudication of landlord-tenant disputes is a field in which every effort should be made to retain the advantages of independent, objective, and trained judges, while making the courts easy of access to the people who are to be served by them. We believe that the Provincial Courts, which through the Family Court and the Small Claims Court are already used to providing informal summary procedures for unrepresented litigants, can provide procedures which will be suitable to the great bulk of landlord and tenant disputes; and that the Supreme and District Courts should be available for cases which require more formal procedures.

(d) Expertise

A rentalsman, being devoted to landlord-tenant matters, would acquire a greater knowledge, and, it might be

thought, a greater understanding, of such matters. We think, however, that these are disputes in matters of business like other disputes, and that they should be adjudicated on the basis of facts objectively established by evidence and upon law as laid down in the proposed Act, supplemented where necessary by recorded decisions; and we do not think that they should be decided with reference to policies laid down by an administrative official who may well have or develop a bias for or against one side. The kind of expertise which we think desirable is that of a judge highly trained in evaluating evidence and with a deep appreciation of the nature of the legal rights and remedies involved.

The considerations we have outlined lead us to believe that the adjudication of landlord-tenant disputes by the courts rather than by a rentalsman is in the public interest and in the interest of landlords and tenants. We will accordingly recommend that the courts continue to adjudicate disputes arising under residential tenancies. We will, however, make recommendations intended to assure that procedures suitable to landlord-tenant disputes are available in the courts.

(3) Jurisdiction and Procedures of Courts

(a) Jurisdiction

Disputes between residential landlords and tenants usually involve matters of small economic consequence, and they usually involve factual and legal problems which fall within a comparatively small compass. Those circumstances suggest that such disputes should be dealt with through summary procedures which can be followed cheaply and easily, as does the further circumstance that a high volume of such disputes may be expected in urban centres. The desirability

of summary procedures and of the availability of service throughout the province suggest that the bulk of such disputes should be dealt with by the Provincial Court which is characterized by summary procedures and experience in dealing with unrepresented litigants, and which sits throughout the province. We will accordingly recommend that the Provincial Court have jurisdiction in residential landlord-tenant disputes other than possession, though only within its usual monetary limitation and without the power to grant equitable relief such as an injunction or relief against forfeiture. On the other hand, we see no reason to deprive any litigant of access to the Supreme and District Courts merely because small claims will rarely be brought there. We will therefore recommend that the existing jurisdiction of those courts should not be interfered with, and that both, as well as the Provincial Court, should have jurisdiction over the new remedies which our recommendations, if adopted, will create.

We turn now to the jurisdiction to make orders for possession. The traditional association of possession proceedings with the Supreme Court, the desirability of avoiding the constitutional difficulties which could arise from the granting of a doubtful power to the Provincial Court, and the availability of a summary procedure for possession in the Supreme Court, suggest that, in general, possession proceedings should be within the jurisdiction of that court alone, and we will recommend accordingly. There is, however, one case in which we think that the Provincial Court should be able to grant possession, namely, that in which an incoming tenant brings proceedings against the landlord or an overholding tenant, or against both of them, for damages and possession. The application for damages is an appropriate one to bring in the Provincial Court and we think that all remedies should be available in that court in one proceeding.

It is not possible to forecast the extent of the additional court business which will be generated if the proposed Act is adopted, but it can with some confidence be said that it will be substantial. The most numerous kinds of disputes would be claims relating to deductions made from security deposits for damages (which the courts already deal with) and tenants' claims for abatement of rent or damages (which would be new). If the Legislature should decide that the proposed Act should provide security of tenure, tenants' applications to set aside notices of termination would also be numerous. Other kinds of proceedings which would arise from our recommendations are likely to be much less common. They would include landlords' proceedings for damages on abandonment of premises, landlords' applications for directions as to disposal of abandoned goods, and tenants' applications to set aside notices of termination of tenancies. We expect that the great bulk of these kinds of proceedings would be within Provincial Court jurisdiction and brought in the Provincial Court, though an occasional dispute involving a substantial amount of money or an important point of principle might be taken in the Supreme Court or District Court.

We think that a landlord or tenant who has a claim within the jurisdiction of the Provincial Court should be able to go to the nearest office of that Court, and that he should there be able to complete a simple form setting out the nature of his claim and giving the date, time and place when it will be brought before the court; and we think also that the court should have facilities for service of the document on the other party. That procedure would involve a system on which a number of matters would be returnable on a particular day; on that day the judge would be able to take at least the first step in disposing of the claim, and in many cases he would be able to dispose of it finally. That

brings us to two additional requirements. One is that the procedures would have to be worked out carefully and we think that Rules of Court should be prepared for the Provincial Court in relation to landlord and tenant matters which would ensure expeditious disposition of landlord and tenant disputes. The second is that the court would need additional resources the nature and extent of which would have to be resolved in consultation with the court itself.

(b) Removal to Supreme Court or District Court

The kinds of matters within the jurisdiction of the Provincial Court would generally be suited to summary procedures. However, an occasional matter may not; an issue on termination of a tenancy or even abatement of rent may involve complex determinations of fact which require the more formal procedures, such as examinations for discovery and production of documents, which are available only in the Supreme and District Courts and which we do not suggest should be made available in the ordinary civil side of the Provincial Court. We therefore think that a judge of any of the three courts should have power to direct that a matter which could be more conveniently tried in the Supreme or District Court be transferred for further proceedings.

(c) Appeals

The Small Claims Act provides for an appeal from the Provincial Court to the District Court by way of trial de novo. We do not think it appropriate to put the parties to the extra expense of a second trial, nor do we see any reason for it. We therefore recommend that the appeal be on the record and that the provisions of the Criminal Code relating to appeals in summary conviction matters apply with necessary changes. The usual provisions for appeals from the Supreme Court and District Court will automatically apply

to decisions of those courts.

(4) Constitutional Considerations

There is no reason to doubt that the Legislature has the constitutional power to deal with the subject matter of the proposed Act, but there can be some argument as to whether it can confer on the Provincial Court all the jurisdiction that we have recommended. The argument arises under section 96 of the British North America Act which provides that only the Governor General can appoint the judges of a superior, district or county court, and which has been judicially interpreted to deny the Legislature power to confer on a court or tribunal not appointed by the Governor General jurisdiction which "broadly conforms" to the type of jurisdiction exercised by the superior, district or county courts: Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1949] A.C. 134; Tomko v. Labour Relations Board (Nova Scotia) (1975), 69 D.L.R. (3d) 250 (S.C.C.).

We do not think that our proposals offend against section 96. For one thing, the proposed Act would provide a system of obligations which are not dependent upon contract and would give a court power to make determinations at odds with contractual provisions: Toronto v. York Township, [1937] 1 D.L.R. 175. The remedies provided are in some cases substantially different from the common law remedies developed by and associated exclusively with the superior courts: Kowanko v. Tremblay, [1920] 1 W.W.R. 787. Some of the powers conferred, such as the power to authorize an abatement of rent, may be characterized as constitutional elements in the rights created by the legislation and therefore distinguishable from the powers typical of section 96 courts: A.E. Dupont v. Inglis, [1958] S.C.R. 535. Then again, where the proposed Act

would confer the power to decide whether or not there has been a breach of obligation, it would do so only where the decision would be incidental either to a damage claim within the usual monetary jurisdiction of the Provincial Court or to the setting aside of a notice of termination for substantial breach under a new statutory remedy. Further, the whole system is intended to provide a way of dealing with a class of matters which are customarily of a minor nature in terms of the amount of money or property involved, and which are therefore of a nature not exclusively associated with the superior courts: Canada Tungsten Mining Corporation Limited v. Reid, [1974] 1 W.W.R. 133 (N.W.T.S.C.). There is the further point that some aspects of the landlord and tenant relationship, including the granting of possession in some limited kinds of cases, have historically been within the jurisdiction of courts other than superior, district or county courts, and that what we are recommending is merely an extension of the jurisdiction of the Provincial Court to similar matters: Reference re Adoption Act, [1938] 3 D.L.R. 497 (S.C.C.); Reference re the Magistrate's Court of Quebec, [1965] S.C.R. 772.

We see no reason to doubt that the Provincial Court, which can give damages in other matters up to a monetary limit prescribed by the Small Claims Act, can be empowered to give damages or allow abatement of rent up to the same monetary limit in matters arising from residential tenancies. We see little reason to doubt that it can be empowered to exercise a novel jurisdiction to set aside notices of termination either in connection with our proposals for termination for breach of the landlord's and tenant's obligations or (if adopted) in connection with a scheme for security of tenure.

We have not recommended that the proposed Act confer upon the Provincial Court power to grant certain remedies

which we think are exclusively associated with superior courts. These are the equitable remedies such as the granting of injunctions, the granting of relief against forfeiture, and the making of orders for specific performance. These powers would remain where they now are. The power to set aside a notice of termination given because of substantial breach of a tenancy agreement is somewhat similar to granting relief against forfeiture, but it is a novel remedy in relation to a novel right of termination and we think is therefore different from relief against forfeiture and would not infringe the exclusive jurisdiction of superior courts.

(5) Recommendations Concerning Adjudication of Disputes

Recommendation #29

(1) That except as otherwise provided, the Supreme Court, the District Court, and the Provincial Court be courts of competent jurisdiction.

(2) That notwithstanding subsection (1), the Provincial Court not have jurisdiction

(a) to give judgment for debt or damages under the proposed Act or a tenancy agreement in excess of the amount prescribed by the Small Claims Act,

(b) to grant equitable remedies, or

(c) to grant an order for possession except in a case in which a tenant who has been denied possession of rented premises at the inception of the tenancy brings proceedings for damages and possession.

(3) That procedures be provided in the Provincial Court for summary disposition of landlord and tenant matters, and that the Lieutenant Governor in Council have power to make Rules of Court for such proceedings.

Recommendation #30

(1) That where it appears in an action or proceeding brought in the Provincial Court under the proposed Act or a tenancy agreement that a question raised therein could for any reason be dealt with more conveniently in the Supreme Court or in the District Court, the judge of the Provincial Court or a judge of the Supreme Court or the District Court may order the action or proceeding to be transferred to the Supreme Court or the District Court.

(2) The order to transfer may be made by the court or judge of his own accord, or upon the application of either party on notice to the other parties interested, and at any stage of the action or proceeding.

(3) When an order is made under subsection (1)

(a) the action or proceeding shall thereafter proceed in the Supreme Court, or District Court,

(b) the judges of the Supreme Court or District Court and the officers thereof have the same powers and shall perform the same duties in relation thereto as if the action or proceeding had been originally instituted in the Supreme Court or District Court as the case may be,

(c) the pleadings and proceedings taken in the court from which the action or proceeding was transferred stand and have effect notwithstanding the transfer, and

(d) subject to the rules of court and to any order in that behalf made by the court or judge, the costs of the proceedings so taken previous to the transfer shall be paid and the solicitor's costs taxed according to the scale of costs in the Provincial Court.

(4) Where an order transferring from the Provincial Court to the District Court or the Supreme Court is made at the instance of any of the parties thereto, the judge making the order may in his discretion make and impose on the party applying for the order terms with regard to payment of costs, or security for costs, or such other terms as he sees fit.

Recommendation #31

(1) That there be an appeal from the Provincial Court to the District Court in a dispute arising under the proposed Act or a tenancy agreement.

(2) That the provisions of sections 748 to 760 inclusive of the Criminal Code of Canada and the rules promulgated thereunder apply with necessary changes to an appeal under subsection (1).

2. Information, Advice and Mediation

The rights we have recommended will be illusory and the remedies we have recommended will be ineffective unless landlords and tenants know about them, so that the next question is whether there should be a separate service for the dissemination of such information. Our opinion is that there should. Our previous recommendation that would require a tenant to be given a statement summarizing his rights will be of some value, but it will not be sufficient for tenants and will not help landlords. The legal profession is the traditional purveyor of information and advice on legal matters, but it is not organized to deal with the great volume of landlord and tenant inquiries, most of which involve matters of small economic consequence.

We believe also that a second service, a mediation service, is desirable. It is better that disputes be resolved in a way which is accepted by the parties rather than imposed upon them, particularly if the relationship is a continuing one. The mediation service can be conveniently and effectively associated with the information service.

The rights and remedies which we have recommended will also be ineffective unless landlords and tenants, particularly tenants, have easy access to the courts. In many cases the cost of legal assistance would render it non-economic to take a landlord-tenant dispute to court, and if access to the courts is not to be effectively denied, it is therefore necessary to design a system through which a landlord or tenant who wishes to do so can proceed without retaining a lawyer. Such a system requires a third service, that is, a service which will give information as to procedures and which will assist the tenant in completing the document which starts the proceedings.

We see two alternative ways in which the information and mediation services could be provided.

(1) Landlord and Tenant Advisory Boards

Municipal councils have power under section 22 of the Landlord and Tenant Act to establish boards to give information and advice to landlords and tenants and to mediate disputes. Such boards exist in Calgary, Edmonton, Red Deer, Lethbridge, Medicine Hat, Banff, Hinton and Fort McMurray. The boards themselves consist of volunteers willing to devote substantial amounts of time to unpaid public service, and they have varying amounts of staff help, sometimes on a full-time basis and sometimes on a part-time basis. The boards are funded entirely from municipal funds, and there is a considerable variation in the importance which

the various municipal bodies attach to the boards.

The boards provide information and mediation services. Through their staffs, they answer questions from landlords and tenants as to their respective legal rights and remedies. If both parties are willing, the boards hold mediation hearings and give the parties a decision as to what should be done, which the parties often accept, but which does not bind them. The boards handle a great volume of work, particularly in the larger urban centres.

(2) Provincial Government Agency

An alternative to the present system would be to provide the information, advice and mediation service through a provincial government agency, probably through a staff attached to the Provincial Courts. In some places the volume of work would be sufficient to justify staff devoted entirely to landlord and tenant matters. In other places it would not, and such matters would be the responsibility of the Provincial Court support staff, who would require training to enable them to discharge these responsibilities. A central office would be necessary in order to provide supervision of the advisory and mediation function in the Provincial Court offices so that accurate information would be given and consistent policies followed. It could also, if desirable, provide a service by telephone and letter for answering questions arising outside of centres in which the Provincial Court has an office. As the service would be provided by court officials it would presumably be placed under the jurisdiction of the official in the Attorney General's Department responsible for Provincial Court services.

(3) Recommendations as to Information and Mediation Functions

The Landlord and Tenant Advisory Boards have the strengths which arise from the local management of local affairs, and from the direction of those affairs by people who are highly motivated towards giving service to their fellow citizens. They have the further advantage that they and their staffs have acquired a considerable amount of experience in dealing with landlord and tenant problems. The disadvantages of the boards also arise from their local character. One disadvantage is that the support which they receive from their municipal councils varies from place to place and time to time. Not all urban municipalities are sufficiently interested even to establish a board and no municipal district or county has done so; while that circumstance may reflect a lack of perceived need in areas in which boards have not been established, it does mean it is unlikely that service can be provided by such boards throughout the province. It may be that the province could help to make up these deficiencies by making grants available to municipalities for the purpose of establishing boards and we will recommend that it do so, but a tendency towards undue dependence on provincial funding involves the risk of a tendency towards provincial control and towards the loss of the benefits of local control. Another disadvantage of the boards is that, being separate local bodies, they are likely to have separate local views as to the correct information to be given out and the correct policies to be followed, though it should also be noted that the existing boards are conscious of this weakness and are meeting regularly to discuss their common problems.

A service provided by the provincial government through the Provincial Court offices would not have the

strengths of the Landlord and Tenant Advisory Boards. On the other hand, once established it might be expected to retain its position in the budget and to have greater continuity. Further, it could be controlled so that consistent information would be given and consistent policies followed, and with the establishment of the central office the service would be able to provide some help throughout the province.

We are reluctant to suggest the dismantling of institutions which have been created to satisfy a specific need, and which appear to us to be satisfying it effectively, at low cost, and without the assistance of a substantial bureaucracy. Further, despite the weaknesses arising from the local nature of the boards, we see no reason to think that landlords and tenants would on the whole be served more effectively by provincial civil servants under more centralized control. So far as the mediation service is concerned, it seems to us likely that landlords and tenants will be more likely to appear before a group of local citizens and accept their common sense approach to the solution of a problem than they will be to accept the help of a civil servant in a court office. We therefore recommend that the proposed Act continue to make provision for Landlord and Tenant Advisory Boards, and that municipal councils be encouraged to maintain and to establish such boards.

We have some recommendations which we think, if adopted, would maintain and improve the level of service given by the boards. They are consistent with recommendations made by the existing boards.

The first is that the provincial government make some funding available to municipal bodies which establish Landlord and Tenant Advisory Boards, subject only to the condition

that the money be used for the purposes of a board. Such funding if made available on a continuing basis would, we think, encourage municipal bodies to establish such boards and provide facilities for them; and, because board members serve without remuneration and municipal governments can often furnish staff and office facilities economically, we think that such funding would result in the provision of substantial service at comparatively little cost. The government could supplement the funding by allowing the boards the use of the government's "RITE" telephone system and by making government printing services available.

Our second recommendation is that the government, through the Department of Consumer and Corporate Affairs, provide help and assistance to the boards. That help could include the making of recommendations as to policies to be followed by the boards, the giving of interpretations of the legal points which arise in the course of the work of the boards, and help in preparing and printing standard forms for use by the boards. If that sort of service were provided by a designated official of the Department, and if all matters affecting the boards were worked out in close and continuous consultation with them, we think that the service would have a very considerable effect in promoting the uniform application of appropriate policies by all the boards in the province, without restricting their independence.

We have considered whether to recommend that a central provincial office be established with the specific duty of answering questions from parts of the province which lack a Landlord and Tenant Advisory Board. We have come to the conclusion, however, that we should not make such a recommendation. We think that the decision as to whether or not there is a sufficient problem of landlord-tenant relations to require a special service is best made locally. We think

also that a special office set up for that purpose would tend to exert pressure for expansion of its function into areas served by Landlord and Tenant Advisory Boards, and that a municipal council might well be persuaded by considerations of cost to dismantle a board if an alternative agency existed. We therefore do not think that a special service should be established except the one we have proposed for the assistance of the boards.

Recommendation #32

(1) That section 22 of the Landlord and Tenant Act providing for Landlord and Tenant Advisory Boards be continued in the proposed Act, and that the maintenance and establishment of such boards be encouraged.

(2) That an official of the Department of Consumer and Corporate Affairs be designated to advise and assist the Landlord and Tenant Advisory Boards and to promote the adoption by them of uniform policies, having due regard to differences in local conditions.

(3) That the province make funding available to municipal bodies who establish and maintain Landlord and Tenant Advisory Boards.

(4) That officials on the staff of the Provincial Courts be given training in assisting landlords and tenants in following procedures involved in prosecution and defence of claims under the proposed Landlord and Tenant Act.

X

SERVICE AND DELIVERY OF NOTICES AND DOCUMENTS

The proposed Act requires service or delivery of various notices and documents. It should provide how service or delivery is to be effected, and where appropriate, establish uniform rules. We will now make recommendations accordingly.

Section 5 of the Landlord and Tenant Act regulates the giving of one important kind of notice, that of termination of a periodic tenancy. We believe that, insofar as practical, the notice provisions should be the same for both landlord and tenant. However, section 5 now contains notice procedures which are different as between landlord and tenant. A tenant may give notice to the landlord either personally or by ordinary mail. A landlord must give notice to the tenant personally, unless the tenant is absent from the premises or is evading service. Under these circumstances, the landlord may give the notice to any adult person who apparently resides with the tenant, or post the notice in a conspicuous place upon some part of the premises, or send the notice by registered mail.

Personal delivery is the customary method of giving notice, and is now available to both parties. We think this is sound. But we believe that the reasons which support the tenants option to give notice by mail apply with equal validity to the landlord. Suppose the landlord rents his home in Calgary to the tenant and then moves to Edmonton. It makes little sense to require either party to undertake a trip to deliver a notice personally. We believe the mail option should be available to both parties. But should registered mail be required? Registered mail emphasizes the importance of the act, it increases the reliability of actual delivery, and it provides a method of securing a receipt for

delivery. For these reasons, the proposed Act will require registered rather than ordinary mail. Where the tenant cannot be given notice personally, because he is absent from the premises or evading service, the present alternatives; (delivery to any adult person apparently residing with the tenant and posting on the premises) should be available to the landlord, whether or not he also sends notice by registered mail. These provisions should apply to the service or delivery of all notices and documents under the proposed Act, unless they are for some reason inappropriate.

Section 5 treats the rented premises as the tenant's address for service, and the address where the rent is payable as the landlord's address for service. Those addresses will usually be satisfactory, but provision should be made for situations in which they will not. We therefore recommend that both parties be allowed to give a different address from time to time so that they may be able to ensure that notices and documents go to a convenient address.

We have provided for one exception in our earlier recommendations, namely, that the landlord may send a copy of a tenancy agreement to the tenant by ordinary mail. The only other exception which we think should be made is for court documents, which should be served in accordance with court rules and practice.

Recommendation #33

(1) That except as otherwise provided, a notice or document be served or delivered personally or by registered mail.

(2) That for service or delivery by registered mail

(a) a tenant's address is the address of the rented premises, and

(b) *a landlord's address is the address where rent is payable.*

(3) *That a landlord or a tenant may from time to time change his address for service or delivery by written notice served upon the other party.*

(4) *That if a notice or document cannot be served or delivered personally by reason of the tenant's absence from the premises, or by reason of his evading service, service or delivery may be effected*

(a) *upon any adult person who apparently resides with the tenant, or*

(b) *by posting it in a conspicuous place upon some part of the premises.*

(5) *That this recommendation not apply to service governed by the rules or practise of a court.*

XI

CONTRACTING OUT

At pages 7-8 of this report we referred to a distinction between two types of problems in landlord-tenant law. The first category includes problems which arise from the application to residential tenancies of obsolete legal theory based on notions of property law. We said that we thought that those problems could be solved relatively easily by giving much greater recognition to the contractual element in the landlord-tenant relationship, so that most of the rights and remedies of contract law would be available. That solution would, however, do little or nothing to alleviate the second category of problems, those arising from the ability of landlords as a class to use tenancy agreements to impose terms favourable to themselves. We recommended that those problems be dealt with by a statute which would impose obligations on the landlord and on the tenant, and prescribe remedies for their breach. We now recommend that the proposed Act apply notwithstanding an agreement of the parties to the contrary unless such agreements are authorized by the proposed Act. Otherwise, it is quite likely that the proposed Act would be rendered nugatory by clauses in standard form tenancy agreements under which tenants would give up the protection provided in the proposed Act. We think this recommendation would tend to simplify tenancy agreements, as there would be little point in preparing agreements with long and complex provisions covering matters governed by the proposed Act.

Recommendation #34

> *That except as otherwise provided, the proposed Act apply notwithstanding an agreement to the contrary.*

XII

TRANSITIONAL PROVISIONS

The next question is whether or not the proposed Act should apply to tenancies which are in existence when it comes into force. On the one hand, if the proposed Act is enacted it will be because it is thought to be beneficial, and if that is true its protection should be made available as soon as possible. On the other hand, it would be unfair to impose upon a landlord or a tenant a substantial change in obligations if they have agreed upon a rent based upon a different set of obligations applicable before the effective date of the Act.

We think that it is necessary to deal differently with three kinds of residential tenancies. We expect that, in view of the important changes included in the proposed Act, the Legislature will postpone its coming into force for some time in order to give landlords and tenants a chance to become familiar with it and prepare to conform to it. If that is done, we think that the proposed Act should be applicable to weekly and monthly tenancies, as soon as it becomes effective, for the parties would have had sufficient time to make new tenancy agreements reflecting the new obligations and remedies. Yearly tenancies, of which there are probably few, can only be terminated unilaterally upon an anniversary date, and we think that the application of the proposed Act to such tenancies should be postponed for one year after it comes into force. We do not think that the proposed Act should apply to tenancies for a fixed term existing when it comes into force, because this would change the obligations of the parties without giving them a chance to protect their positions. Residential tenancies are not customarily made for long fixed terms, and we do not think that excepting existing fixed term tenancies would create serious problems; we would not expect to find landlords insisting

on tenancies for long fixed terms in order to evade the proposed Act.

Recommendation #35

That the proposed Act

(1) apply to

(a) any tenancy agreement made after its commencement,

(b) a weekly or monthly tenancy agreement made before its commencement, and

(c) a yearly tenancy agreement made before its commencement, from and after the first anniversary of its commencement.

(2) not apply to a tenancy agreement for a fixed term made before its commencement, but apply to a renewal of such a tenancy agreement made after its commencement.

XIII
SECURITY OF TENURE

1. Issue

Either the landlord or the tenant may terminate a periodic tenancy by proper notice, or may refuse to renew a fixed-term tenancy. He may do so for good reason or for no reason, and he need not give an explanation.

Should the law be changed so that a tenant who pays his rent and performs his other obligations would be entitled to remain indefinitely in the rented premises unless the landlord withdraws the premises from the rental market? That is to say, should the law confer upon the tenant what is called "security of tenure"?

That is a controversial question. It becomes more controversial as the apartment vacancy rate in a community declines to a point at which it is difficult for an evicted tenant to find other premises to rent.

2. Institute's Disposition of the Question of Security of Tenure

We constantly have in our minds the question as to how far a body constituted as this Institute is constituted should go in making recommendations for change in areas of law in which there is no observable social consensus about important social values, or in which there are factors which our research and consultation cannot fully evaluate. Where the path has seemed fairly clear we have recommended significant departures from existing legal principles; where it has not we have tried in our reports to provide the Legislature with the background material to enable it to

make as fully informed a choice as possible. For the reasons given at page 2 we have decided to follow the latter course, and we will accordingly describe a plan for security of tenure and provide draft legislation but will not make a recommendation for or against its adoption.

3. Arguments For and Against Security of Tenure

The basic argument for security of tenure is stated as follows by the British Columbia Law Reform Commission at page 62 of its Report on Landlord and Tenant Relationships: Residential Tenancies, 1973: "a secure home is a fundamental need of all families and individuals; where termination of a tenancy can take place within a short period of time, and justification is not required, that need is not fulfilled"; in other words, a feeling of insecurity about one's home, and a fear of arbitrary eviction from it, mean that a fundamental need is not fulfilled. As against that, landlords say that the profit motive already protects the good tenant: a landlord, as a businessman who wishes to make a profit, will not evict a tenant who pays his rent and performs his obligations. They say that security of tenure will therefore protect only the bad tenant who does not pay his rent and perform his obligations.

Landlords argue that the rented premises are the property of the landlord and that he should have the usual right of a property owner to decide who should be entitled to live in his property. Further, the landlord is the one who is at risk if the property is not properly cared for; his capital tied up in it will be lost if the property deteriorates. The property is his source of income, and it would be unfair to take away his power to choose tenants who will best look after the property and ensure

his continued income. In reply, tenants say that the landlord's interest is usually economic and can be protected without the power of arbitrary eviction; a law which provides security of tenure will still allow a landlord to evict a tenant who does not perform his obligations.

Tenants argue that the effect of termination of a tenancy is much harsher on the tenant than it is on the landlord. If the tenant moves, he and his family must establish themselves in new surroundings and quite possibly in an unfamiliar neighbourhood. His children may have to change schools. He may lose proximity to his place of employment, or to favourable transportation facilities. He will be burdened with the cost of moving and the extra expenses associated with it. A low vacancy rate magnifies the effects on the tenant. A tenant who is afraid that he cannot find another place for himself and his family to live is likely to be afraid to assert his legal rights for fear that his landlord will evict him if he does so. The vacancy rate in the major cities is very low and it is quite likely that the problems created by it will remain with us for a long time and return periodically.

Landlords on the other hand say that security of tenure is not in the long term interest of tenants generally because it will curtail the construction of new rental accommodation and hasten the conversion of existing rental accommodation to other forms of ownership. It will do that for two reasons. One is that, to the extent that it interferes with sound business decisions or causes increased expenses which cannot be recovered by rent, it will interfere with revenues and profits and cause capital to move into other forms of investment. The second is that at least some landlords and potential landlords will perceive security of tenure as a limitation on their property rights and will regard the extra

trouble and friction necessary to achieve eviction as the last straw which will drive them into another form of investment, even if their financial return is not affected.

Landlords say that they will suffer loss from security of tenure because of the difficulty of evicting bad tenants and that, unless competitive conditions force them to absorb the loss themselves, they will pass it on in the form of higher rents to other tenants who will therefore pay the cost imposed by the bad tenants. They argue that security of tenure will protect the tenant who carries on illegal activity or disrupts the lives of other tenants around him; that the landlord will not be able to evict him unless and until he can collect the evidence necessary to satisfy a court of law that there is cause for termination of the tenancy. They say that proposals for security of tenure take into consideration only bad and arbitrary landlords (who are in the small minority) and that if adopted such a proposal would prevent a conscientious landlord from protecting his good tenants from harassment by a bad one. They say also that security of tenure would be unfair because it would be one-sided; the tenant could terminate the tenancy, but the landlord could not; if both parties want a long tenancy they can agree on one.

Landlords argue that under the present law a tenant who wishes to stay in rented premises has an incentive to be a good tenant which will be removed if he cannot be evicted except for a substantial breach of his legal obligations. Tenants, on the other hand, apart from the negative effects of the power of arbitrary eviction on the tenant, argue there are positive benefits to be gained from a system of security of tenure. A tenant who is encouraged to regard his rented premises as his home is more likely to become settled and responsible, something which is in the public interest. He

is more likely to take pride in a rented house or apartment and to maintain it if he has that attachment and has a reasonable assurance that he will be able to enjoy the benefit of his care, and that is in the landlord's interest as well as in the interest of the tenant. Indeed, it is argued that the easing of friction which security of tenure would bring about and the greater sense of responsibility which it would engender, make the granting of security of tenure a benefit to the landlord as well as to the tenant.

It can also be argued that security of tenure will tend to cause landlords to be increasingly selective, and therefore to make it more difficult for would-be tenants who do not have established credit records, young people without references from previous landlords, and people with low incomes, to find good rental accommodation.

Those are the arguments on the merits of a system of security of tenure. We now proceed to consider separately the question whether such a system can work without rent control.

4. Can Security of Tenure Exist Without Rent Control?

It can be argued that in the absence of rent control security of tenure legislation will not work because the landlord can circumvent the legislation and effectively evict the tenant by increasing the rent so that the tenant cannot pay it or so that it is more than the rented premises are worth. That argument must be examined; while there is now a form of rent control in the Temporary Rent Regulation Measures Act, it cannot be assumed that it will continue indefinitely, and any legislation which we propose in this report should be able to stand by itself.

We note in passing that the Temporary Rent Regulation

Measures Act confers a limited measure of security of tenure in that it makes it an offence for a landlord to evict a tenant merely because the tenant exercises his rights under the Act. That provision is, of course, merely incidental to the scheme of rent control embodied in the Act.

Systems of security of tenure without rent control have operated in West Germany, Switzerland, Manitoba and Surrey, British Columbia, and federal government-funded housing in the United States is subject to what amounts to such a system. The British Columbia Law Reform Commission recommended security of tenure without rent control in its report on Landlord and Tenant Relationships: Residential Tenancies, 1973. The essence of their proposal was that a tenant who received a notice of eviction would be entitled to ask for reasons and to have the notice reviewed by a tribunal with power to reverse the eviction unless one of a prescribed group of causes for termination existed. The proposal was accompanied by a proposal for expeditious eviction in a proper case. The Commission dealt with the problem of effective eviction by rent increase by empowering the tribunal to declare a rent increase discriminatory and ineffective if the tenant could establish that it was imposed on a discriminatory basis in order to dislodge the tenant. However, the British Columbia legislature added a system of rent controls and the Commission's proposed security of tenure did not have to operate independently.

It is obvious that rent control would make for a stronger and more efficient system of security of tenure. However, we think it would be open to the Legislature, if it should decide that security of tenure is desirable, to institute it in a limited way without general rent controls. It could do so by legislation which would give a tenant the right to have a rent increase set aside if it can be shown

that it was imposed in order to get rid of him. That would not give a tribunal power to roll back a rental increase which was imposed for business reasons and not for the purpose of getting rid of a particular tenant, and it would not give the tribunal power to determine the appropriate amount of a rent increase even if it should find that the one proposed by the landlord was proposed in bad faith. There would of course be difficulties with such a system. A determined and skillful landlord might find ways of camouflaging his intentions so that the tenant could not show bad faith. Tenants in some cases might be reluctant to undergo the stress and trouble involved in taking the landlord to court. However, we think that in most cases it would be apparent either that there is a good business reason for a rent increase or that there is not; and we think that the system would give tenants significant protection.

It should be noted that the protection afforded by security of tenure without rent control would be limited by the fact that it would not protect the tenant against increases in rent for business reasons or from other changes in the financial provisions of the tenancy. What it would do is to require the landlord to leave the tenant in possession so long as the tenant performs his other obligations and is prepared to pay the rent for which the landlord would be prepared to rent to other persons. It would also give protection to a tenant who wishes to assert the rights guaranteed to him by the proposed Act or by a tenancy agreement.

5. Plan for Security of Tenure

We will now describe a plan for security of tenure. It is the plan which we think should be adopted if there is to be security of tenure, though as we have indicated, we are

merely indicating the field of choice and are not making a recommendation as to whether or not the proposal should be adopted or rejected.

(1) Basic Protection

As we have said, either party can at present terminate a periodic tenancy upon notice, or can refuse to renew a fixed term tenancy, for any reason or without reason. If the law is to provide security of tenure for the tenant, it should do so on terms which recognize the interests of both landlord and tenant. We think that the way to do that is, first, to specify the reasons which would give the landlord justifiable cause to terminate a periodic tenancy, or refuse to make a new tenancy agreement after the termination of a fixed term tenancy, and second, to permit the tenant to apply to the court to annul the landlord's action if not based on a proper cause.

If the tenant is to challenge the landlord's action effectively, he must be informed in a timely manner of the reasons the landlord will rely on to sustain his action. Therefore, we think that the landlord should be required not only to give the tenant notice of his action, but to include with the notice his supporting reasons. Because the reasons may be defamatory or otherwise actionable, the law should protect the landlord from being sued for giving them in accordance with this requirement.

(2) Cause

What reasons should give the landlord proper cause to terminate a periodic tenancy, or refuse to make a new tenancy agreement after the termination of a fixed term tenancy?

We believe the reasons fall into two categories, those related to conduct of the tenant or persons for whose conduct he is responsible under recommendation #12 at page 41, and those related to the landlord's needs.

(a) Tenant's Conduct

We see no reason why security of tenure should protect a tenant who is in substantial breach of obligation under the proposed Act or under the tenancy agreement. Such a breach should give a landlord proper cause.

(b) Landlord's Needs

The landlord should also have proper cause if he requires possession of the building or the rented premises for the purpose of

i. demolition;

ii. occupation by himself, his spouse, or a child or parent of either, or by an employee;

iii. a proposed change of use, including conversion into condominium ownership;

iv. a bona fide sale of the property; or

v. carrying out extensive repairs that make continued occupation by the tenant not feasible.

(3) Changes in Terms

A system of security of tenure is not intended to freeze the rent and other terms of the tenancy agreement into the indefinite future, and the plan must therefore permit changes. If rents continue to be controlled the changes would of course be subject to the controls.

In Chapter IV.2.(b) we have dealt with increases of rent in the absence of a system of security of tenure by carrying forward with some changes section 21 of the Landlord and Tenant Act which provides for at least 90 days' notice of an increase. We think that the same provision should apply under a plan for security of tenure, but it should be expanded so that it will cover not only increases in rent but also other changes in the terms of the tenancy.

(4) Assignees

Only the original tenant should be entitled to security of tenure under the Act. The purpose of security of tenure should be to protect a tenant in the occupation of his own home, and not to provide him with a saleable asset the value of which is enhanced by security of tenure. A new tenant who wishes to acquire security of tenure should be able to do so only by entering into a new tenancy directly with the landlord or by obtaining security of tenure by the landlord's agreement.

(5) Fixed Term Tenancies

It is necessary to consider whether security of tenure, if it is to be conferred at all, should be conferred on a tenant under a tenancy agreement for a fixed term. Security of tenure is not required during the term of the agreement,

as the agreement itself protects the tenant, but the issue arises at the end of the fixed term.

It may be argued that security of tenure should not apply. The parties have made their contract and have mutually agreed that the tenancy will terminate at a stated time, and there is no reason why the tenant should not carry out a promise which he has made as part of a larger transaction.

We think, however, that if there is to be security of tenure in connection with periodic tenancies there should also be security of tenure for fixed term tenancies. For one reason, we do not believe that most tenants under tenancies for fixed terms are less in need of protection than tenants under periodic tenancies. For another, the use of fixed term rental agreements could easily become a subterfuge to defeat security of tenure if it should apply only to periodic tenancies; a landlord could avoid it by insisting that the tenant each month enter into a tenancy agreement for a fixed term of a month, leaving the landlord the option of refusing to grant a new agreement upon the termination of each tenancy.

We think that the way to deal with a tenancy agreement for a fixed term is to provide that upon its termination a month to month tenancy will come into being unless the parties have agreed on a new tenancy, or unless either party has given 30 days' notice of intention not to make a new tenancy agreement. The tenant would have the same right to apply to the court to set aside such a landlord's notice that he would have for a landlord's notice terminating a monthly tenancy. The terms of the new monthly tenancy would be the same as those of the fixed term tenancy except for the term, unless the landlord took appropriate steps to change them.

A strong case can be made for the proposition that the new tenancy imposed by this plan should be for the same fixed term as the expired tenancy, so that the landlord would have the advantage of having the tenant bound for that period of time. We think, on balance, that the flexibility of a monthly tenancy is more likely to be suitable to the parties.

(6) Burden of Proof

It is important to establish who must prove the facts upon which the court should decide whether or not a landlord has justifiable cause for his action. If the alleged cause is connected with the landlord, the facts will be within his knowledge and he clearly should have the burden of proof. If the cause is related to a breach of obligation by the tenant, the question is more difficult. Our opinion is that in such a case the landlord should have the initial responsibility of adducing evidence, but that he should be able to discharge that responsibility by proving that when he gave notice he had information upon which it was reasonable for him to do so. The tenant should then have the burden of disproving the cause alleged by the landlord.

The proposal would require the tenant to prove a negative, but he would be able to do so by his own evidence if it is believed, and we think that it is fair to him. Our reason for not requiring the landlord to prove the facts, as differentiated from proving that he acted reasonably, is that there would otherwise be many cases in which he would be prevented by lack of legally sufficient evidence from giving notice of termination to a disruptive tenant or a tenant carrying on illegal activities. In the interest of landlords and in the interest of other tenants who may be harrassed by a disruptive tenant or distressed by illegal

activity, we think it fair to require the tenant, who is most likely to have knowledge of the facts, to prove them.

(7) Procedure

As we have stated, the primary objective of security of tenure is to give the tenant assurance that he will not be evicted unless the landlord has justifiable cause for such action. The plan for security of tenure should be consistent with the proposed Act except where unique procedures are necessary to accomplish that objective.

The landlord will be able to terminate a periodic tenancy under the proposed Act for any reason by giving a proper notice of termination under procedures quite comparable to sections 3 to 8 of the Landlord and Tenant Act. We have discussed this at pages 80 to 83 and 124 to 126. We believe this procedure should be available to the landlord under security of tenure, if he has justifiable cause, and subject to the other special requirements we have suggested. Under this option, the landlord with proper cause could terminate a monthly tenancy with the usual one month notice if the tenant did not challenge the termination by applying to the court.

Recommendation #20 at page 67 would give a landlord 2 additional optional methods of obtaining termination of any tenancy, periodic or for a fixed term, if the tenant committed a substantial breach of obligation under the proposed Act or under the tenancy agreement. Under subsection (1) the landlord could terminate any tenancy with 14 days notice, without court assistance, if the tenant did not block the termination by serving a notice of

objection. Or, either after or without an attempted termination under subsection (1), the landlord could apply directly to the court for an order terminating the tenancy agreement under subsection (6). As security of tenure will not apply to fixed term tenancies before they expire, these procedures will remain available for those tenancies. We believe they should also be available to a landlord with a periodic tenancy under security of tenure.

One problem remains. The tenant should have a right to a monthly tenancy at the termination of a fixed term tenancy unless the landlord has proper cause for refusing to continue to rent the premises to the tenant. We believe that the parties can be adequately protected in this situation by treating the landlord's notice that he does not want a new tenancy with the tenant as though it were a notice to terminate, and by applying the same provisions.

6. Summary of Plan for Security of Tenure

The plan which we have described may be summarized as follows:

(1) A periodic tenancy may only be terminated under the following procedures:

(a) Those provided by recommendation #20, except that

(i) if the landlord proceeds under subsection (1) of recommendation #20, his statement of the particulars of the alleged breach under subsection (2) of recommendation #20 is absolutely privileged in any action for defamation or injurious falsehood brought by the tenant, and

(ii) if the landlord proceeds under subsection (6) of recommendation #20, the landlord may establish proper

cause for termination by proving that he has reasonable grounds for believing that the tenant committed a substantial breach of obligation under the tenancy agreement or under the proposed Act, and the tenant may rebut the landlord's cause by proving that he did not commit such a breach.

(b) Those applicable in the absence of security of tenure, but subject to the following additional provisions:

(i) The tenancy may only be terminated if

A. the tenant has committed a substantial breach of obligation under the tenancy agreement or under the proposed Act, or

B. the landlord requires possession of the building or the rented premises for the purpose of

(A) demolition;

(B) occupation by himself, his spouse, or a child or parent of either, or by an employee;

(C) a proposed change of use, including conversion into condominium ownership;

(D) a bona fide sale of the property; or

(E) carrying out extensive repairs that make continued occupation by the tenant not feasible

(ii) The notice of termination must state the reasons which the landlord will rely on to justify the termination.

(iii) The tenant may apply to the court, within 14 days of receipt of the notice of termination, for an order setting aside the order of termination, which application shall be returnable not less than 10 days before the termination date stated in the notice of termination.

(iv) The court may extend any time specified in subsection (1)(b)(iii) upon such terms as it deems appropriate.

(v) *The landlord may establish proper cause for termination under subsection (1)(b)(i)A. by proving that he had reasonable grounds for believing that the tenant committed such a breach, which cause may be rebutted by the tenant's proof that he did not commit such a breach.*

(vi) *The notice of termination is absolutely privileged in any action for defamation or injurious falsehood brought by the tenant.*

(2) (a) *Upon the expiration of a tenancy agreement for a fixed term the landlord and tenant would be deemed to have entered into a month to month tenancy agreement upon the same terms and conditions as are provided for in the expired tenancy, except for the term.*

(b) *Subsection (1) would not apply if the landlord and tenant enter into a new agreement before the expiration of the term specified in the old tenancy agreement, or if either the landlord or the tenant gives to the other, not less than 30 days before the expiration date specified in the old tenancy agreement, notice that no new tenancy agreement is to be implied upon the expiration of the old tenancy agreement.*

(c) *The landlord's notice under subsection (2)(b), and the rights of the parties, are subject to all of the provisions of subsection (1)(b) applicable to termination by notice.*

(3) (a) *A landlord would be prohibited from*

(i) *increasing the rent payable under a tenancy agreement and from recovering any additional rent resulting from such an increase, or*

(ii) *changing any other term of the tenancy agreement and from enforcing any changed term,*

unless he gives to the tenant a written notice of the increase in rent at least 90 days before the date on which the increase is to be effective.

(b) A tenant under a periodic tenancy who receives a notice under subsection (3) and who fails to give to the landlord notice of termination effective on or before the date of the rent increase, or other change in terms, would be deemed to have accepted the same.

(c) A landlord who gives a notice of termination of a periodic tenancy would not, for a period of 90 days after the date the notice is given, be entitled to demand or retain

(i) any rent for the premises in excess of that payable under the tenancy agreement at the time of the notice, or

(ii) any benefit arising from any other term in the tenancy agreement relating to the premises which is more favourable than the terms of the tenancy agreement in force at the date of the notice.

(d) A tenant who

(i) pays rent in excess of that permitted by subsections (3)(a) and (c) would be entitled to recover such excess rent from the landlord, or

(ii) confers a benefit not permitted by subsections (3)(a) and (c) would be entitled to recover compensation from the landlord for the value of the benefit.

(e) That subsection (3) not apply if the tenancy agreement provides for a period of notice longer than 90 days.

(4) The court could annul a rent increase or other change in terms imposed by the landlord for the purpose of evicting the tenant.

(5) The assignee of a tenant's rights would not have security of tenure as against the landlord unless the landlord has agreed to grant him security of tenure.

(6) These provisions would apply to tenancies in existence at the commencement of the proposed Act.

XIV
CONCLUSION

We think that the proposed Act which appears in Appendix B fairly balances the interests of landlords and tenants. It is our hope that it will provide a satisfactory legal framework for their activities. It is our hope also that our discussion of a plan for security of tenure, which we have included for convenience as Appendix C will assist in the making of an informed decision on the subject.

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_____
DIRECTOR

February, 1977

APPENDIX A

CROSS-REFERENCE BETWEEN RECOMMENDATIONS AND PROPOSED ACT

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APPENDIX B

THE LANDLORD AND TENANT ACT

Part 2

(Note: The present Landlord and Tenant Act would become Part 1 and would be made inapplicable to residential tenancies as defined in Part 2).

Definitions

1. In this part, unless the context otherwise requires

   (1) "common areas" means areas controlled by a landlord and used for access to rented premises or for service to a tenant;

   (2) "court" means a court of competent jurisdiction;

   (3) "landlord" means the landlord under a residential tenancy and includes a tenant who sublets;

   (4) "residential premises" means a self-contained dwelling unit;

   (5) "residential tenancy" or "tenancy"

      (a) means a tenancy of residential premises primarily for residential purposes, and

      (b) includes an arrangement under which a landlord provides residential premises to an employee

         (i) who provides services in respect of the property of which the premises are a part, or

         (ii) in connection with the employee's employment, and

      (c) does not include a tenancy primarily for commercial or agricultural purposes.

   (6) "security deposit" means money or any property or right paid or given by a tenant of residential premises to a landlord or his agent or to anyone on his behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition.

(7) "tenancy agreement" means a lease or a written or oral agreement creating a residential tenancy.

(8) "tenant"

(a) means the tenant under a residential tenancy and includes a subtenant, but

(b) does not include a roomer or boarder.

Tenant's Information

2. (1) A landlord of three or more residential premises shall ensure that a notice in Form C is delivered to the tenant at or before the time at which the tenant takes possession of the rented premises.

(2) A landlord who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.

3. (1) Where a tenancy agreement in writing is executed by a tenant, the landlord shall ensure that a fully executed duplicate original copy of the tenancy agreement is delivered to the tenant within 21 days after its execution and delivery by the tenant.

(2) Until a copy of the tenancy agreement is delivered in accordance with subsection (1) the tenant may withhold payment of all rental payments which fall due.

(3) The landlord may deliver the copy of the tenancy agreement as required by subsection (1)

(a) personally, or

(b) by ordinary mail addressed to the tenant

(i) at the rented premises if the tenant has taken possession, or

(ii) at any address provided by the tenant for delivery of a copy of the tenancy agreement.

Landlord's Obligations

4. (1) In every tenancy agreement there are implied the following covenants between the landlord and the tenant:

(a) that the rented premises shall be available for peaceful occupation by the tenant at the commencement of the term,

(b) that neither the landlord or anyone having a claim to the rented premises under the landlord shall in any significant manner disturb the tenant's possession or peaceful enjoyment of the rented premises,

(c) that the rented premises will be habitable and in good repair at the commencement of the tenancy, and

(d) that throughout the tenancy the landlord shall

(i) take all reasonable steps to maintain the rented premises and common areas in good repair, and

(ii) comply with health and safety standards, including housing standards, prescribed by law.

(2) Subsections (1)(c) and (d) apply whether or not a lack of habitability or state of disrepair existed to the knowledge of the tenant before the tenancy agreement was entered into.

(3) Subsection (1)(d) does not apply if

(a) the tenant would be liable to the landlord for the expenses of repair if made,

(b) the repairs would have to be made in the rented premises, and

(c) the landlord is in the process of terminating the tenancy.

Privacy

5. (1) Except as provided in this section a landlord is not entitled to enter rented premises without the consent of the tenant or of a person rightfully in the premises.

(2) A landlord is entitled to enter rented premises without consent or notice if he has reasonable grounds to believe that

(a) an emergency requires entry, or

(b) the tenant has abandoned the premises.

(3) A landlord is entitled to enter rented premises without consent but upon notice

(a) to inspect the state of repair,

(b) to make repairs,

(c) to show the premises to prospective purchasers and mortgagees of the property, or

(d) to show the premises to prospective tenants

(i) after notice of termination of a periodic tenancy has been given, or

(ii) during the last month of a tenancy for a fixed term.

(4) A notice under subsection (3) shall

(a) be in writing,

(b) be given to the tenant at least 24 hours before the time of entry, and

(c) name a reasonable time for the entry.

(5) The landlord shall exercise his rights under this section with due regard to the rights of the tenant under section 4(1)(b).

Retaliatory Eviction

6. (1) A landlord shall not terminate a tenancy for the reason that the tenant has

(a) taken steps to enforce a right granted to the tenant or an obligation imposed on the landlord by this Act, or

(b) made a bona fide complaint to a municipal or governmental authority alleging that the landlord has violated a statute, by-law or regulation dealing with health, safety or housing standards.

(2) A notice of termination given in contravention of subsection (1) is ineffective.

(3) A landlord who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.

Rent

7. (1) A landlord shall not increase the rent payable under a tenancy agreement or recover any additional rent resulting from such an increase unless he gives to the tenant a written notice of the increase in rent at least 90 days before the date on which the increase is to be effective.

(2) A tenant under a periodic tenancy who receives a notice under subsection (1) and who fails to give to the landlord notice of termination effective on or before the date of the rent increase, shall be deemed to have accepted the same.

(3) A landlord who gives a notice of termination of a periodic tenancy shall not, for a period of 90 days after the date the notice is given, be entitled to demand or retain any rent for the premises in excess of that payable under the tenancy agreement at the time of the notice.

(4) A tenant who pays rent in excess of that permitted by subsections (1) and (3) is entitled to recover the excess from the landlord.

(5) This section does not apply if the tenancy agreement provides for a period of notice longer than 90 days.

Acceleration Clauses

8. A term in a tenancy agreement that provides that, by reason of default in payment of rent due or in observance of any obligation of the tenant under a tenancy agreement, the whole or any part of the remaining rent for the term of the tenancy becomes due and payable, is void and unenforceable.

Tenant's Obligations

9. (1) In every tenancy agreement there are implied the following covenants between the tenant and the landlord:

(a) that neither the tenant, another occupant of the rented premises, nor a person invited to property of which the rented premises form a part by the tenant or another occupant, shall

(i) disturb, in any significant manner, the possession and peaceful enjoyment by the landlord or another tenant of their rights in property of which the rented premises form a part, or

(ii) damage such property

by any wilful or negligent conduct including, but not limited to, illegal, dangerous, or offensive conduct.

(b) that the tenant shall maintain the rented premises and included furnishings and equipment in reasonable cleanliness,

(c) that the tenant shall notify the landlord, insofar as reasonably possible, of any condition of disrepair in the rented premises known to the tenant, and

(d) that the tenant shall take such emergency action as would be taken by a reasonable tenant under the circumstances, short of permanent repair, to minimize damage to the rented premises from any cause.

(2) The tenant is not liable under subsection (1)(a) for the conduct of another person other than in the rented premises unless the tenant could reasonably have prevented the conduct.

(3) The covenant implied by subsection (1)(a) in favour of the landlord also benefits and is enforceable by any other tenant of the landlord affected by a breach thereof.

(4) The tenant is not liable to the landlord under sections (1) and (2) for any damage sustained from fire, unless

(a) the fire was intentionally caused by the tenant, or

(b) the insurer under a policy of insurance in favour of the landlord is entitled to and does refuse to indemnify the landlord by reason of the tenant's conduct.

Locks and Security Devices

10. (1) Neither a tenant nor a landlord shall add to or change the locks on doors giving access to the rented premises or to the property of which the rented premises form a part, without the consent of the other party, or, in the case of a landlord, unless a key is made available forthwith to the tenant.

(2) Subsection (1) does not apply to the installation by a tenant of a security device which is capable of being put into effect only while a person is inside the rented premises and which can be installed and removed without damage to the property.

(3) A landlord or tenant who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.

Transfer of Interests

11. (1) A tenant has the right to assign or sublet.

(2) If the tenancy agreement so provides, the right is subject to the landlord's consent, but the landlord shall not withhold his consent arbitrarily or unreasonably.

(3) Unless a contrary intention is expressed in the tenancy agreement a provision requiring the landlord's consent to an assignment applies to a subsequent assignment or subletting.

(4) If the landlord does not answer a request for his consent to an assignment or subletting within 15 days from the date of the request, he is deemed to have consented to the assignment or subletting.

(5) Notwithstanding subsection (2) a landlord may withhold his consent if

(a) the premises are by law available to tenants with special qualifications, and

(b) the assignee or subtenant does not have the special qualifications.

12. (1) Except as provided in section 40 a subsequent owner of property subject to a tenancy, while he remains owner of the property, has all the rights and is subject to all the obligations of the landlord relating to the tenancy.

(2) An assignee of the interest of the tenant, while he continues to hold the interest, has all the rights and is subject to all the obligations of the tenant relating to the tenancy.

(3) This section is subject to the Land Titles Act.

Preservation of Existing Remedies

13. Unless otherwise provided this Act does not affect

(1) a remedy to which a landlord or tenant is entitled, or

(2) the power of a court to grant relief.

Tenant's Remedies

14. (1) If a landlord's breach of obligation under the tenancy agreement or under this Act deprives the tenant of a substantial part of the benefit of the tenancy agreement the tenant may

(a) treat the tenancy agreement as terminated and vacate the rented premises, or

(b) proceed under subsection (2).

(2) The tenant may give the landlord a notice in writing

(a) specifying the breach; and

(b) notifying the landlord that the tenancy agreement will terminate 14 days after the giving of the notice unless within that time the landlord files and serves a notice of application to the court for an order setting aside the notice.

(3) The court shall set aside the notice unless it is satisfied that a breach described in subsection (1) has occurred.

(4) If the landlord does not apply, it shall be conclusively deemed that there was a breach described in subsection (1) and the tenancy is terminated.

(5) If a tenancy is terminated under this section

(a) rent is payable to the date of termination, and no longer, at the rate provided in the tenancy agreement, with pro rata provision for a fractional rental period; and

(b) each party is entitled to enforce all rights which accrue to the time of termination, and

(c) the tenant is entitled to damages for the loss of the benefit of the agreement over the balance of the unexpired term.

15. (1) If a landlord commits a breach of an obligation under a tenancy agreement or this Act, the tenant may by notice apply for any one or more of the following remedies

(a) damages suffered by reason of the breach,

(b) abatement of rent to the extent that the breach deprives the tenant of the benefit of the tenancy agreement, and

(c) judgment for the cost of making good the landlord's default.

(2) The court may

(a) make an order or give a judgment applied for under subsection (1),

(b) direct that the tenant pay into court, pending and after disposition of the application, such amounts of future rent, if any, as the court deems appropriate to secure enforcement of any order granted under subsection (1), and

(c) direct that any amount of rent paid into court be disbursed, as appropriate,

(i) to the tenant as damages,

(ii) to the landlord, the tenant or a third party, for costs reasonably incurred in making good the landlord's default, and

(iii) to the landlord any remaining sums.

(3) The court may refuse to permit the tenant to pay future rent into court upon being satisfied that

(a) there was no breach, or

(b) the breach

(i) was not significant,

(ii) was beyond the landlord's reasonable control, or

(iii) was expressly or impliedly waived by the tenant.

Landlord's Remedies

16. (1) If a tenant, by abandonment of the rented premises or otherwise, gives the landlord reasonable grounds to believe that the tenant has repudiated the tenancy agreement, the landlord may either

(a) accept the repudiation as a termination of the tenancy, or

(b) refuse to accept the repudiation and continue the tenancy.

(2) A landlord who proceeds under subsection (1)(a)

(a) may recover any rent accrued, and damages suffered by reason of the breach of other obligations of the tenant, to the date of termination of the tenancy,

(b) may recover damages for the loss of the benefit of the tenancy agreement

(i) if for a fixed term tenancy, over the unexpired period of the tenancy agreement, or

(ii) if for a periodic tenancy, until the earliest date the tenant could have terminated the tenancy if his acts of repudiation had constituted a proper notice of termination,

and

(c) is subject to a duty to take reasonable steps to mitigate his damages.

(3) A landlord who proceeds under subsection (1)(b)

(a) may enforce the tenancy agreement, but

(b) is subject to a duty to take reasonable steps to rent the premises on behalf of the tenant to mitigate the tenant's liability for rent under the tenancy agreement.

17. (1) If a tenant commits a substantial breach of obligation under a tenancy agreement or under the Act, the landlord may give the tenant notice that the tenancy will terminate 14 days after the date of giving of notice unless within the said period of 14 days the tenant serves on the landlord a notice of objection to the termination.

(2) A notice under subsection (1) shall give particulars of the alleged breach.

(3) Without restricting the generality of subsection (1), "substantial breach" for the purposes of this section includes

(a) a failure to pay rent,

(b) doing or permitting substantial damage to the rented premises or common areas,

(c) performing illegal acts, or carrying on an illegal trade, business, occupation or calling, in the rented premises or common areas,

(d) a breach which creates a danger to person or property,

(e) a breach which causes undue interference with the rights of the landlord or other tenants,

(f) a series of breaches the cumulative effect of which is substantial.

(4) If the breach is a default in payment of rent, and if the tenant pays the arrears of rent within the said period of 14 days, the notice is ineffective whether or not the landlord applies under subsection (6).

(5) Except as provided in subsection (4) the tenancy shall terminate in accordance with the landlord's notice unless the tenant serves a notice of objection under subsection (1).

(6) The landlord may

(a) instead of serving a notice under subsection (1), or

(b) if the tenant serves a notice of objection under subsection (1)

apply to the court for an order terminating the tenancy agreement.

(7) Upon an application by a landlord under subsection (6) the court

(a) if satisfied that the tenant has committed a substantial breach of obligation under the tenancy agreement or under this Act, shall make an order terminating the tenancy agreement, or

(b) if not so satisfied, shall deny the application.

(8) If a tenancy agreement is terminated under this section

(a) rent accrued before the date of termination is payable, and

(b) the rights of the parties shall be determined as in the case of any other termination of a tenancy agreement.

Frustration

18. (1) A tenancy agreement is frustrated if

(a) the rented premises are destroyed, or

(b) the rented premises, the common areas, or the property of which they form a part, are damaged to such an extent that

(i) a reasonable landlord would not repair the damaged property, or

(ii) a reasonable tenant would not be willing to remain as tenant.

(2) The Frustrated Contracts Act applies to a tenancy agreement which is frustrated.

Overholding Tenant

19. While an overholding tenant remains in possession of premises after the termination of the tenancy, neither the landlord nor a new tenant is entitled to obtain possession except by consent or under order of a court.

Failure to Give Possession

20. (1) Where a tenant overholds after the termination of a tenancy, the landlord has a right to recover from such tenant

(a) compensation for use and occupation by the overholding tenant,

(b) damages suffered by the landlord as a consequence of the overholding, including, but not limited to, indemnification for damages, general and special, for which the landlord is liable to a new tenant, which could reasonably have been foreseen by the overholding tenant as a consequence of the overholding.

(2) Where a landlord breaches his covenant to give a tenant possession of the rented premises at the commencement of the term, the tenant has the following rights against the landlord

(a) to repudiate the tenancy agreement,

(b) to recover damages, general and special, which could reasonably have been foreseen by the landlord as a consequence of the breach, and

(c) to obtain specific performance of the covenant for possession in the discretion of the court.

(3) Where a tenant is unable to obtain possession of rented premises because they are wrongfully occupied by another, the tenant has a right to recover from the wrongful occupant

(a) possession of the premises,

(b) damages, general and special, which could reasonably have been foreseen by the wrongful occupant as a consequence of the occupation.

(4) The doctrine of interesse termini is abolished.

Obtaining Possession

21. (1) Where a tenant, after his tenancy has expired or has been terminated, does not go out of possession of the premises held by him, the landlord may apply by originating notice of motion to the Supreme Court for an order for possession.

(2) The originating notice shall be served at least three days before the day named in the notice for hearing of the application.

(3) The application of the landlord shall be supported by an affidavit

(a) setting forth the terms of the tenancy,

(b) proving the expiration or termination of the tenancy,

(c) stating the failure of the tenant to deliver up possession and the reasons given for the failure, if any were given, and

(d) stating any other relevant facts.

22. (1) The originating notice of motion of the landlord may also include

(a) a claim for arrears of rent,

(b) a claim for compensation for use and occupation of the premises by the tenant after the expiration or termination of the tenancy, and

(c) a claim for damages.

(2) Where a claim is made under subsection (1) the affidavit in support of the motion shall also show

(a) where a claim is made for rent, the amount of rent in arrear and the time during which it has been in arrear,

(b) where a claim is made for compensation, particulars of the use made of the premises after the expiration or termination of the tenancy, so far as is known, and

(c) where a claim is made for damages, particulars thereof.

23. (1) Upon hearing the motion, or where it is opposed, upon hearing and considering, in a summary way, the oral and affidavit evidence of the parties and their witnesses, the court may

(a) if it is satisfied that the tenancy has expired, give an order for possession,

(b) where a claim for rent is made, give judgment for the amount of rent proven to be in arrears,

(c) where a claim for compensation for use and occupation or for damages is made give judgment in such amount as the court may determine, having regard in the case of a claim for compensation for use and occupation to the nature of the use and occupation and the rent payable during the tenancy, and

(d) make such order as to costs as it thinks just.

(2) The court may grant or dismiss the application in whole or in part and may direct the trial of an issue to determine any matter in dispute.

(Note: If the Temporary Rent Regulation Measures Act is continued references should be made to it in this section as is done in section 12 (1.1) of the Landlord and Tenant Act as amended by section 42 of S.A. 1975, c. 84).

24. (1) An order under section 23 granting possession

(a) shall direct the tenant to deliver up possession of the premises to the landlord by a specified date or within a specified time after service of the order on the tenant, and

(b) shall state that if the order is not obeyed by the specified date or within the specified time a writ of possession will issue without any further order.

(2) The order may be served in the same manner as a notice may be served on a tenant pursuant to section 45.

25. Where the order is not obeyed by the specified date or within the specified time, the landlord is entitled, without any further order, to be issued a writ of possession on filing an affidavit showing service of the order and that it has not been obeyed.

26. Proceedings in respect of a claim for arrears of rent or compensation may continue to judgment notwithstanding that the tenant delivers up possession of or vacates the premises after service upon him of the originating notice of motion.

27. Where an application is made in which the Provincial Court has power to grant an order for possession as provided in section 42, the landlord, instead of proceeding under sections 21 to 27, may apply to the Provincial Court in accordance with the rules and practice of the court for an order for possession, compensation for use and occupation, and damages flowing from the tenant's refusal to give possession.

Termination of Tenancies

28. (1) A weekly or monthly or year-to-year tenancy may be terminated by either the landlord or the tenant upon notice to the other and, the notice

(a) shall meet the requirements of section 29,

(b) shall be given in the manner prescribed by section 45, and

(c) shall be given in sufficient time to give the period of notice required by section 30, 31, or 32, as the case may be.

(2) Any other kind of tenancy determinable on notice may, be terminated as provided by sections 29 and 45.

29. (1) A landlord or a tenant shall give notice in writing.

(2) A notice in writing

(a) shall be signed by the person giving the notice, or his agent,

(b) shall identify the premises in respect of which the notice is given, and

(c) shall state the date on which the tenancy is to terminate or that the tenancy is to terminate on the last day of the period of tenancy next following the giving of the notice.

(3) A notice may state both

(a) the date on which the tenancy is to terminate, and

(b) that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice,

and if it does state both and the date on which the tenancy is to terminate is incorrectly stated, the notice is nevertheless effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.

(4) A notice need not be in any particular form, but a notice by a landlord to a tenant may be in Form A of the Schedule and a notice by a tenant to a landlord may be in Form B of the Schedule.

30. (1) A notice to terminate a weekly tenancy shall be given on or before the last day of one week of the tenancy to be effective on the last day of the following week of the tenancy.

(2) For the purposes of this section, "week of the tenancy" means the weekly period on which the tenancy is based and not necessarily a calendar week and, unless otherwise specifically agreed upon, the week shall be deemed to begin on the day upon which rent is payable.

31. (1) A notice to terminate a monthly tenancy shall be given on or before the last day of one month of the tenancy to be effective on the last day of the following month of the tenancy.

(2) For the purposes of this section, "month of the tenancy" means the monthly period on which the tenancy is based and not necessarily a calendar month and, unless otherwise specifically agreed upon, the month shall be deemed to begin on the day upon which rent is payable.

32. (1) A notice to terminate a year-to-year tenancy shall be given on or before the 60th day before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy.

(2) For the purposes of this section, "year of the tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and unless otherwise agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

33. (1) In this section, "condominium plan" and "condominium unit" mean respectively a condominium plan and unit as defined in The Condominium Property Act.

(2) Where, after the commencement of a tenancy or residential premises,

(a) a condominium plan is registered or is proposed to be registered in the Land Titles Office and includes or is proposed to include those residential premises, and

(b) a notice of termination of that tenancy is given to the tenant for the purpose of obtaining vacant possession of the residential premises in order that the residential premises or any part thereof may be sold as a condominium unit or as part of a condominium unit,

the notice of termination is void unless it provides that the tenancy is to terminate as of a day not less than six months after the day on which the notice is given to the tenant.

(3) This section applies only to a notice of termination given on or after May 21, 1975.

34. Notwithstanding anything contained in this Act, where a periodic residential tenancy has been entered into because of the tenant's employment by the landlord, and the landlord terminates the employment, either the landlord or the tenant may terminate the tenancy by giving a one-week notice to the other which shall in all other respects meet the notice requirements of this Act.

Implied Tenancy

35. (1) The acceptance by a landlord of arrears of rent, or compensation for use and occupation of premises, after the expiration of a tenancy or after notice of termination of the tenancy has been given, does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree.

    (2) The burden of proof that the notice has been waived or that the tenancy has been reinstated or a new tenancy created is upon the person so claiming.

36. Where a periodic tenancy is implied by operation of law after the termination of a prior tenancy for a fixed term, the implied tenancy, in the absence of facts showing a contrary intention is,

    (1) where the prior tenancy was for a fixed term of one month or more, a tenancy from month to month, or

    (2) where the prior tenancy was for a fixed term of less than one month, a tenancy from week to week.

Security Deposits

37. A landlord shall not exact from a tenant

    (1) a security deposit exceeding one month's rent under the tenancy agreement, or

    (2) any sums of money totalling more than the security deposit permitted by subsection (1) and one month's rent in advance.

38. (1) A landlord holds each security deposit paid or given to him or his agent, or to anyone on his behalf, as trustee for the tenant but subject to the provisions of this Act and the tenancy agreement and any other agreement pertaining to it.

(2) Where the security deposit consists of money, the landlord may invest the money in investments authorized by The Trustee Act for the investment of trust funds.

(3) Subject to subsection (4), a landlord shall pay annually to the tenant interest on a security deposit consisting of money held by him or his agent or anyone on his behalf at the rate of 6 per cent per year.

(4) Where the security deposit consists of money, a tenant may notify his landlord in writing that he elects not to have the interest on the security deposit paid annually as provided in subsection (3) and in that case the interest shall be payable on the termination or expiration of the tenancy, unless otherwise agreed between the landlord and the tenant.

(5) The landlord is entitled to retain any interest and profit resulting from the investment of a security deposit in excess of the amount of interest payable under subsection (3) or (4).

(6) Where the landlord and the tenant agree that interest shall be payable under this section at a rate of interest higher than 6 per cent per year, subsections (3), (4) and (5) shall be deemed to refer to the higher rate.

39. (1) Where a landlord holds a security deposit, then, upon the expiry or termination of the tenancy,

(a) the landlord shall return the security deposit to the tenant within 10 days after the tenant delivered up possession of the premises,

(b) if all or part of the security deposit may be deducted in accordance with the conditions agreed to by the tenant, the landlord shall

(i) deliver a statement of account therefor, and

(ii) return the balance of the deposit, if any, to the tenant within 10 days after the tenant delivered up possession of the premises,

or

(c) if the landlord is entitled to make a deduction from the security deposit for repairs to the premises but is unable to determine the correct amount thereof within 10 days after the tenant delivers up possession of the premises, the landlord may make an estimate thereof, and in that case the landlord

(i) shall

(A) deliver an estimated statement of account, and

(B) return the estimated balance of the deposit, if any,

to the tenant within 10 days after the tenant delivered up possession of the premises, and

(ii) shall

(A) deliver a final statement of account, and

(B) return the final balance, if any,

to the tenant within 30 days after the tenant delivered up possession of the premises.

(2) A person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.

(3) Where a landlord fails to return all or part of a security deposit to a tenant in accordance with subsection (1), then, whether or not a statement of account was delivered to the tenant, the tenant may take proceedings under The Small Claims Act to recover the whole of the deposit or that part of the deposit to which the tenant

claims to be entitled, if the amount claimed is within the monetary jurisdiction of the court.

(4) In proceedings taken under subsection (3) the magistrate or judge

(a) shall determine the amounts, if any, which the landlord is entitled to deduct from the security deposit in accordance with the conditions agreed to by the tenant, and

(b) where the deductions so determined are less than the amount of the deposit, shall give judgment in favour of the tenant for the balance.

(5) In this section, "security deposit" includes any amounts owing to the tenant as interest by virtue of section 38 at the time of termination or expiration of the tenancy.

40. (1) A person who becomes an owner of premises which are subject to a residential tenancy is subject to the obligations of the landlord with respect to a security deposit except as provided in subsections (2) and (3).

(2) A purchaser of the property is entitled

(a) to demand from the seller

(i) a statement of account certified by the seller of all security deposits held by the seller at the date of the sale and of the interest accrued to date on each, and

(ii) payment to the purchaser of all such security deposits and interest,

and

(b) to give to each residential tenant notice not less than 7 days before the completion of the sale of the statement of account of the tenant certified by the seller.

(3) A purchaser who has complied with subsection (2) is liable to the tenant only for the amount or amounts stated in the statement of account.

(4) Upon paying a security deposit and interest to the purchaser under this section the seller is discharged from all further liability for the amount so paid.

Abandoned Goods

41. (1) In this Act, "abandoned goods" means goods left on residential premises by a tenant who has

(a) abandoned the premises in breach of the tenancy agreement, or

(b) gone out of possession of the premises upon termination of the tenancy agreement.

(2) A landlord who believes on reasonable grounds that abandoned goods have a market value of less than $200 may dispose of the goods in any manner he chooses.

(3) If subsection (2) does not apply, a landlord who on reasonable grounds believes

(a) that the storage of the goods would be unsanitary or unsafe or would rapidly result in total or substantial depreciation in their market value, or

(b) that the cost of removing, storing and selling the goods would exceed the proceeds of the sale,

may sell the goods by a means and for a price which he believes reasonable.

(4) If neither subsection (2) nor subsection (3) applies, the landlord

(a) shall store or arrange for storage of the goods on behalf of the tenant until the expiration of a period of 60 days after the date of abandonment, and

(b) thereafter may dispose of the goods by public auction.

(5) A landlord may apply to the Provincial Court for directions as to the disposition of the goods remaining on the premises and upon such application the court may make any order which appears appropriate in the circumstances.

(6) The landlord shall, upon payment of his proper costs of removing and storing the goods, deliver the goods to the tenant or an encumbrancer claiming them.

(7) The landlord may apply the proceeds of the sale

(a) upon his reasonable costs of removing storing and selling the goods, and

(b) upon any judgment obtained by him against the tenant in connection with the tenancy.

(8) The landlord shall pay the balance of any proceeds of sale to the Provincial Treasurer who shall retain the same for one year on behalf of the tenant and thereafter, if the tenant has not claimed the same, pay the same into the general revenue of the Province, following which payment the claim of the tenant shall be extinguished.

(9) This section does not apply if the landlord and the tenant agree to the contrary.

(10) This section does not apply to goods and chattels on premises against which the Sheriff executes a writ of possession.

Courts

42. (1) Except as otherwise provided, the Supreme Court, the District Court, and the Provincial Court are courts of competent jurisdiction for the purposes of this Act.

(2) Notwithstanding subsection (1), the Provincial Court does not have jurisdiction

(a) to give judgment for debt or damages under this Act or a tenancy agreement in excess of the amount prescribed by the Small Claims Act,

(b) to grant equitable remedies, or

(c) to grant an order for possession except in a case in which a tenant who has been denied possession of rented premises at the inception of the tenancy brings proceedings for damages and possession.

(3) The Lieutenant Governor in Council may make rules of court for the Provincial Court for disputes between landlords and tenants.

(4) Where it appears in an action or proceeding brought in the Provincial Court under this Act or a tenancy agreement that a question raised therein could for any reason be dealt with more conveniently in the Supreme Court or in the District Court, the judge of the Provincial Court or a judge of the Supreme Court or the District Court may order the action or proceeding to be transferred to the Supreme Court or the District Court.

(5) The order to transfer may be made by the court or judge of his own accord, or upon the application of either party on notice to the other parties interested, and at any stage of the action or proceeding.

(6) When an order is made under subsection (1)

(a) the action or proceeding shall thereafter proceed in the Supreme Court, or District Court,

(b) the judges of the Supreme Court or District Court and the officers thereof have the same powers and shall perform the same duties in relation thereto as if the action or proceeding had been originally instituted in the Supreme Court or District Court as the case may be,

(c) the pleadings and proceedings taken in the court from which the action or proceeding was transferred stand and have effect notwithstanding the transfer, and

(d) subject to the rules of court and to any order in that behalf made by the court or judge, the costs of the proceedings so taken previous to the transfer shall be paid and the solicitor's costs taxed according to the scale of costs in the Provincial Court.

(7) Where an order transferring from the Provincial Court to the District Court or the Supreme Court is made at the instance of any of the parties thereto, the judge making the order may in his discretion make and impose on the party applying for the order terms with regard to payment of costs, or security for costs, or such other terms as he sees fit.

43. (1) An appeal lies from the Provincial Court to the District Court in a dispute arising under the proposed Act or a tenancy agreement.

(2) The provisions of sections 748 to 760 inclusive of the Criminal Code of Canada and the rules promulgated thereunder, and not the provisions of sections 33 to 44 inclusive of the Small Claims Act, apply with necessary changes to an appeal under subsection (1).

Landlord and Tenant Advisory Boards

44. (1) The council of a city, town, village, municipal district or county, or the board of administrators of a new town, may by by-law establish a Landlord and Tenant Advisory Board and provide for the remuneration of its members and any other matters pertaining to its procedures or incidental to the exercise of its functions.

(2) The functions of a Landlord and Tenant Advisory Board are

(a) to advise landlords and tenants in tenancy matters,

(b) to receive complaints and seek to mediate disputes between landlords and tenants,

(c) to disseminate information for the purpose of educating and advising landlords and tenants concerning rental practices, rights and remedies, and

(d) to receive and investigate complaints of conduct in contravention of legislation governing tenancies.

Service of Documents and Notices

45. (1) Except as otherwise provided, a notice or document shall be served or delivered personally or by registered mail.

(2) For service or delivery by registered mail

(a) a tenant's address is the address of the rented premises, and

(b) a landlord's address is the address where rent is payable.

(3) A landlord or a tenant may from time to time change his address for service or delivery by written notice served upon the other party.

(4) If a notice or document cannot be served or delivered personally by reason of the tenant's absence from the premises, or by reason of his evading service, service or delivery may be effected

(a) upon any adult person who apparently resides with the tenant, or

(b) by posting it in a conspicuous place upon some part of the premises.

(5) This section does not apply to service governed by the rules or practice of a court.

Contracting Out

46. Except as otherwise provided, this Act applies notwithstanding an agreement to the contrary.

Crown

47. The Crown in right of Alberta is bound by this Act.

Transitional Provisions

48. This Act

(1) applies to

(a) any tenancy agreement made after its commencement,

(b) a weekly or monthly tenancy agreement made before its commencement, and

(c) a yearly tenancy agreement made before its commencement, from and after the first anniversary of its commencement,

and

(2) does not apply to a tenancy agreement for a fixed term made before its commencement, but applies to a renewal of such a tenancy agreement made after its commencement.

Exclusion of Statutes

49. The following do not apply to residential tenancies:

(1) The Grantees of Reversion Act, 32 Hen. 8, c. 34 (Imp.),

(2) The Landlord and Tenant Act, 4 Geo. 2 c. 28 (Imp.),

(3) The Distress for Rent Act, 11 Geo. 2 c. 19, s. 18 (Imp.), and

(4) Sections 98 and 99 of the Land Titles Act.

LANDLORD AND TENANT ACT

SCHEDULE

FORM A

NOTICE TO TENANT

TO (Name of Tenant)

I hereby give you notice to deliver up possession of the premises . . . . . .
(identify the premises)
. . . . . .
which you hold of me as tenant, on the . . . . . day of . . . . . next, or on the last day of the period of your tenancy next following the giving of this notice.

Dated this . . . . . day of . . . . . 19. . .

. . . . . .
(Landlord)

LANDLORD AND TENANT ACT

SCHEDULE

FORM B

NOTICE TO LANDLORD

TO (Name of Landlord)

I hereby give you notice that I am giving up possession of the premises . . . . . .
(identify the premises)
. . . . . which I hold of you as tenant, on the . . . . . day of . . . . . next, or on the last day of the period of my tenancy next following the giving of this notice.

Dated this . . . . . day of . . . . . 19. . .

. . . . . .
(Tenant)

LANDLORD AND TENANT ACT

SCHEDULE

FORM C

INFORMATION FOR TENANT

IT IS IMPORTANT THAT ALL TENANTS READ THE FOLLOWING:

UNDER THE LANDLORD AND TENANT ACT:

A. You have the right to

1. receive a copy of the tenancy agreement;
2. premises in a good state of repair;
3. possession and peaceful enjoyment of the premises, subject to your landlord's right to enter in specified circumstances.
4. assign or sublet, though your landlord's consent may be needed if your tenancy agreement says so;
5. an abatement of rent by court order if the landlord does not perform his obligations;
6. terminate the tenancy for a very serious breach of your landlord's obligations;
7. receive back your security deposit and interest less any deductions made under the tenancy agreement.

B. You are obliged to

1. keep the premises clean;
2. refrain from disturbing the landlord or other tenants;
3. pay for wilful or careless damage caused by yourself, other occupants of the premises, and visitors;
4. notify the landlord of needed repairs and take reasonable emergency steps to prevent damage;

5. give notice of termination if your tenancy is periodic (that is, month to month, etc.);
6. vacate at the end of the tenancy;

C. Your landlord is not entitled to

1. evict you because you assert your legal rights;
   Note: If security of tenure is adopted, substitute the following:

   1. evict you without just cause as set forth in the Act.

2. increase the rent except on 90 days' notice;
   (Note that if you receive a notice of rent increase you must either accept it or terminate the tenancy).

FOR MORE COMPLETE INFORMATION:

1. obtain a copy of the Landlord and Tenant Act;
2. obtain legal advice;
3. consult your Landlord and Tenant Advisory Board if there is one in your area;
4. consult the nearest office of the Provincial Court if you wish to commence legal proceedings.

APPENDIX C

SECURITY OF TENURE

The plan which we have described may be summarized as follows:

(1) A periodic tenancy may only be terminated under the following procedures:

(a) Those provided by recommendation #20, except that

(i) if the landlord proceeds under subsection (1) of recommendation #20, his statement of the particulars of the alleged breach under subsection (2) of recommendation #20 is absolutely privileged in any action for defamation or injurious falsehood brought by the tenant, and

(ii) if the landlord proceeds under subsection (6) of recommendation #20, the landlord may establish proper cause for termination by proving that he has reasonable grounds for believing that the tenant committed a substantial breach of obligation under the tenancy agreement or under the proposed Act, and the tenant may rebut the landlord's cause by proving that he did not commit such a breach.

(b) Those applicable in the absence of security of tenure, but subject to the following additional provisions:

(i) The tenancy may only be terminated if

A. the tenant has committed a substantial breach of obligation under the tenancy agreement or under the proposed Act, or

B. the landlord requires possession of the building or the rented premises for the purpose of

(A) demolition;

(B) *occupation by himself, his spouse, or a child or parent of either, or by an employee;*

(C) *a proposed change of use, including conversion into condominium ownership;*

(D) *a bona fide sale of the property; or*

(E) *carrying out extensive repairs that make continued occupation by the tenant not feasible*

(ii) *The notice of termination must state the reasons which the landlord will rely on to justify the termination.*

(iii) *The tenant may apply to the court, within 14 days of receipt of the notice of termination, for an order setting aside the order of termination, which application shall be returnable not less than 10 days before the termination date stated in the notice of termination.*

(iv) *The court may extend any time specified in subsection (1)(b)(iii) upon such terms as it deems appropriate.*

(v) *The landlord may establish proper cause for termination under subsection (1)(b)(i)A. by proving that he had reasonable grounds for believing that the tenant committed such a breach, which cause may be rebutted by the tenant's proof that he did not commit such a breach.*

(vi) *The notice of termination is absolutely privileged in any action for defamation or injurious falsehood brought by the tenant.*

(2) (a) *Upon the expiration of a tenancy agreement for a fixed term the landlord and tenant would be deemed to have entered into a month to month tenancy agreement upon the same terms and conditions as are provided for in the expired tenancy, except for the term.*

(b) Subsection (1) would not apply if the landlord and tenant enter into a new agreement before the expiration of the term specified in the old tenancy agreement, or if either the landlord or the tenant gives to the other, not less than 30 days before the expiration date specified in the old tenancy agreement, notice that no new tenancy agreement is to be implied upon the expiration of the old tenancy agreement.

(c) The landlord's notice under subsection (2)(b), and the rights of the parties, are subject to all of the provisions of subsection (1)(b) applicable to termination by notice.

(3) (a) A landlord would be prohibited from

(i) increasing the rent payable under a tenancy agreement and from recovering any additional rent resulting from such an increase, or

(ii) changing any other term of the tenancy agreement and from enforcing any changed term,

unless he gives to the tenant a written notice of the increase in rent at least 90 days before the date on which the increase is to be effective.

(b) A tenant under a periodic tenancy who receives a notice under subsection (3) and who fails to give to the landlord notice of termination effective on or before the date of the rent increase, or other change in terms, would be deemed to have accepted the same.

(c) A landlord who gives a notice of termination of a periodic tenancy would not, for a period of 90 days after the date the notice is given, be entitled to demand or retain

(i) any rent for the premises in excess of that payable under the tenancy agreement at the time of the notice, or

(ii) any benefit arising from any other term in the tenancy agreement relating to the premises which is more favourable than the terms of the tenancy agreement in force at the date of the notice.

(d) A tenant who

(i) pays rent in excess of that permitted by subsections (3)(a) and (c) would be entitled to recover such excess rent from the landlord, or

(ii) confers a benefit not permitted by subsections (3)(a) and (c) would be entitled to recover compensation from the landlord for the value of the benefit.

(e) That subsection (3) not apply if the tenancy agreement provides for a period of notice longer than 90 days.

(4) The court could annul a rent increase or other change in terms imposed by the landlord for the purpose of evicting the tenant.

(5) The assignee of a tenant's rights would not have security of tenure as against the landlord unless the landlord has agreed to grant him security of tenure.

(6) These provisions would apply to tenancies in existence at the commencement of the proposed Act.

APPENDIX D

RECOMMENDATIONS NOT INCLUDED IN PROPOSED ACT

(1) That maintenance and establishment of Landlord and Tenant Advisory Boards be encouraged.

(2) That an official of the Department of Consumer and Corporate Affairs be designated to advise and assist the Landlord and Tenant Advisory Boards and to promote the adoption by them of uniform policies, having due regard to differences in local conditions.

(3) That the province make funding available to municipal bodies who establish and maintain Landlord and Tenant Advisory Boards.

(4) That officials on the staff of the Provincial Courts be given training in assisting landlords and tenants in following procedures involved in prosecution and defence of claims under the Landlord and Tenant Act.

APPENDIX E

1. THE LANDLORD AND TENANT ACT

(Note: This Act is reproduced from an office consolidation which includes amendments up to and including June 25, 1975. It is followed by the amendments made by the Temporary Rent Regulation Measures Act.)

Short title

1. This Act may be cited as *The Landlord and Tenant Act*. [R.S.A. 1970, c. 200, s. 1]

Mineral leases exempt

2. This Act does not apply to minerals held separately from the surface of land or any dealings in minerals. [R.S.A. 1970, c. 200, s. 2]

Termination of Tenancies

Notice of termination of tenancy

3. (1) A weekly or monthly or year-to-year tenancy may be terminated by either the landlord or the tenant upon notice to the other and, unless otherwise agreed upon, the notice

(*a*) shall meet the requirements of section 4,

(*b*) shall be given in the manner prescribed by section 5, and

(*c*) shall be given in sufficient time to give the period of notice required by section 6, 7 or 8, as the case may be.

(2) Any other kind of tenancy determinable on notice may, unless otherwise agreed upon, be terminated as provided by sections 4 and 5. [R.S.A. 1970, c. 200, s. 3]

Form of notice

4. (1) A landlord or a tenant may give notice either orally or in writing, but a notice by a landlord to a tenant is not enforceable under sections 10 to 15 unless it is in writing.

(2) A notice in writing

(*a*) shall be signed by the person giving the notice, or his agent,

(*b*) shall identify the premises in respect of which the notice is given, and

(*c*) shall state the date on which the tenancy is to terminate or that the tenancy is to terminate on the last day of the period of tenancy next following the giving of the notice.

(3) A notice may state both

(*a*) the date on which the tenancy is to terminate, and

(*b*) that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice,

and if it does state both and the date on which the tenancy is to terminate is incorrectly stated, the notice is neverthe-

less effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.

(4) A notice need not be in any particular form, but a notice by a landlord to a tenant may be in Form A of the Schedule and a notice by a tenant to a landlord may be in Form B of the Schedule. [R.S.A. 1970, c. 200, s. 4]

Manner of giving notice

5. (1) Notice by a tenant to a landlord may be given personally to the landlord, or his agent, or may be sent to him by ordinary mail at the address where the rent is payable.

(2) Except as provided in this section, a notice by a landlord to a tenant shall be given personally to the tenant.

(3) Where the tenant cannot be given notice by reason of his absence from the premises, or by reason of his evading service, the notice may be given to the tenant,

(*a*) by giving it to any adult person who apparently resides with the tenant, or

(*b*) by posting it up in a conspicuous place upon some part of the premises, or

(*c*) by sending it by registered mail to the tenant at the address where he resides.

(4) Notwithstanding anything in this section, a notice to a corporation may be given in the manner permitted under section 289 of *The Companies Act*.

[R.S.A. 1970, c. 200, s. 5]

Notice to terminate weekly tenancy

6. (1) A notice to terminate a weekly tenancy shall be given on or before the last day of one week of tenancy to be effective on the last day of the following week of the tenancy.

(2) For the purposes of this section, "week of the tenancy" means the weekly period on which the tenancy is based and not necessarily a calendar week and, unless otherwise specifically agreed upon, the week shall be deemed to begin on the day upon which rent is payable.

[R.S.A. 1970, c. 200, s. 6]

Notice to terminate monthly tenancy

7. (1) A notice to terminate a monthly tenancy shall be given on or before the last day of one month of the tenancy to be effective on the last day of the following month of the tenancy.

(2) For the purposes of this section, "month of the tenancy" means the monthly period on which the tenancy is based and not necessarily a calendar month and, unless otherwise specifically agreed upon the month shall be deemed to begin on the day upon which rent is payable.

[R.S.A. 1970, c. 200, s. 7]

Notice to terminate yearly tenancy

8. (1) A notice to terminate a year-to-year tenancy shall be given on or before the 60th day before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy.

(2) For the purposes of this section, "year of the tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and unless otherwise agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

[R.S.A. 1970, c. 200, s. 8]

Compensation when premises not vacated

9. (1) A landlord is entitled to compensation for the use and occupation of premises after the tenancy has expired or been terminated and the acceptance by a landlord of arrears of rent or compensation after the expiration of the tenancy or after notice of termination of a tenancy has been given does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree.

(2) The burden of proof that the notice has been waived or the tenancy has been reinstated or a new tenancy created is upon the person so claiming.

(3) A landlord's claim for arrears of rent or compensation for use and occupation by a tenant after the expiration or termination of the tenancy may be enforced by action or as provided in section 11. [R.S.A. 1970, c. 200, s. 9]

Application for order for possession

10. (1) Where a tenant, after his tenancy has expired or has been terminated, does not go out of possession of the premises held by him, the landlord may apply by originating notice of motion to the Supreme Court for an order for possession.

(2) The originating notice shall be served at least three days before the day named in the notice for hearing of the application.

(3) The application of the landlord shall be supported by an affidavit

(*a*) setting forth the terms of the tenancy,

(*b*) proving the expiration or termination of the tenancy,

(*c*) stating the failure of the tenant to deliver up possession and the reasons given for the failure, if any were given, and

(*d*) stating any other relevant facts.

[R.S.A. 1970, c. 200, s. 10]

Claim for arrears in rent and compensation

11. (1) The originating notice of motion of the landlord may also include a claim for arrears of rent and for compensation for use and occupation of the premises by the tenant after the expiration or termination of the tenancy.

(2) Where a claim is made under subsection (1) the affidavit in support of the motion shall also show

(*a*) where a claim is made for rent, the amount of rent in arrear and the time during which it has been in arrear, and

(*b*) where a claim is made for compensation, particulars of the use made of the premises after the expiration or termination of the tenancy, so far as is known. [R.S.A. 1970, c. 200, s. 11]

Hearing of application

12. (1) Upon hearing the motion, or, where it is opposed, upon hearing and considering, in a summary way, the oral and affidavit evidence of the parties and their witnesses, the Court may

(*a*) if he is satisfied that the tenancy has expired or has been terminated, give an order for possession,

(*b*) where a claim for rent is made, give judgment for the amount of rent proven to him to be in arrear,

(*c*) where a claim for compensation is made, give judgment in such amount as the Court may determine as compensation for the use and occupation of the premises after the expiration or termination of the tenancy, having regard to the nature of the use and occupation and the rent payable during the tenancy, and

(*d*) make such order as to costs as he thinks just.

(2) The Court may grant or dismiss the application in whole or in part and may direct the trial of an issue to determine any matter in dispute.

[R.S.A. 1970, c. 200, s. 12]

Terms of order for possession

13. (1) An order under section 12 granting possession

(*a*) shall direct the tenant to deliver up possession of the premises to the landlord by a specified date or within a specified time after service of the order on the tenant, and

(*b*) shall state that if the order is not obeyed by the specified date or within the specified time a writ of possession will issue without any further order.

(2) The order may be served in the same manner as a notice may be served on a tenant pursuant to section 5.

[R.S.A. 1970, c. 200, s. 13]

Writ of possession

14. Where the order is not obeyed by the specified date or within the specified time, the landlord is entitled, without any further order, to be issued a writ of possession on filing an affidavit showing service of the order and that it has not been obeyed. [R.S.A. 1970, c. 200, s. 14]

Proceedings after tenant vacates

15. Proceedings in respect of a claim for arrears of rent or compensation may continue to judgment notwithstanding that the tenant delivers up possession of or vacates the premises after service upon him of the originating notice of motion. [R.S.A. 1970, c. 200, s. 15]

Tenancies of Residential Premises

Tenancies of residential premises

16. (1) In this section and sections 17 to 22,

(*a*) "residential premises" means

(i) premises used for residential purposes, or

(ii) land leased as a site for a mobile home used for residential purposes, whether or not the landlord also leases that mobile home to the tenant,

but does not include premises occupied for business purposes with living accommodation attached and leased under a single lease;

(*b*) "security deposit" means money or any property or right paid or given by a tenant of residential premises to a landlord or his agent or to anyone on his behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition;

(*c*) "tenancy agreement" means an agreement between a landlord and a tenant for possession of residential premises, whether written, oral or implied.

(2) The provisions of sections 3 to 15 in so far as they apply to tenancies of residential premises are subject to this section and sections 17 to 22.

(3) Sections 17 to 22 apply only to tenancies of residential premises and tenancy agreements notwithstanding any other Act and notwithstanding any agreement or waiver to the contrary except as is specifically provided in sections 17 to 22. [R.S.A. 1970, c. 200, s. 16; 1971, c. 59, s. 2]

Tenancy agreements

17. (1) Where a tenancy agreement in writing is executed by a tenant, the landlord shall ensure that a fully executed duplicate original copy of the tenancy agreement is delivered to the tenant within 21 days after its execution and delivery by the tenant.

(2) Where the copy of the tenancy agreement is not delivered in accordance with subsection (1), the obligations of the tenant thereunder cease until such copy is delivered to him. [R.S.A. 1970, c. 200, s. 17]

Security deposit

18. (1) A landlord holds each security deposit paid or given to him or his agent, or to anyone on his behalf, as trustee for the tenant but subject to the provisions of this Act and the tenancy agreement and any other agreement pertaining to it.

(2) Where the security deposit consists of money, the landlord may invest the money in investments authorized by *The Trustee Act* for the investment of trust funds.

(3) Subject to subsection (4), a landlord shall pay annually to the tenant interest on a security deposit consisting of money held by him or his agent or anyone on his behalf at the rate of 6 per cent per year.

(4) Where the security deposit consists of money, a tenant may notify his landlord in writing that he elects not to have the interest on the security deposit paid annually as provided in subsection (3) and in that case the interest shall be payable on the termination or expiration of the tenancy, unless otherwise agreed between the landlord and the tenant.

(5) The landlord is entitled to retain any interest and profit resulting from the investment of a security deposit in excess of the amount of interest payable under subsection (3) or (4).

(6) Where the landlord and the tenant agree that interest shall be payable under this section at a rate of interest higher than 6 per cent per year, subsections (3), (4) and (5) shall be deemed to refer to the higher rate.

(7) This section applies to security deposits paid or given before, on or after July 1, 1970.

[R.S.A. 1970, c. 200, s. 18]

Return of security deposit

19. (1) Where a landlord holds a security deposit, then, upon the expiry or termination of the tenancy,

(*a*) the landlord shall return the security deposit to the tenant within 10 days after the tenant delivered up possession of the premises, or

(*b*) if all or part of the security deposit may be deducted in accordance with the conditions agreed to by the tenant, the landlord shall

(i) deliver a statement of account therefor, and

(ii) return the balance of the deposit, if any, to the tenant within 10 days after the tenant delivered up possession of the premises,

or

(*c*) if the landlord is entitled to make a deduction from the security deposit for repairs to the premises but is unable to determine the correct amount thereof within 10 days after the tenant delivers up possession of the premises, the landlord may make an estimate thereof, and in that case the landlord

(i) shall

(A) deliver an estimated statement of account, and

(B) return the estimated balance of the deposit, if any,

to the tenant within 10 days after the tenant delivered up possession of the premises, and

(ii) shall

(A) deliver a final statement of account, and

(B) return the final balance, if any,

to the tenant within 30 days after the tenant delivered up possession of the premises.

(2) A person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100.

(3) Where a landlord fails to return all or part of a security deposit to a tenant in accordance with subsection (1), then, whether or not a statement of account was delivered to the tenant, the tenant may take proceedings under *The Small Claims Act* to recover the whole of the deposit or that part of the deposit to which the tenant claims to be entitled, if the amount claimed is within the monetary jurisdiction of the court.

(4) In proceedings taken under subsection (3) the magistrate or judge

(*a*) shall determine the amounts, if any, which the landlord is entitled to deduct from the security deposit in accordance with the conditions agreed to by the tenant, and

(*b*) where the deductions so determined are less than the amount of the deposit, shall give judgment in favour of the tenant for the balance.

(5) In this section, "security deposit" includes any amounts owing to the tenant as interest by virtue of section 18 at the time of termination or expiration of the tenancy. [R.S.A. 1970, c. 200, s. 19]

Entry to premises

20. Except in cases of emergency and except where the landlord has a right to show the premises to prospective tenants at reasonable hours after notice of termination of the tenancy has been given, the landlord shall not exercise a right to enter the rented premises unless he has first given written notice to the tenant at least 24 hours before

the time of entry, and the time of entry shall be during daylight hours and specified in the notice, except that nothing in this section shall be construed to prohibit entry with the consent of the tenant given at the time of entry.

[R.S.A. 1970, c. 200, s. 20]

Notice of increase in rent

21. (1) A landlord shall not increase the rent payable under a tenancy agreement, or be entitled to recover any additional rent resulting from such an increase, unless he gives to the tenant a written notice of the increase in rent at least 90 days before the date on which the increase is to be effective.

(2) Subsection (1) does not apply where the tenancy agreement provides for a period of notice longer than 90 days before the increase in rent is effective.

(3) Any notice of termination of a tenancy of residential premises given by a landlord to a tenant is void if the landlord, either before or after giving the notice, initiates negotiations with that tenant towards an agreement to increase the tenant's rent effective as of a date prior to the expiration of 90 days from the date of giving the notice of termination.

(4) Subsection (3) applies only to a notice of termination given on or after November 1, 1974.

[R.S.A. 1970, c. 200, s. 21; 1974, c. 73, s. 2]

Notice of termination re condominium units

21.1 (1) In this section, "condominium plan" and "condominium unit" mean respectively a condominium plan and unit as defined in *The Condominium Property Act*.

(2) Where, after the commencement of a tenancy or residential premises,

(a) a condominium plan is registered or is proposed to be registered in the Land Titles Office and includes or is proposed to include those residential premises, and

(b) a notice of termination of that tenancy is given to the tenant for the purpose of obtaining vacant possession of the residential premises in order that the residential premises or any part thereof may be sold as a condominium unit or as part of a condominium unit,

the notice of termination is void unless it provides that the tenancy is to terminate as of a day not less than six months after the day on which the notice is given to the tenant.

(3) This section applies only to a notice of termination given on or after May 21, 1975.

Landlord and Tenant Advisory Board

22. (1) The council of a city, town, village, municipal district or county, or the board of administrators of a new town, may by by-law establish a Landlord and Tenant Advisory Board and provide for the remuneration of its members and any other matters pertaining to its procedures or incidental to the exercise of its functions.

(2) The functions of a Landlord and Tenant Advisory Board are

(*a*) to advise landlords and tenants in tenancy matters,

(*b*) to receive complaints and seek to mediate disputes between landlords and tenants,

(*c*) to disseminate information for the purpose of educating and advising landlords and tenants concerning rental practices, rights and remedies, and

(*d*) to receive and investigate complaints of conduct in contravention of legislation governing tenancies.

[R.S.A. 1970, c. 200, s. 22]

Regulations

Regulations

23. The Lieutenant Governor in Council may make regulations for the purpose of carrying out the intent of this Act and, without restricting the generality of the foregoing, may

(*a*) prescribe forms to be used in proceedings under this Act, and

(*b*) prescribe a tariff of court fees and solicitors' costs in connection with proceedings under this Act.

[R.S.A. 1970, c. 200, s. 23]

SCHEDULE

FORM A

NOTICE TO TENANT

TO (Name of Tenant)

I hereby give you notice to deliver up possession of the premises ..... which you hold
(*identify the premises*)
of me as tenant, on the ..... day of ..... next, or on the last day of the period of your tenancy next following the giving of this notice.

Dated this ..... day of ..... 19....

.....
(*Landlord*)

[R.S.A. 1970, c. 200, Sched. Form A]

FORM B

NOTICE TO LANDLORD

TO (Name of Landlord)

I hereby give you notice that I am giving up possession of the premises ..... which I hold
(*identify the premises*)
of you as tenant, on the ..... day of ..... next, or on the last day of the period of my tenancy next following the giving of this notice.

Dated this ..... day of ..... 19....

.....
(*Tenant*)

[R.S.A. 1970, c. 200, Sched. Form B]

2. AMENDMENT TO THE LANDLORD AND TENANT ACT

(*Note: This amendment is reproduced from The Temporary Rent Regulation Measures Act, S.A. 1975, c. 84.*)

R.S.A. 1970, c. 200

42. *The Landlord and Tenant Act is hereby amended*

(a) as to section 10, subsection (3)

(i) by striking out the word "and" *at the end of clause (c), and*

(ii) by striking out clause (d) and substituting the following clauses:

(d) stating the reasons for the termination of the tenancy, and

(e) stating any other relevant facts.

(b) as to section 12, subsection (1)

(i) by striking out clause (a) and substituting the following clauses:

(a) if he is satisfied that the tenancy has expired, give an order for possession,

(a1) if he is satisfied that the tenancy has been terminated for a reason other than that the tenant has

(i) made any application or filed any statement under *The Temporary Rent Regulation Measures Act*, or

(ii) made any complaint, assisted in any investigation or inquiry or given any evidence at a hearing under *The Temporary Rent Regulation Measures Act*,

give an order for possession,

and

(ii) by adding the following subsection after subsection (1):

(1.1) Where it appears to a judge that a landlord has terminated a tenancy for more than one reason and the judge considers that the principal reason was that the tenant had

(a) made any application or filed any statement under *The Temporary Rent Regulations Measures Act*, or

(b) made any complaint, assisted in any investigation or inquiry or given any evidence at a hearing under *The Temporary Rent Regulation Measures Act*,

the judge shall make an order declaring the notice of termination void.

and

(c) section 21 is amended by adding the following subsection after subsection (4):

(5) Notwithstanding anything in this section, any increase in rent or notice of increase in rent is subject to *The Temporary Rent Regulation Measures Act.*

APPENDIX F

THE JUDICATURE ACT

Execution of writ of possession

36.1 (1) For the purpose of executing a writ of possession respecting any premises, it is not necessary to remove any goods or chattels from the premises.

(2) Where the sheriff in his discretion removes and stores any goods in executing a writ of possession, the party at whose suit or instance the writ is issued and the solicitors who issue it, are severally liable to pay to the sheriff his taxable costs, including transportation and storage costs, for executing the writ.

(3) Where goods have been stored under subsection (2), the owner may, upon the written authorization of the sheriff, obtain the goods from storage upon

(a) paying to the sheriff the costs, including transportation and storage, paid by the sheriff or the person on whose behalf the writ was executed, and

(b) paying to the warehouseman any further outstanding storage charges.

(4) In the event that the owner does not redeem the goods within 30 days after they have been placed in storage, the person on whose behalf the writ was executed may apply by originating notice of motion to the court which issued the writ for an order directing that the goods be sold.

(5) The court may direct that the goods be sold either by the sheriff or by the applicant, and by public auction or private sale, as he considers appropriate in the circumstances.

(6) The proceeds of the sale shall be applied

(a) firstly, to the costs of the sale, and

(b) secondly, to payment of storage, transportation and other costs incurred in removing and storing the goods and making the application for the order for sale.

(7) Where the sale is effected by a person other than a sheriff, that person

(a) shall within 30 days after the sale file with the sheriff a statutory declaration setting out

(i) the particulars of the sale,

(ii) the amount realized by the sale, and

(iii) the necessary and proper disbursements and fees in connection with the sale, which shall not exceed those which the sheriff would have been entitled to charge if the sale had been effected by the sheriff,

and

(b) shall pay the balance, if any, to the sheriff on behalf of the former owner of the goods.

(8) Where the sheriff comes into possession of the balance of the sale price, either pursuant to subsection (6) or upon the conclusion of the sale effected by him, he shall deliver that balance to the persons lawfully entitled thereto.

(9) In the event that goods are not removed by the sheriff in executing a writ of possession and the owner thereof does not within 30 days after the writ has been executed remove the goods, the person on whose behalf the writ was executed may apply by originating notice of motion to the court which issued the writ for directions as to the disposition of the goods remaining on the premises and upon such application the judge may make any order which appears appropriate in the circumstances.

(10) If it is made to appear to the court in an application under subsection (4) or (9) that it is not practicable to serve a notice required to be given by this section on any person, either personally or by registered mail, the court may, on an application ex parte by or on behalf of the applicant, make any order for substituted or other service or for the substitution for service of notice by letter, public advertisement or otherwise, or may dispense with service.

APPENDIX G

SUBMISSIONS

I. Meetings and Interviews:

1. Alberta Branch, Canadian Bar Association, a committee designated by W.M. Mustard, Q.C., Vice-President for Alberta, and consisting of Messrs. T.D. Hetherington (Calgary); J.D. Karvellas (Edmonton); W.E. O'Leary (Calgary); and K.J. Purvis (Lethbridge).

2. Professor Burton Bass, Faculty of Law, University of Manitoba.

3. Calgary Tenants' Association.

4. His Honour Chief Judge Cawsey and His Honour Judge Spevakow (Provincial Court).

5. F.J. De Vrieze, Barrister and Solicitor, Winnipeg.

6. Edmonton Housing Association.

7. Housing and Urban Development Association, Calgary.

8. Mr. Ron Kolbus, Edmonton Housing Authority.

9. The Landlord and Tenant Advisory Boards of Alberta.

10. Mr. Allan Lefever, Barrister and Solicitor, Edmonton.

11. Lethbridge citizens convened by the Lethbridge Landlord and Tenant Advisory Board:

    Ms. Lee Arner
    Mr. Doug Bowen
    Mr. Pat Brown
    Mr. Mike Duchan
    Ms. Eunice Gordon
    Mr. Delbert Gough
    Mr. Darrel Hanson
    Mrs. Edith Haszard
    Mr. Kay Jensen
    Mr. Alf Kaszuba
    Ms. Cindy Kuhl
    Alderman D.M. LeBaron
    Mr. Jack Look

Ms. Connie May
Mr. H.A. Marquadson
Mr. John McColl
Mr. Bruce McKillop
Ms. Diane Miedema
Mr. Joe Mould
Mr. Dennis Polluck
Ms. Linda Sleightholm
Alderman R.D. Tarleck
Mrs. Betty Waldren
Mr. Steve Wild

12. The Mobile Home Owners of Alberta.

13. Mr. Jim Patterson, B.C. Rent Review Commission.

14. The Property Taxpayers Association, Calgary.

15. Bert Rogan, Information Office, B.C. Office of the Rentalsman.

16. Student Legal Services, Edmonton.

17. Mrs. Laura Taylor, Canadian Organization of Public Housing Tenants.

18. Mrs. Maryann Weiss, President, Alberta Social Housing Tenants' Association.

19. Mr. Bruce York and Margaret De Wees, president and secretary-treasurer of the B.C. Tenants' Association.

II. Written Submissions:

Mr. L. Baumann, Lethbridge

Calgary Tenants' Association

Mrs. K. Castelani, Medicine Hat

Mr. R.S. Cope, Calgary

Edmonton Housing Association

Edmonton Landlord and Tenant Advisory Board

Ms. Fern E. Grieshuber, Edmonton

Mrs. Dorothy Haines, Edmonton

Housing and Urban Development Association of Calgary

Mr. E.W. Kuder, Edmonton

Landlord and Tenant Advisory Boards of Alberta

Medicine Hat Landlord and Tenant Advisory Board

Mobile Home Owners of Alberta, Edmonton/Calgary
Property Owners' Defence Association, Calgary
Property Taxpayers Association of Alberta, Calgary
Mr. Peter R. Smy, Edmonton.

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The Institute has made extensive use of work done across Canada in recent years, particularly the various reports of the Ontario Law Reform Commission, the report of the British Columbia Law Reform Commission on the subject, and a report prepared for the Law Reform Division of the New Brunswick Department of Justice, prepared by Alan M. Sinclair.

Professor Clayton Rice of the Faculty of Law, University of Alberta, did a great part of the preparation of the background papers which were circulated, and has given us valuable assistance. Professor P.N. McDonald has given us extensive advice on constitutional matters. We have had the benefit of a paper by Professor Burton Bass of the Faculty of Law, University of Manitoba, concerning the Manitoba law and practice.

We are grateful to those who gave us considered views on this complex and important subject, including the Landlord and Tenant Advisory Boards, with whom we spent several days; the committee of the Alberta Branch of the Canadian Bar Association mentioned in Appendix G; and the various groups and citizens mentioned in that Appendix.

A substantial amount of work on the project was done by John F. Barclay while a member of the Institute's staff. Gerry van der Ven, Legal Research Officer, has participated in the project at all stages and made valuable contributions throughout, including the initial draft of our report. T. W. Mapp is the originator of many proposals which we have adopted, and the shape of the proposed legislation and the report, as well as the writing, embody substantial contributions from him.