Institute of Law Research and Reform

The University of Alberta

Edmonton, Alberta

RESIDENTIAL TENANCIES PROJECT

Background Paper No. 3

OBLIGATIONS TO REPAIR
SECURITY (Damage) DEPOSITS
POSTDATED CHEQUES

November 1975

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

OBLIGATIONS TO REPAIR

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1. Common Law

(1) Landlord's Duty

With a couple of minor exceptions, the obligations imposed at common law on the landlord with respect to the suitability and habitability of the demised premises are non-existent. The landlord is under no obligation to give to the tenant at the commencement of the tenancy a suitable place in which to live. He is not required, furthermore, to ensure the upkeep or maintenance of the property in any way during the term of the tenancy. Nevertheless, many landlords have in fact agreed to maintain the property. The Sinclair Report, at p. 1, has noted that from this, many tenants have been lead at times into believing that because the landlord has seen fit to assume the responsibility that in fact legal obligation does then exist. Many tenants are thereupon surprised when they are required to maintain and repair the property, even if caused by normal deterioration or through lack of care on the part of the landlord. The fact that many landlords do care for their property on the basis of, perhaps, protecting the capital investment does not alter the legal position whatsoever.

One of the exceptions, referred to above, is in the area of short-term leasing of furnished property. Here, the common law has held that the landlord makes an implied warranty that the property will be suitable for habitation and that such things as infestation by vermin will enable the tenant to have a cause of action against the landlord for a breach of his implied warranty. The second exception is that situation where the landlord is under an obligation to maintain the common areas in a proper state of repair, e.g., hallways, stairwells, elevator shafts, driveways, parking lots, etc.

It is necessary to mention one further aspect of this problem, that is the situation where the landlord and tenant have entered into a written lease whereby the landlord requires the tenant to render up the property at the end of the term in a good state of repair, reasonable wear and tear excepted. It appears that many tenants have misunderstood this particular covenant in thinking that they are responsible for reasonable wear and tear. The Sinclair Report, at p. 3, has stated that some landlords have taken advantage of this misunderstanding. Furthermore, such a covenant does not exclude the tenant's obligation to repair those items of damage which cannot be attributed directly to reasonable wear and tear.

One of the most difficult problems in this area is that of inevitable accident, acts of God, and the like. Where, for example, property has been damaged due to an inordinate rain storm which could not be called reasonable wear and tear, but an act of God--the tenant would be held responsible. There is always a danger here that the tenant may be mislead either by a clause in the lease which does not give sufficient latitude or is capable of being easily misunderstood.

(2) Tenant's Duty

At common law, the tenant is under no direct obligation to repair the demised premises. One notable exception is, of course, in those cases where there has been an obligation directly assumed by the tenant under the terms of the lease.

In some jurisdictions, tenants have been further bound by the law of waste which provides that some tenants may be liable to their landlords for the commission of voluntary and permissive waste and provides an action in

damages to the landlord for breach of this obligation as well as the effective remedy of injunctive relief.

The Sinclair Report, at p. 10, has noted that in those cases in which a lease has been concluded between the parties, it is very common for the landlord to extract from the tenant a covenant that he will render up the property at the end of the term in the same condition it was at the time of leasing and then add to that the provision that reasonable wear and tear is excepted and perhaps other things, such as acts of God and the Queen's enemies.

The cases reveal that the difficult task is to determine the limits of a tenant's liability under such provisions. The law is in a very unsatisfactory state. The tenant does not know in advance precisely what his obligations are and it is almost impossible for the landlord to accurately predict the effectiveness of such an obligation.

The Sinclair Report, at p. 11, has concluded that:

> . . . whether operating under lease or otherwise the landlord has been in a position, if he wished to exercise his rights, to say to the tenant at the end of the term that he is to give back the property in the same condition it was at the time he got it, reasonable wear and tear excepted. It should be remembered that this is a conclusion which one can make in general and does not take into account any particular agreement between the parties. Taking it, however, as a general conclusion, it has not been entirely a satisfactory situation.

2. Statutory Provisions in Canada

With respect to the landlord's obligations, the reform legislation in most Canadian provinces attacks this problem on three fronts:

(a) condition of the property at the time of renting;
(b) maintenance of the property during the relationship; and,
(c) patent defects existing at the time the relationship begins.

All reform jurisdictions require the landlord to carry out repairs as they become necessary during the term. About two-thirds require the landlord to provide a habitable, safe dwelling at the commencement of the term as well. A few require this even if the defect is a patent defect existing at the time the relationship begins, which is particularly notable because, at common law, if there is a patent defect which the tenant knows about when he inspects the property before renting, it is his tough luck.

With respect to the tenant's obligations, the reform legislation bisects his duty not to commit waste and basically restricts a tenant's obligation to maintain short of repair; that is, to clean but not to go so far as to replace or mend. However, where repairs are necessary due to the tenant's negligence or that of his guests, this then becomes the responsibility of the tenant.

(1) The present law in Alberta

(a) Landlord's Duty

The present residential tenancy law in Alberta does not place any obligation on the landlord to repair. Accordingly, the common law rules apply and the landlord for practical purposes then has no such obligation.

(b) Tenant's Duty

There is no direct reference in the Alberta Act

to obligations of tenants to repair. The only indication as to the obligation is in the security deposit area. Section 19(c) provides that if the parties had agreed in advance for deduction from a security deposit for repairs to the premises made by the landlord, then certain results will follow, which would indicate that the question of repairs is less open to private contract between the landlord and the tenant. If this position is accurate then it can be concluded that the law as to tenant's obligations to repair is the same aside from the contract as it is at common law.

(2) Ontario

(a) Landlord's Duty

Section 96(1) of the Landlord & Tenant Act reads as follows:

> A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

If the landlord does not comply with the above requirements, the tenant may proceed under section 96(3), which will be considered below.

Under this provision the landlord is required to do three things:

(a) to provide the premises in a good state of repair;

(b) to maintain the demised premises during the tenancy in a similar state of repair; and,

(c) to comply with health and housing standards.

Further protection is extended to the tenant who, knowing of a defect, takes the property in any event and says nothing. An obligation is now imposed on the landlord to repair that defect.

(b) Tenant's Duty

Section 96(2) of the Ontario Act is as follows:

> The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him.

The Sinclair Report, at p. 11, has described the above section as a "good housekeeping" provision. The section does not seem to contemplate major repairs. The tenant would only be responsible for replacement of such things as light bulbs and keeping drains clear from minor obstructions, and the like.

It is worthwhile to here set out section 96(3) which states:

> The obligations imposed under this section may be enforced by summary application to a judge of the county or district court of the county or district in which the premises are situate and the judge may,
>
> (a) terminate the tenancy subject to such relief against forfeiture as the judge sees fit;
>
> (b) authorize any repair that has been or is to be made and order the cost thereof

> to be paid by the person responsible to make the repair, such cost to be covered by due process or by set-off;
>
> (c) make such further or other order as the judge considers appropriate.

Section 96(3) provides that where the landlord or the tenant has failed to carry out his obligations under subsections (1) or (2) of section 96, then the opposite party may apply to a judge of the county or district court by summary application.

The judge hearing the complaint is given broad powers of adjudication. He may order that the tenancy is terminated subject to such relief against forfeiture as he sees fit. If the landlord is in default in making repairs, the tenant may obtain an order terminating the lease. In his book Residential Tenancies, Donald Lamont, Q.C., has stated the following at p. 43:

> Although the subsection does not specifically require that the tenant give prior notice to the landlord of the required repairs, it is most likely that the judge hearing the application will only order the lease terminated if the tenant has notified the landlord, preferable in writing, of the lack of repair and has given the landlord a reasonable time to rectify the situation. Furthermore, it is suggested that a judge should only grant an order terminating a lease for lack of repairs when the non-repair is of a substantial nature or has rendered the premises unfit for habitation.

Lamont has further noted at p. 44 that some leases now incorporate the landlord's statutory obligation to repair as a covenant to repair, in which case the effect of convenance being interdependent would apply to the landlord's covenant to repair, and the tenant would be relieved

of his obligations, i.e., to pay rent. But for the breach of the landlord's statutory obligation to repair, statutory remedies are the only ones provided. Prior to the reform legislation in Ontario a tenant could never break a lease for default by a landlord. Accordingly, this provision is a great step forward for tenants.

Under the next statutory remedy the judge, hearing a summary application concerning lack of repair, may authorize any repair already made or any repair required to be made and order the cost to be paid by the landlord or be recovered by due process or by set-off. In regard to this remedy, Lamont has stated the following at p. 44:

> . . . a tenant can go ahead and make the repairs which the landlord should have made, then apply for an order approving of them and that the cost be deducted from the rent. He takes his chances of obtaining the order, i.e., being able to prove that the repairs were necessary and that the cost was reasonable. It would also seem likely that he will have to prove some urgency for having gone ahead without prior court authorization.

In the past, tenants have thought they could make repairs which they considered the landlord should have made and deduct the cost from the rent. As a result many have had their leases terminated for non-payment of rent. The above reform in Ontario permits the tenant to get on with necessary repairs when the landlord fails to make them. It may also have the effect of impressing upon landlords their new responsibility for repair.

In Milley v. Hudson, [1971] 3 O.R. 8, the Ontario Court of Appeal held that set-off for repairs done by a tenant is not an automatic right in law. Accordingly, Lamont has made the following comment at p. 45:

> Before a tenant proceeds to make repairs relying on this subsection, he should notify the landlord of the necessity for the repairs and give the landlord a reasonable time to make them. In the case of a tenant who goes ahead to repair without notifying the landlord and then applies to a county court judge, one would expect the judge to exercise his discretion more strictly in favour of the landlord.

Lastly, there is a broad power given by clause (c) above, to make such further order as the judge considers appropriate. In Re Claydon and Quann Agencies Ltd., [1972] 2 O.R. 405, the judge stated that he could make an order which he considered ". . . to be fair in the circumstances", and ordered that the rent be abated until the municipal workorders to bring the accommodation up to the required housing standards by-law were complied with. The judge commented on the unsatisfactory evidence to assist him in determining the amount of the abatement. The provision would also seem to permit a judge to order that damages be paid to a tenant in appropriate circumstances of non-repair or non-compliance with housing standards. It would be reasonable to expect that a tenant should only be awarded damages provided the landlord already had notice of the defective condition, or the tenant had notified the landlord of the defect and the latter had failed to remedy it properly.

One of the recommendations which was made by the Ontario Law Reform Commission was that legal process must be made more accessible to tenants, and that landlord and tenant matters in urban areas be dealt with more expeditiously.

It is possible that the judge could make such further order as he deems appropriate in regard to:

(a) the extent of the repairs to be ordered;

(b) the time by which they are to be effected;
(c) a reduction in rent while out of repair and until required repairs are effected; and, perhaps,
(d) damages for the non-repair.

The above comments have dealt principally with the enforcement of the landlord's obligations. Tenant's obligations for ordinary cleanliness can also be enforced under this section. There is also the obvious requirement that tenants must repair any damage caused by their wilful or negligent conduct or that of persons who are permitted on the premises with the tenant's consent.

(3) British Columbia

(a) Landlord's Duty

The new 1974 Landlord and Tenant Act in British Columbia sets out the landlord's and tenant's obligations to repair in section 30. That section does not differ from the pre-existing legislation insofar as the landlord is required to provide and maintain the residential premises in a good state of repair. However, the new provision differs from the 1970 Act in that it requires the landlord to maintain the premises in such a state of decoration and repair so as to comply with health and safety standards, including housing standards required by law and having regard to the age, character and locality of the residential building such that it would be reasonably suitable for occupation by a reasonable tenant who would be willing to rent it. This new provision echoes the remarks which were made by Lord Justice Lopes in the leading English case of Proudfoot v. Hart decided in 1890 and considered below in this paper at p. 30.

Subsection (2) of section 30 provides that the landlord's duty applies notwithstanding that the tenant may have had knowledge of the breach by the landlord at the time the tenancy agreement was entered into.

(b) Tenant's Duty

Section 30(4) requires the tenant to maintain ordinary health, cleanliness and sanitary standards throughout the premises and to repair damage caused by his wilful or negligent act or omission, or that of a person permitted on the premises by him.

The new British Columbia legislation has departed from the Ontario provisions in that the obligations imposed are no longer enforceable by summary application to a judge. A tenant may now make application to a rentalsman who will conduct an investigation and hearing as he considers necessary. Where the rentalsman is of the opinion that the landlord contravenes his duty to repair, the rentalsman may order the tenant to pay all or part of any instalment of rent to him that would otherwise be paid to the landlord. Section 34(2) provides that where the rentalsman makes an order, a tenant who pays rent in accordance with the order shall not, to the extent of the amount so paid, be in default of payment of rent under the agreement. The rentalsman may pay, from the amount paid to him under the order, such amount as the rentalsman considers necessary for the purpose of repairing or maintaining the residential premises in such a state of decoration and repair as to comply with section 30(1).

Subsection (3) of section 34 provides that where the amount paid to the rentalsman by the tenant exceeds the amount paid in order to carry out the necessary repairs, the rentalsman will pay the excess to the landlord.

The above new provisions in British Columbia have provided a remedy for a tenant in a situation where a landlord has breached his duty to repair. However, upon this writer's reading of section 34, the question must be raised whether a landlord has a similar remedy. It appears that the landlord does not for section 34 only provides for the situation where a rentalsman may receive an application by a tenant. The landlord's remedy is conspicuously absent. If the tenant fails to perform his duty to maintain ordinary health, cleanliness and sanitary standards or wilfully or negligently causes damage, the only recourse that the landlord appears to have under the new legislation is to deduct an amount from the security deposit or to make a claim against the tenant in a court, pursuant to section 40(1). Since this particular aspect pertains to security deposits it is more appropriate to deal with it under that heading.

(4) Manitoba

(a) Landlord's Duty

Section 98(1) of the Manitoba legislation provides as follows:

> Subject to subsection (2), a landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

The above provision is very similar to that in Ontario. No further comment is necessary other than to say that the "subject to" portion refers to the obligation

of the tenant to repair. Furthermore, the remedy available to a tenant for breach of the landlord's obligation differs from that in Ontario. In Manitoba, under the provisions of section 98(3), the tenant may, himself, without judicial intervention, terminate the tenancy by simply following the notice requirements further provided in the Act for bringing the tenancy to a close.

(b) Tenant's Duty

The obligations of the tenant are contained in section 98(2) which states:

> The tenant shall
>
> (a) be responsible for ordinary cleanliness of the rented premises; and,
>
> (b) take reasonable care of the rented premises and repair damage to the rented premises caused by his wilful or negligent conduct or such conduct by persons who are permitted on the premises by him; and,
>
> (c) take all reasonable precaution to avoid causing a nuisance or disturbance to other tenants in the building by any person resident in his rented premises or by others who are permitted on the premises by him.

The only provision above which is significant and differs from other legislation is contained in clause (c) which provides that the tenant must take reasonable precautions to avoid causing a nuisance or disturbance to other tenants.

The result of a failure to fulfil these obligations is provided in section 98(3):

> A failure by a landlord or a tenant to fulfil any of his obligations or responsibilities under this section shall be sufficient reason

> for the non-offending party to terminate the tenancy agreement in accordance with section 100 but where the failure is by a tenant in respect of his obligations under clause (b) or (c) of subsection (2), the landlord, notwithstanding any other provision of this Act, may terminate the tenancy agreement to take effect on the fifth day following the date on which notice to terminate is given to the tenant by the landlord.

In regard to the above termination power vested in the landlord the Sinclair Report, has stated the following at p. 18:

> As section 98(3) makes it quite clear that the landlord can take this somewhat precipitous section without abiding by any other provision of the Act it might be said such a right given to the landlord is not in line with the rights which have been given to the tenant. For example, the tenant does not have the right, unilaterally, to move without going through the court procedure provided, where the landlord has failed to provide the required heat or other services.

Furthermore, under the provisions of section 98(3), the landlord is not required to terminate the tenancy agreement on this five-day provision. He could act under the provisions of section 100 whereby notice of termination is given in accordance with prescriptions under the balance of the Act.

With respect to nuisance or disturbances, the landlord may lay a complaint against either the tenant or whoever is causing the disturbance and who has been permitted on the premises by the tenant after requiring such person to cease and desist. On summary conviction, the judge who hears the information may fine the offender.

Under the provisions of section 98(6), a provision is

made whereby the court, before adjudicating on the information under subsections (4) and (5), may refer the matter to a rentalsman.

(5) Saskatchewan

(a) Landlord's duty

Section 16 of the 1973 Saskatchewan legislation respecting residential tenancies contains a number of statutory conditions which are deemed to be part of every tenancy agreement.

Statutory condition 2 imposes an obligation upon landlords to maintain and repair. Clause (a) of subsection (1) of statutory condition 2 requires the landlord to keep in good, safe and healthy state and in a tenantable state of repair any part of the building in which the residential premises are situated and of which he retains possession and that is intended for the common use and enjoyment of the tenants of the landlord. Clause (b) requires the landlord to keep in a good state of repair all services supplied by him under the agreement. If any service is discontinued due to malfunction or otherwise the landlord is obligated to have it repaired or restored. If any such service is not restored within forty-eight hours, any rent payable in respect of the residential premises is abated or reduced for the period of such discontinuance by one-tenth for each occasion on which a service is discontinued or by such other amount as may be agreed upon by the landlord and tenant. If the landlord and tenant are unable to agree, the amount may be fixed by a judge pursuant to section 35, upon application by the landlord or the tenant.

Statutory condition 3(a) provides that, except with

respect to residential premises that are destroyed to such an extent as to be uninhabitable, the landlord shall during the term granted by the agreement, maintain and keep in a good state of repair and fit for habitation, use and enjoyment of the residential premises notwithstanding that the state of non-repair of the residential premises existed to the knowledge of the tenant before the agreement was entered into or come into existence thereafter. Clause (b) of statutory condition 3, further requires the landlord to keep in a good state of repair all fixtures that are supplied by him under the agreement or that are added or substituted therefor, reasonable wear and tear or other causes not being accepted.

Statutory condition 4 requires the landlord to maintain for the tenant, "a wholesome standard of board and reasonable attendances including the services required to keep the rooms and the fixtures leased in a condition fit for human use, occupation and enjoyment.

The above statutory conditions, if breached, may be enforced by summary application of the tenant to a judge. The judge, acting under section 35, may order that the tenancy be terminated subject to such relief against forfeiture as he considers fit; approve any repair that has been made or direct any repair to be made and order that the cost thereof be paid by the person responsible to make the repair, and direct that such costs may be recovered by due processs or by way of set-off or paid out of the security deposit; and, make such further or other order as he considered appropriate.

The landlord is furthermore required, according to statutory condition 6, to comply with all legal requirements concerning health, safety or otherwise relating to the residential premises.

(b) Tenant's duty

The tenant is responsible, pursuant to statutory condition 7 of section 16, for the ordinary cleanliness of the interior of the residential premises occupied by him and for repair of damage caused by him wilfully or negligently, or any person whom he permits on the premises.

The tenant is prohibited by statutory condition 8, from using the premises for certain uses, such as, the carrying on of any noxious, offensive or illegal act, trade, business, occupation or calling; or to make a nuisance or disturbance to other persons in the same building. If the tenant does not comply with these obligations the landlord, upon complaint by any person resident in the building, may request the tenant not to repeat the contravention. If the tenant does not so cease or discontinue after a request is made, the landlord may apply to a judge pursuant to section 35 for an order for possession.

(6) New Brunswick

(a) Landlord's Duty

In regard to the obligation to repair the common law rules are in effect in the province of New Brunswick. Accordingly, the comments made above would apply here.

The Sinclair Report, at p. 9, recommended that a responsibility should be fastened on landlords to provide rental property to a tenant in a state of repair which both renders it habitable and meets existing health and safety standards as established by provincial and municipal law. Furthermore, Professor Sinclair recommended that a new Landlord and Tenant statute in New Brunswick should require that the maintenance of the property during the tenant's

term to be the responsibility of the landlord. Finally, it was recommended that the problem of patent defects should be covered as it is done by section 96(1) of the Ontario legislation, that is, the knowledge of the tenant that there are defects should not be an obstacle in the path of his requiring the landlord to repair where possession is gained after inspection.

Section 3 of the reform bill in New Brunswick provides as follows:

> (1) A landlord
>
> (a) shall deliver the premises to the tenant in a good state of repair and fit for habitation;
>
> (b) shall maintain the premises in a good state of repair and fit for habitation;
>
> (c) shall comply with all legal requirements respecting health, safety and housing and building standards; and
>
> (d) shall keep all common areas in a clean and safe condition.
>
> (2) Subsection (1) applies whether any state of non-repair or unfitness for habitation existed to the knowledge of the tenant before the tenancy agreement was entered into or arose thereafter.
>
> (3) The landlord and tenant of
>
> (a) a single family dwelling house; or
>
> (b) premises within a two-family dwelling house;
>
> may agree in writing that the tenant perform any or all of the landlord's responsibilities under subsection (1).
>
> (4) This section does not apply to a tenancy agreement for a term of years entered into before this section comes into force.

The above bill in New Brunswick in regard to residential tenancies has incorporated substantially the same provisions as are contained in the Ontario legislation. However, it should be noted that section 3(3) provides that the landlord and tenant may contract out of the landlord's obligations in regard to a single family dwelling house or premises within a two-family dwelling house.

(b) Tenant's Duty

Under the provisions at common law, which are in effect in the Province of New Brunswick, the tenant is not under a direct obligation to repair the demised premises. Therefore, the comments which were made above would apply here.

The Sinclair Report, at pp. 20-21, recommended that a section should be drafted and included in new residential tenancies' legislation in New Brunswick so as to require landlords to clean and otherwise maintain the common areas of multiple family dwellings. Professor Sinclair furthermore recommended as follows:

> Tenants should be required to clean the demised premises and maintain in such a state; such maintenance, however, not to extend to repair unless such repair is required by reason of negligent conduct by the tenant or his guests. Tenants should be advised by the new legislation of a procedure they may follow where the obligation to repair is fastened on the landlord is not carried out so that such repair may be affected by the tenants following advice and a waiting period. Withholding of rent to pay for such repairs should be allowed where strict compliance with the notice and waiting periods has been followed. If such withholding procedure is not acceptable then it is recommended that failure of a landlord to repair as required, notice and waiting period following, would allow a tenant to terminate the tenancy by application to the court or administrative body.

The New Brunswick bill respecting residential tenancies provides for the obligations of the tenant in section 4 which provides as follows:

> (1) A tenant
>
> (a) shall be responsible for ordinary cleanliness of the premises;
>
> (b) shall repair within a reasonable time after its occurrence any damage to the premises caused by his own wilful or negligent conduct or by such conduct of persons who are permitted on the premises by the tenant; and
>
> (c) shall conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not cause a disturbance or nuisance to other tenants.

Section 4(2) provides that the above quoted sections shall not apply to a tenancy agreement for a term of years entered into before the section comes into force.

The following provisions provide remedies where a tenant or a landlord fails to comply with his obligations. They are set out in detail below:

> 5.(1) Subject to subsection (5), where a tenant fails to comply with his obligations under this Act or the terms of the tenancy agreement, a landlord may serve on the tenant a notice, in the form prescribed by regulation, stating the complaint and shall forward a copy of such notice to a rentalsman.
>
> (2) Where a tenant on whom a notice under subsection (1) is served fails to comply with his obligations within the time as prescribed by regulation and as set forth in the notice the landlord may so advise a rentalsman by notice.

(3) Where a rentalsman receives a copy of a notice under subsection (1) and a notice under subsection (2), he

(a) may conduct an investigation;

(b) may inspect the premises; and

(c) after conducting an investigation or inspecting the premises or both may require the tenant to fulfill his obligations.

(4) Where the tenant fails to fulfill his obligations as required under subsection (3) to the satisfaction of the rentalsman within the time established by him, the rentalsman may serve on the tenant a notice to quit terminating the tenancy and requiring the tenant to vacate the premises at the time selected by the rentalsman and specified in the notice.

(5) This section does not apply to the obligation of the tenant to pay rent.

6.(1) Where a landlord fails to comply with his obligations under the Act or the terms of the tenancy agreement, a tenant may serve on the landlord a notice in the form prescribed by regulation, stating the complaint and shall forward a copy of such notice to a rentalsman.

(2) Subject to subsection (7), where a landlord on whom a notice under subsection (1) is served fails to comply with his obligations within the time as prescribed by regulation and set forth in the notice the tenant may so advise a rentalsman by notice.

(3) Where a rentalsman receives a copy of a notice under subsection (1) and a notice under subsection (2), he

(a) may conduct an investigation;

(b) may inspect the premises; and

(c) after conducting an investigation or inspecting the premises or both may, subject to subsection (8), require the landlord to fulfill his obligation.

(4) Where the landlord fails to fulfill his obligations as required under subsection (3) to the satisfaction of the rentalsman within the time established by him, the rentalsman may himself perform such obligations.

(5) Where the rentalsman performs the obligations under subsection (4) he may require the next and any succeeding rental payments of any tenant to be made to him and so advise the landlord by notice.

(6) From the amounts received under subsection (5) the rentalsman shall pay the cost of performance of the obligations and forward the balance to the landlord, accounting for his expenditures.

(7) Where the failure of the landlord to comply with his obligations under this Act or the terms of the tenancy agreement results, in the opinion of a rentalsman, in an emergency and the landlord fails to comply with his obligations within twenty-four hours of service of notice under subsection (1), if such notice described the situation as an emergency, the rentalsman may proceed to perform the obligations of the landlord immediately thereafter and subsections (5) and (6) shall apply.

(8) Where

(a) on the basis of destruction of the premises or other cause, a landlord applies to a rentalsman in the manner provided by regulation;

(b) the landlord serves a copy of such application on the tenant; and

(c) the rentalsman determines that on such a basis it is reasonable;

the rentalsman may serve a notice to quit on the tenant terminating the tenancy in the manner provided by regulation.

7. No action lies against a tenant based on failure to pay rent where the rent has been paid to the rentalsman in accordance with the provisions of this Act.

The above New Brunswick proposals deserve some

comment.

First, if a tenant fails to comply with his obligations under the Act or the terms of the tenancy agreement, the landlord may advise a rentalsman by notice. However, before the landlord may go to the rentalsman he is required to advise the tenant by notice and it appears that he is required to give him a period of time to comply with his obligations. The provision is reasonable in that prior to forcing the issue before a rentalsman a tenant is given an opportunity to comply with the law and avoid an investigation by the rentalsman, the inspection of the premises, and a formal order by the rentalsman.

Secondly, if the tenant fails to comply with the order of the rentalsman to his satisfaction, the rentalsman may serve on the tenant a notice to quit and require the tenant to vacate the premises at a specified time. This provision also is reasonable in that before the rentalsman may require the tenant to quit the provisions of subsection (3) must be met.

Thirdly, section 6(1) provides that the tenant may serve a notice on the landlord where the landlord fails to comply with his obligations. As with the landlord's remedy noted above, if the landlord does not comply with his obligations the tenant may advise a rentalsman by notice. Subsection (7) provides that if the failure of the landlord to comply with his obligations, in the opinion of a rentalsman, results in an emergency, and the landlord fails to comply with his obligations within twenty-four hours of service of the notice, if the notice described the situation as an emergency, the rentalsman may proceed to perform the obligations of the landlord immediately. If the rentalsman performs the obligations he may require the next and any succeeding rental payments of any tenant to be made to him

and so advise the landlord by notice. The rentalsman shall pay the cost of performance of the obligations and forward the balance to the landlord accounting for his expenditures. Again, this would seem to be a useful mechanism, although it is somewhat cumbersome, in that it provides for a method of arbitration and would therefore avoid a costly and time consuming court proceeding.

(7) Newfoundland

(a) Landlord's Duty

Newfoundland and Nova Scotia have included obligations of both landlord and tenant in new residential tenancy legislation. The statutory conditions are by statute deemed to be included in every agreement between landlord and tenant. Statutory condition 1 under section 7 of the Newfoundland Landlord and Tenant Act provides as follows:

> Condition of Premises
>
> The landlord shall provide and maintain the premises in a good state of repair and fit for habitation during the tenancy and shall comply with health and safety standards, including any housing standards, required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the relationship of landlord and tenant arose.

The landlord is not only required to provide the demised premises in a good state of repair but also to maintain in the same fashion through the term of the tenancy. Furthermore, the knowledge of the tenant of existing non-repair is immaterial.

The remedy for failure to abide by this statutory condition is covered in section 19(2) in that it is considered

as a ground for a "complaint", and the provisions of the Summary Jurisdiction Act apply thereto.

(b) Tenant's Duty

Statutory conditon 2 of the Newfoundland legislation requires that the tenant be responsible for the ordinary cleanliness of the interior of the premises and for wilful damage by himself or by those whom he permits on the premises.

This provision is similar to that in the Ontario legislation. However, it should be noted that the obligation of the tenant as provided in Newfoundland is specifically directed towards cleanliness of the interior of the premises while the Ontario provisions simply speak of cleanliness of the "rented premises".

The Sinclair Report, at p. 14, notes that a great many of the questionnaires submitted to tenants in New Brunswick displayed that the tenants themselves in many cases in fact do any cleaning that is done to the halls, stairwells, etc., of many of the apartment buildings within the jurisdiction. At p. 15 Professor Sinclair states the following:

> Presumably the landlord's responsibility to provide and maintain the rented premises in a good state of repair, fit for habitation and compliance with health and safety standards would require the landlord to do at least a minimum amount of cleaning in the common area. The pattern of the past, however, has been that the landlord is requiring the tenant to clean the hallways and stairwells . . . in many properties, and, unless a statute specifically provides for cleaning the common areas, this condition may well continue.

(8) Nova Scotia

(a) Landlord's Duty

The Nova Scotia legislation has departed from that in Newfoundland in that statutory condition 1 under section 6 of the Act respecting Residential Tenancies provides as follows:

> Condition of Premises
>
> The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing.

The above provision departs from the dual obligation of the landlord under the Ontario and Newfoundland's statutes to both provide a habitable piece of property and to maintain it throughout the term of the tenancy. Under statutory condition 1 in Nova Scotia the landlord is required only to maintain the premises in a good state of repair during the term of the tenancy. With respect to the condition of the property immediately prior to the tenant entering into possession, statutory condition 2, provides as follows:

> Existing Condition
>
> Except as required by any statutory enactment or law respecting standards of health, safety or housing, the landlord shall not be required to repair or improve the premises beyond the state of repair that existed at the time the tenant first acquired possession of the premises.

The above provision merely provides that the landlord will not be required to repair the premises beyond the condition that they were in at the time the tenant first

went into possession.

This is a radical departure from the requirements examined in other jurisdictions. The Sinclair Report, at p. 6, stated the following in regard to the Nova Scotia legislation:

> It is, of course, obvious that there is a substantial difference between requiring that the property be in a reasonable condition at the beginning and then to require the landlord to maintain that condition from the provision merely that the landlord maintain it throughout the tenancy in the condition it was, no matter what that condition may have been at the beginning.

Provision for the tenant to enforce performance with the statutory condition is as in Newfoundland by way of complaint under the Summary Convictions Act.

(b) Tenant's Duty

Statutory condition 3 of the Nova Scotia legislation is an exact duplicate of that in Newfoundland. Accordingly, the same comments made there apply here as well.

(9) Prince Edward Island

(a) Landlord's Duty

Section 102(1) of the Prince Edward Island legislation provides as follows:

> A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for

> complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.

The above provision is a copy of the Ontario legislation. The method of enforcement in Prince Edward Island is also the same as that under the Ontario system--application to a judge.

(b) Tenant's Duty

Section 102(2) of the Prince Edward Island legislation is also a copy of the Ontario Act, with the exception that to that subsection in Prince Edward Island is added the following:

> . . . and for maintaining ordinary health, cleanliness, and sanitary standards throughout the premises.

If the words "throughout the premises" are restricted to mean only the demised premises, it is difficult to see how these additional words extend the opening words of section 102(2), that "the tenant is responsible for ordinary cleanliness of rented premises", particularly when there is a possibility of confusion added by these words as the preceding subsection imposes on the landlord the responsibility of "complying with health and safety standards". The Sinclair Report, at p. 16, stated that it is preferable that these words in fact be omitted and thus it is made clear that the tenant is responsible for cleanliness of the rented premises, and the landlord is responsible for compliance with health and safety standards. The basis of this conclusion in the Sinclair Report is that those things which relate to health and safety standards are more closely connected with repair

responsibilities then they are with the philosophy behind the tenant's responsibility of simple housekeeping duties.

The rights given to a landlord for breach of the tenant's responsibilities under section 102(2) are similar to those given to a landlord under the Ontario legislation.

(10) Quebec

(a) Landlord's Duty

Article 1654 and 1655 of the Civil Code provide that the lessor is obliged to deliver and maintain the dwelling in a condition fit for habitation and give peacable enjoyment of it. He is obliged to make all repairs imposed on him by law or by a municipal by-law respecting safety or sanitation of the dwelling.

If the lessor does not make the repairs to which he is bound, the tenant may apply to the tribunal to obtain permission to withhold the rent in order to get the repairs done (article 1612). The lessee, who must suffer urgent and necessary repairs to be made, is entitled to a reduction of rent, according to the circumstances. Alternatively he may cancel the lease if the repairs cause him serious inconvenience.

Where the lessor does not undertake urgent and necessary repairs after he is informed by the lessee that they are needed, the lessee may perform the repairs himself and charge the lessor for them.

(b) Tenant's Duty

Article 1657 provides that the lessee must use the

dwelling as a prudent administrator and keep it clean. He should behave himself in a way that he does not cause a nuisance or disturbance to the other lessees in the building. If a violation of his obligations results in damage then the lessee is responsible.

3. Comment

Before concluding this memorandum dealing with the obligation to repair, some consideration should be given to what is meant by a "good state of repair".

The words "in a good state of repair" are often considered to be similar to "good tenantable repair". The latter words are defined by Lopes L.J. in the leading case of Proudfoot v. Hart (1890), 25 Q.B.D. 42, at p. 55:

> Good tenantable repair . . . [is] such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it.

In Gordon v. Goodwin (1910), 20 O.L.R. 327 (C.A.), Mr. Justice Riddell stated the following:

> The house must be so reasonably fit for habitation at the time of the beginning of the term . . . of course, there is no need for the tenement to answer every whim of a finacle tenant; but common sense should be applied in determining whether it does fulfill the required conditions.

United Cigar Stores Ltd. v. Buller, [1931] 2 D.L.R. 144 (Ont. C.A.), held, in referring to such a state of repair, that the premises should be such that it might be used not only with safety, but with reasonable comfort by the class of persons by whom and for the sort of purposes for

which the premises were to be occupied.

In Vicro Investments Ltd. v. Adams Brands Ltd., [1963] 2 O.R. 583, many of the reported decisions on the obligation to repair were discussed. In that case it was held that the landlord cannot insist on repairs that will make the building new or that will give him a building substantially different from that which he rented, nor can he require new signs of age to be eliminated.

A more recent case in England affords some guidance as to the standard of repair required of a landlord. In McPhail v. Islington London Borrough Council, [1970] 2 Q.B.D. 197, the Court of Appeal stated that it is a matter of fact and degree in which regard must be had to the general conditions prevailing in the locality. This may vary with the area in question and the type of housing available, and also that one must look at the whole tenure of the obvious intentions of the Legislature.

Lamont, at p. 48 of his book, Residential Tenancies, has noted that it should be considered when interpreting what is a good state of repair that the Ontario legislation couples that with being fit for habitation and complying with health and safety standards. He suggests that taken together and applying an objective test along with the appropriate principles of law, there should not be too much difficulty for landlords and tenants, and a judge when having to decide what is a fair and reasonable state of repair required by a landlord for the particular accommodation.

4. Issues

(1) The Obligations

(a) Should the landlord be required to provide a habitable, safe dwelling at the commencement of the term?

(b) Should the landlord be permitted to let premises which are in poor repair on the basis that the tenant is paying a lower rent?

(c) Should the landlord be required to repair an obvious defect which existed when the tenant inspected the building? If so, should he be obligated to repair if the tenant actually knew of the defect?

(d) Should the law require the landlord to carry out repairs to the rented premises as they become necessary during the term of the rental?

(e) Should the law require the landlord to comply with health, safety and other housing and building standards as established by provincial and municipal law?

(f) Should the tenant:

(i) be required only to "maintain" the rented premises short of "repair"?

(ii) be responsible for the damage caused to the rented premises by the carelessness of himself or his guests?

(iii) be required to conduct himself, and cause his guests to conduct themselves, in a manner that will not cause a disturbance or nuisance to other tenants?

(g) (i) Should the law require the landlord to maintain the common areas in a clean and safe condition? If not, should it require the tenant to do so?

(ii) Should different rules apply to highrise complexes, single family dwelling houses, and rented premises within a two-family dwelling house? If so, what should the differences be?

(iii) Should the requirement extend to the interior of the building, the exterior or both.

(2) The Remedies

(a) If the law imposes an obligation to repair:

(i) Should the aggrieved party, before going to court or to any other authority, be required to give notice in writing to the offending party in order to give the offending party sufficient time to make the necessary repairs and avoid the proceedings? If so, how much time should he have to give?

(ii) If the aggrieved party is to go to court, what court should it be? Should there be a summary procedure upon application to a judge? Should the judge have power to terminate the tenancy, authorize repairs, or make such other or further order as is appropriate in the circumstances, as in Ontario?

(iii) If the court has power to terminate the lease, should it be able to do so only when the non-repair is of a substantial nature or has rendered the premises unfit for habitation.

(iv) Should the judge hearing the summary application have the power to authorize any repair already made or any repair required to be made and to order the cost to be paid by the offending party or recovered by deduction from rent or from any deposit held by the landlord?

(v) If a landlord or a tenant is authorized to give notice requiring a repair to

be made and if the repair is not made, should he be permitted to terminate the tenancy without going to court or any other authority?

(b) If the law imposes a duty to repair, and if it is decided that a court is not the appropriate authority, should the aggrieved party be able to apply to a rentalsman or other official? And if so should he have to give the offending party notice requiring the repair, and if so, how long?

(c) Should the rentalsman or other authority, in an emergency, be permitted to perform the repair and require the succeeding rental payments to be made to him in trust and deduct the cost of the rental from the amounts paid to him? If so, should he have a duty to make the repairs at a reasonable cost?

(3) Other Matters

(a) If the obligation to repair is substantially shifted to the landlord, what effect is it likely to have upon rents?

(b) Should the law define what is meant by a "good state of repair"?

(c) Should an obligation to repair be deemed a part of all tenancy agreements? If so, should the landlord and the tenant be allowed to contract out of any obligations imposed by law?

(d) Should the law require that the landlord and tenant, before the signing of a lease agreement or the taking of possession under an unwritten agreement, be required to sign check lists outlining the state of repair of the rented premises? Alternatively should the law require that a prospective tenant be granted access to the rented premises for the purposes of inspection before a written lease is signed or oral rental arrangement made?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

SECURITY (DAMAGE) DEPOSITS

TABLE OF CONTENTS

1. Common Law

At common law it is clear that the landlord and the tenant may conclude any legal contractual relationship that they desire. The Sinclair Report, at p. 24, has noted that, on this basis in the past, the landlord has required the tenant, as a condition of entering into the tenurial relationship to pay a security deposit. A security deposit is somewhat of a misnomer in that it really should be called a "damage deposit" on the basis that landlords have treated the amount of money deposited with them in the beginning as security against damage rather than as direct security for the payment of rent.

2. Some General Observations

In the survey conducted by Professor Sinclair it was noted that, while the matter of security or damage deposits was not of serious magnitude in New Brunswick, there were doubts, in tenants' minds at least, as to the continuance of the right of the landlord to exact such a deposit. The Ontario Law Reform Commission found that tenants had complained to a considerable extent respecting this practice. It may be concluded that tenants' arguments that damage is not a widespread problem and that they have experienced difficulty in regaining their damage deposits in cases where damage had not in fact been proven by the landlord may well have some merit. Tenants have also advanced the argument that security deposits are only a method of additional, cheap financing by landlords and, that the landlord, instead of having a direct windfall, should be required to pay interest for the use of such money.

The questionnaires which were mailed to landlords by Professor Sinclair indicated that landlords are not dissatisfied with the behaviour of tenants. Most of them replied

that tenants were, on the whole, careful. From the study conducted by the Ontario Law Reform Commission it was discovered that only a small minority of tenants acted in irresponsible fashion and that the security deposit requirements apparently did not have the effect of marked reduction in occurrence of damage. On the other hand, if it is argued that the security deposit is a valuable tool in relation to security of rent rather than pure damage security, such an argument becomes more acceptable in that a landlord should be entitled to exact from a tenant at the beginning of the tenancy a sum of money which represents in the case of a monthly tenancy not more than one month's rent. If interest is required to be paid on such a deposit, little objection can be seen to its adoption.

The Ontario Law Reform Commission stated that repayment of the security deposit was the second most serious cause of tenant concern. In Alberta, the Edmonton Advisory Board, without hesitation views the return of the security deposit as the number one landlord-tenant problem in this province (see: Initial Submission of the Landlord and Tenant Advisory Board of the City of Edmonton, to the Institute of Law Research and Reform, at p. 3).

The Landlord and Tenant Advisory Board of the City of Edmonton has noted that, in the mid-1960s, there were landlords in Edmonton who had reputations for never returning a deposit to their tenants. While the Advisory Board considers this abuse to be on the decline in Edmonton, it is still not satisfied with the method of tabulating the deductions to be made from the security deposit by landlords. It has been found that the poorest accounting of how security deposits are disbursed is by smaller landlords who may only own and rent a single detached house.

The general feeling of the Advisory Board is that

security deposits should be retained as part of the standard rental practice with some recommendations for change. The recommendations of the Advisory Board will be considered below in section 3(1).

3. Statutory Provisions in Canada

(1) The present law in Alberta

Sections 18 and 19 of the Alberta legislation provide for security deposits. They are set out as follows in detail:

> 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.

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.

The following comments may be made in regard to the above provisions.

The provisions for holding the security deposit in trust depart from similar requirements in other jurisdictions,

which will be considered below, in that the landlord is required to invest only in investments authorized by the Trustee Act. The landlord is required to pay annually to the tenant interest on the security deposit in the amount of six per cent. The tenant may elect to have the interest paid at the end of the tenancy rather than every year. The landlord is entitled to any amount in excess of the six per cent and the landlord and tenant may agree on a rate of interest in excess of six per cent.

The requirement to hold in trust and to pay interest refers, in section 18(7), to those security deposits which arise after July 1, 1970, and to those which were in existence before. This means that a lease in existence since 1965, for example, in which there was a security deposit, that the landlord under this subsection presumably must pay interest to the tenant when he leaves, say in 1974, back dated in time from the time that the security deposit was made in 1965. It may be argued that this retroactivity is unnecessary and creates a burden on the landlord's financial affairs. The Sinclair Report, at p. 41, has noted that while it is true that in the past landlords have been able to enhance their financial situation by using the security deposits, it would be unfair to allow, particularly in the cases of smaller landlord and tenant arrangements, for the landlord now to have to pay interest when in fact he may have simply kept the security deposit in a savings account in the bank and earned a considerable amount less than the required six per cent payment.

The landlord must return the security deposit within ten days of the termination of the tenancy or, if the lease so provides, return the balance with a statement of account attached, after having paid for damages, or, if no reduction can be made because of inability to determine the correct amount, then follow the procedure whereby estimates

are made and the final statement with the final balance within thirty days of the termination of the tenancy. Where the landlord fails to abide by the return provision, then the tenant may take proceedings under the Small Claims Act, and the court to whom that claim is made is to determine the matter in accordance with section 19(4). It is worthwhile to point out that while the tenant does have the advantage of low cost procedure under the Small Claims Act the fact remains that the obligation is upon him and has not been shifted to the landlord, which in those cases where a security deposit is going to be used under the law for damage cases is thought to be a better arrangement (see: Sinclair Report, at p. 41).

In Alberta, damage deposits used to be collected from tenants on the understanding that they were to cover the costs of repairs to the premises over and above normal wear and tear. The amounts asked for in the past were relatively small and there seemed to be little resistance from tenants who were used to making all sorts of deposits on consumer goods and services (see: Advisory Board Submission, at p. 4).

The Advisory Board has noted that landlords now regard the damage deposit as performing more functions than just after-tenancy compensation. The deposit has become, to a minor degree, an initiation fee. As well, the deterrent function of the deposit cannot be overestimated. From the Advisory Board's experience, the proportion of complaints and enquiries during a tenancy, excluding the first and last month, is minimal. The Advisory Board has estimated that eighty per cent of complaints are initiated by the actions of either party in the last month of a tenancy, fifteen per cent in the first month, and five per cent during the term. Furthermore, the Advisory Board has stated that unacceptable behavior in rental accommodation has been deterred by the

nuisance and cost of moving and possible non-refund of the deposit. Tenants usually have to be told only once of their unacceptable behaviour in order for the situation to be corrected. The Advisory Board is of the opinion that without the deposit, the deterrent to poor tenant behavior is cut in half, or maybe more in periods of high vacancies. Of course, the damage/security deposit would have to remain in the possession of the landlord in order for the deterrent power to work effectively.

The justification for the retention of the damage/security deposit privilege has been argued on the basis total risk to the property. The average house for rental is valued at $24,000. Walkup suites are individually valued at between $11,000 and $16,000. Highrise suites are valued at $9,000 and up. In other words, monthly rent of $200 is only one per cent of accommodation valued at $20,000. In the experience of sitting Advisory Board members, there have been very few cases where the amount of damage in dispute has exceeded $150. One case prior to the Board's establishment involved damage to the extent of $2,000 to a house rented to a welfare tenant, who absconded to British Columbia. It is the Edmonton Advisory Board's opinion that the security deposit alone cannot protect a landlord from such situations but that better management practices are the answer. The Edmonton Advisory Board is opposed to the abolition of security deposits and its optional replacement by retention of the last month's rent. It states the following reasons in support of its position:

(1) a $100 security deposit may be replaced by an extra rental outlay of, say, $240, which is an initial financial hardship to the majority of the renting public;
(2) the landlord is only then protected for a possible rental arrear of one month which

is presently only one of five types of deductions considered valid by the Board; and,

(3) there is no deterrent for poor tenant behaviour in the last month of the tenancy--the time of most landlord-tenant conflicts.

On December 24, 1969, a meeting was held with The Honourable Edgar Gerhardt, Attorney General; The Honourable F. Colborne, Minister of Municipal Affairs; and Mr. David Collier, representing three apartment owner associations in the province. Mr. Collier listed six types of deductions that landlords considered valid from the damage deposit:

(1) repairs;
(2) cleaning;
(3) rent owing;
(4) utility payments owing;
(5) nominal re-rental fees; and
(6) loss of first month's rent if the premises were not occupied by the tenant as agreed upon.

According to the Advisory Board Submission, at p. 8, it was agreed that the damage deposit could be used for the first five purposes, and that the sixth should require a court decision, as it related specifically to contract law. The name of the deposit was changed to "security deposit" since it had become a problem for landlords to deduct cleaning and other deductions from damage deposits as some tenants thought that only physical damage was deductible.

The Advisory Board, in its Submission, also noted a problem with some landlords using the 1964 and 1968 statutory definition "subject to such conditions as to deductions therefrom as were agreed to by the tenant" so that obligations of a private nature beyond the area of the tenancy were being

included. A tenant who backed his car into a landlord's car in the parking lot found his damage deposit applied to the landlord's car repairs. Babysitting and furniture purchases were also examples of deductions from tenants' deposits taken by landlords. Recently, the Advisory Board states that Alldritt Apartments (Lord Byron Place) raised their parking rental fees, deducted the first month's increase from each tenants' security deposit, and advised their tenants to bring the deposit back up to $100 with an immediate payment.

Accordingly, the name of the deposit was changed. However, there was no statutory declaration of the types of deductions considered valid. Since Mr. Collier was an initial member of the Edmonton Advisory Board, the Board accepted these five types of deductions as valid, and has defined them as follows:

(1) charges for physical damage to the rental premises and common areas attributable to the tenant and his guests;

(2) necessary cleaning costs ($2.50-$3.50 per hour);

(3) rent owing to the landlord, if it is a fairly recent debt. Ignored rental increases that have accumulated for a period of time without action by the landlord have constituted waiver in the opinion of the Board;

(4) utility payments owing by the tenant. This deduction usually pertains to duplexes or rented houses where utility billings may lag behind the cut-off of utilities; and,

(5) re-rental fees where the landlord as the tenant's agent, is required to find a new tenant because of early termination of the lease. A nominal fee of $20 is standard, but the Advisory Board accepts invoices of Edmonton Journal advertisements if the standard fee is exceeded.

The Advisory Board has gone ahead of the statute law in requiring landlords to mitigate their losses whether the tenant has correctly terminated the tenancy or not. The Board considers this to be fair rental practice and feels that there are sufficient legal precedents for this policy. The Board, however, has stated that a short clause in any new Alberta legislation would be helpful (see: Advisory Board Submission, at p. 9).

In the 1950s, damage deposits were required by thirty per cent to fifty per cent of landlords in Edmonton. They were usually $25, with $50 used in the minority of cases. In the 1960s, with the explosion in apartment building, the amount asked for increased to a range of $50 to $100. Very few rental situations now are created without a damage/security deposit.

In forty-five cases that were scheduled for hearings in the first six months of 1974, the amounts of the security deposit averaged out to a figure of $85.50 (see: Advisory Board Submission, p. 9).

During the past year, the Advisory Board has noted that the previously accepted maximum of $100 in the private market has been creeping up to $150. Furthermore, some small landlords with private houses to rent have asked for deposits

equivalent to the last month's rent. The Board has noted that one case which came before it concerned a deposit of $230.

In the Board's opinion, a maximum limit to the security deposit is required, especially under conditions of low vacancy, where landlords may attempt to shift as much of the burden of risk to their tenants as possible. The Board has suggested an amount of $100 or, in the alternative, one-half of one month's normal rent as the maximum allowable (see: Advisory Board Submission, at p. 10).

The Board is in favour of the compulsory use of inspection check lists by landlords and their tenants. Prior to 1969, several landlords in Edmonton used such a form. However, the inspection was done by the landlord or his agent and incoming and outgoing reports were usually on separate sheets. Often, the incoming report was actually the previous tenant's outgoing report. In 1969, a condition check form was prepared by the Edmonton Rental Accommodation Association for use by its members. The form has been continued by the Edmonton Housing Association ever since. Non-member landlords have secured sample copies and are having their own copies printed. The Advisory Board has made its state of repair/condition check form available to the public since 1972.

The Advisory Board is in favour of co-inspection by the landlord and tenant at commencement and termination of each tenancy. The Board has suggested that both parties should sign on each occasion. The Board also prefers forms with "in" and "out" on the same sheet for comparison.

The Board has also suggested that both parties should get a copy upon commencement. A two week period for the tenant to note deficiencies on initial inspection may be good practice and has been the procedure of some landlords in Edmonton (see: Advisory Board Submission, at p. 11).

The Board has stated that it is not aware of any cases where a landlord has absconded with the deposit fund when ownership of rental premises has been transferred to a new landlord. This was also the case in 1969, when the problem of co-mingling of payments was considered. The Board has consistently held the new landlord responsible for payment of security deposits to his new tenants. The Board's attitude has been that both assets and liabilities are transferred. If the previous landlord had failed to transfer the deposit, then it was a legal matter between the two parties and innocent third persons should not suffer.

The six per cent simple interest was established for the reason of simple bookkeeping (one-half per cent per month). Some landlords apparently have complained that they could get only four per cent from the banks, but the loss of $2 per year per unit has been deemed by the Board to be insignificant. The only recurring infraction of the law in this regard concerns payment at the end of the tenancy rather than on the anniversary date of the deposit being given. Written permission from the tenant for this procedure is usually not secured. Considering the length of the average tenancy in Edmonton, the Board has been reluctant to make an issue of the matter (see: Advisory Board Submission, at p. 12).

(2) Ontario

Sections 84 and 85 of the Ontario legislation are as follows:

84.(1) A landlord shall not require or receive a security deposit from a tenant under a tenancy agreement entered into or renewed after this part comes into force other than the rent for a rent period not exceeding one month, which payment shall be applied in payment of the rent for the last rent period under the tenancy agreement.

(2) A landlord shall pay annually to the tenant interest on the security deposit for rent referred to in subsection (1) at the rate of six per cent per year.

85.(1) This section applies to security deposits held by landlords at the time this part comes into force, other than security deposits for rent only as described in section 83.

(2) The landlord shall pay interest annually on any moneys held by him as a security deposit at the rate of six per cent per year.

(3) Subject to subsection (4), the landlord shall pay the security deposit to the tenant, together with the unpaid interest that has accrued thereon within fifteen days after the tenancy is terminated or renewed, but a judge of the County or District Court of the county or district in which the premises are situate may, upon summary application therefore, extend the time to such longer period as he considers proper.

(4) Where the landlord proposes to retain any amount out of security deposit, he shall so notify the tenant together with the particulars of and grounds for the retention and he shall not retain such amount unless,

(a) the tenant consents thereto in writing after receipt of the notice; or

(b) he obtains an order of the judge under subsections (5) and (6).

(5) A landlord may apply to a judge of the County or District Court in the county or district in which the premises are situate for an order authorizing the retention of all or part of a security deposit in the same manner as upon an application for termination of a tenancy and section 105 applies to the application mutatis mutandis.

(6) Upon an application under subsection (5), the judge may dismiss the application or order that all or part of the security deposit be retained by the landlord to be applied on account of any obligation or liability of the tenant for which the security deposit was taken.

The security deposit provisions in the Ontario legislation may be divided into three categories for purposes of analysis:

(a) Existing security deposits for damage

The landlord is required to pay interest on existing security deposits held for damage at six per cent per annum. He is furthermore required to repay these amounts to the tenant within fifteen days of the termination of the tenancy, and in addition he is also required to pay the accrued interest thereon. The landlord is required to repay to the tenant within fifteen days of renewal of an old tenancy, i.e., an old tenancy prior to the Act where there was an existing security deposit for damage. The landlord may also apply to a judge who may extend the fifteen day period.

In order to retain all or a portion of the security deposit for damage, the landlord must proceed to give notice to the tenant with the anticipation that the tenant will agree to the withholding in writing. If the tenant does not so agree then the landlord can only retain all or a portion thereof by applying directly to the court. Under this procedure, the Sinclair Report, at p. 27, has noted that the landlord has to work to keep the money, and the hope evidently is that the tendency will be to give it back, whereas under the old common law system a tenant had to sue to get the money back, and the tendency was not to bother.

The landlord may not retain an existing security deposit for damage unless the terms of the lease expressly provide for such retention, and violation of those express provisions occurs. If the landlord does not give the deposit back and has not received the tenant's permission or has sued as required, the landlord is then also liable to a fine for such failure, up to $1,000, as set out in section 108 (1).

At the time of a renewal of a lease in existence prior to the Act coming into force, the landlord must either return the existing security deposit for damage or retain it as a future security deposit.

(b) Existing security deposits for non-payment of rent

There are no new, direct provisions in the Ontario legislation respecting existing security deposits for non-payment of rent. Accordingly, there is no requirement for a landlord to pay interest on it. Furthermore, there is no specific procedure outlined for the landlord to retain

for the last month's rent, as is the case with future security deposits considered below.

(c) Future security deposits

With respect to all new leases entered into after this section came into force, and all renewed periodic tenancies, the landlord can retain in advance a maximum of one month's rent as security against non-payment of rent. Interest on this security deposit is paid at the same rate, six per cent. There are no penalty provisions if the landlord does not use the deposit for the last month's rent. As noted in the Sinclair Report, at p. 28, this is presumably so because the tenant, ". . . recognizing from the beginning that he has on deposit a full month's rent, simply neglects to pay the last month and by default lets the landlord keep the deposit which he would be entitled to in any event."

The above analysis yields two conclusions. First, there is no question that the damage deposit as such has been misused and that tenants through ignorance, neglect or fear have not been treated properly with respect to their opportunities to retrieve damage deposits. Second, there is the problem where the landlord has, after extracting a security deposit under new legislation for non-payment of rent, sold the property. The new owner of the building, that is the new landlord, is not privy to the original contract whereby the tenant had a right to get back the full security deposit if he, in fact, had kept up his rental payment. Lamont has pointed out that this covenant to repay a deposit is not a covenant that runs with the land, and the landlord who is an assignee of the original landlord is, therefore, not bound. The running of covenants at common law has always been a vexing problem, but one which has often been cured by legislation (see:

Lamont, Residential Tenancies, at pp. 15-20).

(3) British Columbia

Sections 37-44 of the 1974 British Columbia legislation deals with security deposits and their administration by a rentalsman. The following comments may be made respecting the new provisions:

(a) A landlord may require that a tenant give a security deposit by paying to the rentalsman an amount not exceeding the equivalent of one month's rent.
(b) The rentalsman is required to hold the security deposit in trust for the tenant and to pay all security deposits made to him into one fund, and to invest the fund in securities authorized under the Trustee Act. The rentalsman pays the interest or income received by him in respect of the fund or any investment to the Minister of Finance who holds the moneys in the Consolidated Revenue Fund for the purposes of the Renters Resource Grant Act in addition to any other moneys appropriated under that Act.

Section 39 of the new legislation provides for transferring deposits in those cases where the residential premises in respect of which a tenant has made a deposit are sold. Section 40 provides remedies for a landlord where he has a claim by reason that a tenant does not pay rent, the tenancy is terminated and the tenant does not pay all or part of the last instalment, the tenant abandons the premises or terminates the tenancy other than in accordance with the Act, or the tenant breaches his duty to maintain the premises in a clean state or has negligently or wilfully

caused damage. The new provisions are set out below:

37.(1) No landlord and no person on behalf of a landlord shall, except in accordance with this section, require a tenant or prospective tenant, or a person on behalf of a tenant or prospective tenant, to give a security deposit.

(2) A landlord may require, at the date a tenancy agreement is entered into, that a tenant give a security deposit by paying to the rentalsman an amount not exceeding the equivalent of one month's rent payable under the tenancy agreement.

(3) Notwithstanding the number of occupants of residential premises, no landlord shall require more than one security deposit under subsection (2) in respect of the residential premises.

38.(1) Subject to subsection (2) and the claim by a landlord made in accordance with this Act, the rentalsman shall hold a security deposit in trust for the tenant who paid the security deposit.

(2) All security deposits made to the rentalsman shall be paid into and form one fund, and the rentalsman shall invest the fund in securities in which a trustee is authorized, under the Trustee Act, to invest trust funds.

(3) The rentalsman shall pay the interest or income received by him in respect of the fund or any investment under subsection (2) to the Minister of Finance who shall hold the moneys in the Consolidated Revenue Fund for the purposes of the Renters Resource Grant Act in addition to any other moneys appropriated under that Act.

39.(1) Where residential premises in respect of which a tenant has made a security deposit are sold, the rentalsman shall, upon application made by the new landlord, and with the consent of the former landlord, transfer the rights of the former landlord under this Part in respect of the security deposit to the new landlord.

(2) Where a tenant terminates a tenancy agreement in respect of which he made a security deposit, and enters into another tenancy agreement in respect of which a new landlord requires the tenant to make a security deposit, the rentalsman shall, upon application by the tenant, and with the consent of the former landlord, transfer the rights of the former landlord under this Part in respect of such portion of the security deposit as the tenant and the former landlord may specify to the new landlord.

(3) Where a tenant

(a) terminates a tenancy in accordance with this Act; and

(b) signs a consent, in such form as may be prescribed in the regulations, permitting the rentalsman to pay the rent deposit to the landlord,

the rentalsman, upon receipt of the consent, shall pay the rent deposit to the landlord.

40.(1) Where a landlord has a claim by reason that

(a) a tenant does not pay rent in accordance with a tenancy agreement; or

(b) a tenancy is terminated in accordance with this Act and the tenant does not pay all or part of the last instalment of rent under the tenancy agreement; or

(c) a tenant abandons residential premises, or terminates a tenancy agreement other than in accordance with this Act, and the landlord suffers loss of revenue resulting from such termination or abandonment; or

(d) a tenant contravenes section 30(4),

the landlord, subject to subsection (2), may make the claim against the tenant in a court, or, where the tenant has paid a security deposit, may make the claim against the security deposit held by the rentalsman.

(2) Where a landlord has a claim under subsection (1) that is equal to or less than the amount of the security deposit held by the rentalsman,

the landlord shall make his claim to the rentalsman in accordance with section 43.

(3) Where a landlord has a claim under subsection (1) that is greater than the amount of the security deposit held by the rentalsman, the landlord may, subject to section 42(2), make his claim in a court and shall give to the rentalsman a copy of the writ or summons respecting the claim.

41. No landlord shall make a claim under section 40(1) in respect of cleaning residential premises unless, in the opinion of the court or the rentalsman hearing the claim, the cleaning is necessary for the purpose of repairing damage caused by a tenant contravening section 30(4).

42.(1) Where the rentalsman is given a copy of a writ or summons under section 40(3), he shall not disburse any part of the security deposit relating to the writ or summons unless

(a) the court that issued the writ or summons orders otherwise; or

(b) the landlord and tenant who are parties to the writ or summons agree otherwise.

(2) Notwithstanding section 40(3), where the landlord has, under section 40(1), a claim against a tenant greater than the amount of a security deposit, the landlord may make a claim to the rentalsman for an amount equal to or less than the amount of the security deposit, but, having done so, he shall not take proceedings in any court in respect of the claim.

43.(1) An application to the rentalsman under section 40 shall be made not more than fifteen days after the date the tenancy is terminated or otherwise expires and shall be made in accordance with this Act and the regulations.

(2) Upon application under subsection (1) the rentalsman, after such investigation and hearing as he considers neccessary, shall pay to the landlord such part of the security deposit as the rentalsman considers appropriate to satisfy the claim of the landlord.

(3) Where a copy of a writ or summons is not given to him under section 40(3) and an application is not made to him under section 40 within the time limited by subsection (1), or where the landlord gives his written consent, the rentalsman, upon application by the tenant, shall pay the security deposit to the tenant.

44. No security deposit shall be attached, executed upon, or garnisheed except under a court order made in respect of an action under this Act or a tenancy agreement, or in respect of the relationship of landlord and tenant.

(4) Saskatchewan

Sections 26-31 of the 1973 Saskatchewan legislation respecting residential tenancies deal with security deposits.

Section 26 permits the landlord to demand a security deposit of an amount not exceeding $75,00 or equal to one-half month's rent in the case of a tenancy other than a week-to-week tenancy, or one week's rent, in the case of a week-to-week tenancy. Section 27 provides that every security deposit paid to the landlord or his agent shall be held by the landlord in trust for the tenant. The landlord is permitted, by section 28, to invest the security deposit in securities authorized by the Trustee Act or to deposit the security deposits in a trust account in a chartered bank, trust company or credit union. The landlord is required to pay interest to the tenant at the rate of 5% per annum. The interest is payable by the landlord to the tenant as it accumulates to the amount of $10.00 from time to time. Upon termination of the tenancy, the remaining interest is to be paid by the landlord to the tenant. Section 30 provides that no security deposit held by a landlord is attachable under any garnishee proceeding or receiving order, or exigible under a writ of execution.

Section 31 sets out the requirements for return of the security deposit upon termination of the tenancy. The landlord is required by subsection (1) to return the security deposit to the tenant together with any unpaid interest thereon within ten days after the termination of the tenancy. If he intends to retain the whole or any portion of the deposit with respect to a claim for compensation or other claim the landlord is required, where the tenancy has terminated by effluxion of time or where the landlord or tenant has served notice of termination, within five days after the termination or within five days after the service of notice, serve on the tenant a notice of claim in writing setting forth the nature of the claim and particulars.

If the tenant does not within five days after the service of the notice of claim, consent in writing to the retention by the landlord of the amount claimed, or other amount agreed upon by the parties, the landlord is required to, within ten days after the date of service by him of the notice, pay or deliver to the board the security deposit and unpaid interest, if any, together with a copy of the notice of claim, the lease, and a certified copy of the landlord's records relating to the security deposit; and, apply to a judge under section 35 for an appointment to fix the time and place for a hearing of the matter and serve a copy of the appointment upon the board and the tenant.

The Board will then forward the documents and records it has to the judge and will hold the security deposit subject to the court order.

When the order is given the landlord is required to serve a copy of it upon the board and upon the tenant. The board will then pay out the deposit and unpaid interest thereon in accordance with the order.

If the landlord does not apply to a judge as required or fails to serve the board and the tenant with a copy of the appointment granted by the judge after the day on which the appointment was granted, his claim is barred and the board will pay the security deposit and any unclaimed interest to the tenant.

(5) Manitoba

There are some differences in the Manitoba legislation which distinguish it from that legislation examined to this point. The provisions may be summarized as follows;

(a) The total amount of the security deposit may not exceed one-half month's rent.

(b) Interest is required to be paid at the rate of four per cent per annum, compounded annually. The Manitoba legislation contains specific provisions that the rate of interest is to be applicable only on security deposits entered into after the Act came into force, and is to be paid on leases begun before that date, and security deposits, therefore, made before that date, but the interest is not to begin until the Act came into force on such earlier leases.

(c) The landlord is to return the money within fourteen days of the end of the tenancy together with the interest thereon.

(d) Unless the parties agree otherwise, in order to extract money from the security deposit, the landlord must notify the rentalsman and the tenant in writing of his objections to the return of the security deposit, or a part thereof, and forward at that juncture all of the deposit,

plus the four per cent accrued income, directly to the rentalsman, and at the same time send to the rentalsman a detailed description of the damage, with an estimated cost of repair. The rentalsman will then attempt to obtain an agreement between the parties as to how to deal with the claim, and in fact it may then proceed to arbitration, which will be binding on the parties and not subject to appeal. Furthermore, where the rentalsman is not able to arbitrate the dispute and come to a decision within thirty days, he is to notify the landlord. The landlord may then commence an action in the courts for the security deposit. If the landlord does not commence the action within ten days, the rentalsman will return the security deposit, together with the accrued interest, to the tenant.

In regard to the above provisions in Manitoba, the Sinclair Report, at p. 38, has noted that this system has the advantage of shifting the obligation to the landlord and not requiring the tenant to pursue what has in the past often been a fruitless task.

(6) Quebec

Article 1664d of the Civil Code prohibits the landlord to exact in advance any amount other than the payment of rent for one term, or if such term exceeds one month, the payment of one month's rent.

(7) Nova Scotia

Section 9 of the Nova Scotia legislation contains provisions similar to those which have been examined above. However, there are some minor differences.

(a) The security deposit is to be an amount not in excess of one-half of one month's rent.

(b) The proceeds are to be held in trust.

(c) interest at the rate of six per cent is to be paid on this amount by the landlord.

(d) It is to be returned to the tenant within ten days of the termination of the tenancy.

(e) If the tenant does not consent, then the landlord may keep all or a portion of the deposit, but only upon making a complaint under the provisions of section 10, that is, to proceed by way of complaint under the Summary Convictions Act. Such complaint must be made within fifteen days of the end of the tenancy, and if no such complaint is made within that time period, then the deposit is to be returned to the tenant.

Section 9(3) provides that the proceeds of the trust fund representing the security deposit may under the terms of the statute be applied to expenses incurred in respect of damage to the residential premises that is a responsibility of the tenant. Under the Prince Edward Island legislation, which will be examined below, if the landlord is entitled to make a deduction, then he may do so by following the prescription laid down. It seems that under the Prince Edward Island provisions the landlord would make a deduction if the lease provided that the tenant was to be responsible for certain items, but could not otherwise, whereas it appears that the legislation itself gives this right to the landlord under the Nova Scotia Act.

(8) New Brunswick

The Sinclair Report, at pp. 42-43, made the following recommendations for reform of the New Brunswick law respecting security deposits:

(a) Landlords should be expressly permitted to require as a condition of leasing that in addition to a rental period's rent in advance that a separate sum, equal to the week's or the month's rent be paid to the landlord by the tenant to be used by the former as security solely against non-payment of rent.

(b) A provision should be included in the Act which makes it clear that this type of security deposit, dealing only with non-payment of rent, is the only extraction of money to be allowed by a landlord from a tenant aside from the rental obligations and any others imposed by legislation.

(c) The running of the covenant to repay should be expressly provided for as under the Ontario legislation.

(d) Where a security deposit is taken, interest at a fixed rate should be paid.

(e) The new legislation should require that landlords keep security deposits in a separate trust account and return the money, plus any unpaid interest, within fifteen days of the end of the tenancy. The obligation to pay should be fastened directly on the landlord with a penalty provision included where he fails to comply with the statutory requirement.

(f) With respect to amounts of money held by landlords for tenurial relationships existing at the time the new Act comes into force, the legislation should require that such sums continue to be held by landlords only as security against non-payment of rent; that damage deposits are no longer to be held, and that any sum held by landlords at such date in excess of the permitted week's or month's rent be returned immediately upon request by the tenants concerned.

The New Brunswick bill respecting residential tenancies (1974) contains the following provisions in regard to security deposits and provides for the establishment of a security deposit fund and its administration by a rentalsman.

SECURITY DEPOSIT FUND

8.(1) A lease entered into after this section comes into force may provide for a security deposit to be made by the tenant at the beginning of the tenancy.

(2) A security deposit is to provide security against the tenant's failure to pay rent or his failure to comply with his obligation respecting cleanliness or repair of the premises under clause (a) or (b) of subsection (1) of section 4.

(3) A security deposit is not to exceed an amount equal to the rent payable for one month's occupation of the premises.

(4) No person shall require

(a) under a lease, or

(b) as a condition of

(i) entering into a lease, or

(ii) not terminating a lease,

any other person to pay any amount other than rent, a security deposit or a reasonable amount for any service to be provided in relation to the tenancy, and any agreement under which such a requirement is imposed is void.

(5) Each rentalsman shall maintain a fund to be known as a security deposit fund

(a) into which are to be paid in accordance with this section amounts required to be provided under the terms of a tenancy agreement as security deposits; and

(b) out of which may be paid amounts to satisfy claims of landlords allowed by the rentalsman.

(6) A rentalsman

(a) shall establish and maintain in his records separate accounts of each tenant and of all money received under subsections (7), (8), (10) and (13);

(b) shall credit the tenant's account with the amounts received under subsections (7), (8), (10) and (13);

(c) shall debit the tenant's account with any amounts used or returned under subsections (12), (14) and (15); and

(d) shall indicate on each account the name of the landlord currently under contract with that tenant and the address of the premises in respect of which the security deposit is held.

(7) Where an amount of money is held by a landlord as a deposit for damage or security against non-payment of rent at the coming into force of this section, the landlord shall deliver that amount to a rentalsman in the manner provided by regulation.

(8) Except where appropriate action is taken by the tenant and a rentalsman in accordance with subsections (9) and (10), where a lease entered into after this section comes into force provides for a security deposit the tenant shall deposit with a rentalsman the amount established by the lease.

(9) Where a tenant enters into a lease providing for a security deposit and has to his credit in an account maintained by a rentalsman an amount deposited as a security deposit under a previous tenancy agreement, he may apply to the rentalsman in the form prescribed by regulation requesting the rentalsman to issue a certificate in satisfaction of the tenant's obligation to provide a security deposit under the lease.

(10) Where

(a) a tenant deposits with a rentalsman an amount in accordance with subsection (8);

(b) a landlord delivers to a rentalsman an amount in accordance with subsection (7); and

(c) a rentalsman

(i) determines that an application under subsection (9) should be approved, after inquiring into the likelihood of a claim being made in respect of the amount presently credited to the tenant's account, and

(ii) receives a sum of money from the tenant equal to the amount by which the security deposit under the lease exceeds the balance in the tenant's account under subsection (6);

the rentalsman shall deliver to the landlord a certificate to the effect that an amount prescribed therein is held by him as a security deposit in respect of premises designated therein.

(11) The certificate issued under subsection (10) shall be a sufficient basis upon which the landlord may make a claim in respect of the failure of the tenant to comply with his obligations up to the amount set out in such certificate.

(12) Where a tenancy has terminated and the tenant has failed to perform any of his obligations in respect of which the security deposit was made, the rentalsman, upon a claim being made by the landlord within seven days after the termination of the tenancy and upon conducting a proper investigation, may use all or a portion of the security deposit toward the discharge of such obligation.

(13) Subject to subsection (15), where the allowance of a claim pursuant to subsection (12) reduces the balance of a tenant's account under subsection (6) below the amount prescribed in a certificate issued under subsection (10) the tenant shall deposit with the rentalsman, within the time established by the rentalsman, an amount sufficient to bring the balance of his account up to the amount prescribed in the certificate; and the amount required to

be deposited is a debt owing to the rentalsman, as agent of Her Majesty in right of the Province, and may be recovered in any court of competent jurisdiction.

(14) Where there is an amount in a tenant's account under subsection (6) in excess of the amount prescribed in a certificate issued under subsection (10), that excess amount is to be returned to the tenant within seven days of a request in writing by the tenant for such return if the period provided for under subsection (12) has elapsed.

(15) Where a tenancy has terminated and no application has been made by the tenant under subsection (9), an amount equal to the balance of the tenant's account, after the application of subsection (12) is to be returned to the tenant within seven days of a request in writing by the tenant if the period provided for under subsection (12) has elapsed.

(16) Notwithstanding anything in the Financial Administration Act to the contrary, a rentalsman shall deposit all money received by him in respect of the security deposit fund, or pursuant to any other provisions of this Act, in one or more interest bearing accounts in one or more chartered banks or trust companies within the Province.

(17) To help defray the administrative expenses of the offices of the rentalsmen, all interest earned on money deposited in any account by a rentalsman pursuant to subsection (16) is the property of Her Majesty in right of the Province and is to be paid annually by the rentalsman into the Consolidated Fund.

(18) All accounts and records of each rentalsman are to be examined by the Auditor General in accordance with the provisions of the Financial Administration Act.

(9) Prince Edward Island

Sections 96 and 97 of the Prince Edward Island Residential Tenancies legislation deal with security deposits. These sections are very cumbersome, so much so

that Professor Sinclair commented, at p. 32, that this is one of the areas that a tenant, if he was in possession of a copy of the Act, after reading the first couple of sentences would give up. One redeeming feature of the Prince Edward Island legislation is that it is not worded in complete legal jargon. However, it attempts to cover so many facets of future situations that it is bogged down in superfluous detail. For example, section 97(1) provides as follows:

> (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 ten 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 ten 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 therefor within ten 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.

With regard to the above provision, the Sinclair Report, at p. 32, states the following:

> It can be seen from the above that it is easy to get top heavy with the detail which attempts to cover the many different situations. One could imagine, surely, that it would be simpler to take care of the situation in a more efficacious fashion without quite so many different methods of handling security deposits.

(10) Newfoundland

The Province of Newfoundland, in its bill respecting residential tenancies introduced in 1973, has a separate portion dealing with security deposits.

The Newfoundland provisions differ from those in Ontario in that while there is regulation in Newfoundland of security deposits there is no differentiation between deposits held for non-payment of rent and those deposits which are more accurately described as damage deposits. Accordingly, a landlord in Newfoundland may continue to extract from a tenant a security deposit and use it for whatever purpose the parties have agreed to.

The security deposit is regulated in the following manner:

(a) The maximum amount that the landlord may demand in the nature of a security deposit is, in the case of a week-to-week tenancy, a sum not exceeding the rent for two weeks, and in all other cases the maximum amount is one-half of one month's rent.

(b) The landlord is to pay interest on the security deposit at six per cent per year.

(c) Under normal circumstances the deposit, together with the interest accrued thereon, is to be returned to the tenant within 30 days after the date of the termination of the tenancy.

(d) If the landlord wishes to use the security deposit for damage incurred while the tenant was in possession of the premises, then he may do so if the tenant agrees in writing, and if not, the only way in which it may be done is for the landlord to make a complaint under the provisions of a further section of the Act whereby he must move under the Summary Jurisdiction Act, and judicial intervention in order to retain all or a portion of the security deposit is, therefore, mandatory. Such action must be taken within 15 days after the termination of the lease, and failure to move within that time, means that the landlord must then comply with the earlier provision of full return plus interest within 30 days of the date of termination.

A number of comments may be made in regard to the Newfoundland provisions.

First of all there is the fundamental question of whether or not security deposits should in the future be allowed to cover the damage claims or be restricted to security for non-payment of rent.

Secondly, where a tenant anticipates remaining on the demised premises as a tenant for a long period of time, it does not seem practical from either the tenant's viewpoint or that of the landlord that the security deposit should remain within the hands of the landlord and continue to accumulate interest over this long period. On occasion, tenants remain in possession of premises for a number of years regardless of whether they are on a weekly or monthly tenancy, and the Newfoundland provision that interest will be paid to the tenant only after the date of termination of the lease may mean that the period is too long.

Thirdly, while the responsibility is shifted to the landlord to make his claim through judicial intervention to use the security deposit for payment of damages caused by the tenant, and thus, the tenant is not so liable to lose his security deposit through simple ignorance or neglect, upon which it is alleged at least that landlords have relied in the past, the fact remains that if the landlord fails to return as required, the tenant himself must lay a complaint and proceed under the provisions of the Summary Jurisdiction Act.

It may be worthwhile, at this point, to contrast the provisions of the Newfoundland and Prince Edward Island legislation since both are quite distinct from that in other provinces.

The distinction between the Prince Edward Island Act and that of Newfoundland, revolves around, firstly, the amount that the landlord can bargain for, in that no matter whether the tenancy in Prince Edward Island is weekly, monthly or yearly, the maximum amount to be taken as security deposit is not to exceed one month's rent. Secondly, the rate of interest in Prince Edward Island as in Newfoundland, is six per cent per year, and is, in fact,

to be paid every year unless the tenant agrees that it will be paid at the end of the tenancy. The Sinclair Report, at p. 34, has commented that this does not cure the potential problem for those tenancies which are long term.

There is an additional provision in the Prince Edward Island statute whereby the landlord may invest money in a fashion which will yield an amount in excess of six per cent. He may keep the excess for his own purposes. In the same manner as it was handled in Newfoundland, the landlord is required either to return the security deposit within 10 days of the end of the tenancy, or give a statement of account, and return the balance of the deposit after making his deduction in accordance with the terms of the lease, or, if he is unable to so determine, then to make an estimate and deliver a statement of the estimate and the estimated balance within 10 days of the end, and a final statement and balance within 30 days of the end of the tenancy.

Unlike Ontario, Prince Edward Island has proceeded on the basis that a security deposit may be taken for both non-payment of rent and for damages. To avoid the cumbersome Prince Edward Island provisions it may be worthwhile in Alberta to move on the basis that the security deposit should be for payment of rent only and, similar to Ontario, only for security for the last month's rent.

4. Issues

(1) Should the law abolish the taking of deposits against damage? Alternatively should the law restrict the amount to be taken to the amount of the rent for one rental period, or some other amount? Or should the law leave the matter unregulated?

(2) Should the law abolish the taking of deposits against non-payment of rent? Alternatively should the law restrict the amount to be taken to the amount of the rent for one rental period, or some other amount? Or should the law leave the matter unregulated?

(3) Should the law clearly state that the deposit or deposits provided for above, if any, are the only exactions of money to be allowed by a landlord from a tenant aside from the payment of rent and any other obligations imposed by legislation?

(4) Should the landlord be required to pay interest on the security deposit and if so from what date and at what rate? Should any such rate be fixed by law?

(5) Should the law require the landlord to keep the security deposit in a separate trust account, as the Landlord and Tenant Act now does? Should the law require the landlord to invest the money only in investments authorized by the Trustee Act?

(6) Should the law require the landlord to return the security deposit and any accrued interest to the tenant within a stated time period, and if so what?

(7) Should the law impose a penalty upon a landlord who fails to comply with any statutory requirement as to the investment of security deposits and the payment of interest?

(8) Should the law require landlords to pay security deposits into a fund administered by a rentalsman or other official, or should disputes over the return of security deposits continue to be resolved by the court?

(9) Should the law make provision for a case in which the landlord who holds security deposits sells the property to someone else who is not bound by contract with the tenant to give the tenant credit for the deposit or to return it?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

POST-DATED CHEQUES

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1. The Law in Alberta (at Common Law)

The practice of requiring a tenant to issue a series of post-dated cheques to cover future payment of rent is not regulated by the common law in Alberta.

There are few statistics to verify the incidence of this practice. However, it is known that some landlords have found it to be a time saving device which ensures that the rent cheques are available on the due dates. The ability of a landlord to require future rental payments by post-dated cheques depends upon the relative bargaining position of the parties such that a situation of high demand for accommodation coupled with short supply will ensure to a landlord a de facto right to require post-dated cheques as a condition of renting the premises should he choose to do so.

In a questionnaire survey of three hundred tenants in the New Brunswick cities of Fredericton and St. John, noted in the Sinclair Report, at p. 44, only fourteen of two hundred and thirty-eight tenants responding to the questionnaire indicated that their landlords required the rent to be paid by post-dated cheques. There is no statistical information on the incidence of the practice in Alberta.

In addition to making the monthly collection of rent more speedy and efficient the practice also provides landlords with a measure of security.

As will be seen in other jurisdictions, which will be treated below, a number of Canadian provinces have included provision in residential tenancy legislation to cover post-dated cheques. Two factors have influenced this reform:

(a) Complaints by tenants that landlords have used their possession of the cheques to create a restrictive

atmosphere whereby a tenant feels prevented from exercising future rights such as an action to terminate for constructive eviction; and,

(b) The view in jurisdictions which are reforming the law of landlord and tenant relating to residential tenancies that the creation of increased rights for tenants to take positive action where a landlord fails to meet new statutory obligations (e.g., a right to terminate where a landlord fails to make necessary repairs), may be thwarted by the use of post-dated cheques as a threat against tenants exercising new rights created by legislation.

2. The Legislative Response in Other Jurisdictions

(1) Ontario

As recommended by the Ontario Law Reform Commission the present Ontario legislation provides as follows in s. 84(3):

> (3) On or after the first day of January, 1970, a landlord or a tenancy agreement shall not require the delivery of any post-dated cheques or other negotiable instrument to be used for the payment of rent. [R.S.O. 1970, c. 236, s. 84].

Lamont, in his book, Residential Tenancies, at p. 20, has noted that in the light of the amendments and the intent to balance the interests of landlords and tenants, it was apparently felt that to require prepayment of rent by post-dated cheques would give some landlords more control over tenants who had, as it were, prepaid their rent and therefore might hesitate to exercise the rights given to them by the amendments. Furthermore, the prohibition of post-dated cheques is complimentary to the amendment that the only security

deposit permitted in the future will be for the last month's rent. However, if the tenant wishes, he may pay future rent by post-dated cheques.

(2) British Columbia

The new British Columbia legislation contains no provision in regard to the use of post-dated cheques.

(3) Saskatchewan

The 1973 Saskatchewan legislation has made provision for post-dated cheques in section 17. In providing for post-dated cheques the new Saskatchewan Act permits a landlord and a tenant to agree in writing for the use of such cheques. Section 17 is as follows:

> Except where his tenant agrees thereto in writing, no landlord shall include in a tenancy agreement, a requirement that the tenant deliver to the landlord post-dated cheques or other negotiable instruments for the payment of future rent under the tenancy agreement.

(4) Manitoba

The Manitoba legislation has not only prohibited the use of post-dated cheques in a residential tenancy situation but has also made it an offence for a landlord to coerce a tenant in any way to provide post-dated cheques as a condition of entering into a tenancy agreement.

The provisions of the Manitoba Act in this regard are as follows:

> 84.(3) On, from and after the coming into force of this part, a tenancy agreement shall not include a provision for the delivery

> of any post-dated or other negotiable instrument to be used for a payment of rent.
>
> [S.M. 1970, c. 106, s. 3]
>
> (4) Where a landlord or his agent coerces or attempts to coerce a tenant or offers any monetary or other consideration to a tenant to induce the tenant to deliver any post-dated cheques or other instruments to the landlord or his agent, the landlord or his agent, as the case may be, is guilty of an offence under this Act.
>
> [S.M. 1971, c. 35, s. 2]

(5) Quebec

The use of post-dated cheques is specifically forbidden in Quebec except for the payment of the last month's rent by the terms of Article 1664e which states:

> The lessor cannot exact issue of a cheque or other post-dated instrument for payment of rent except for the final term, or, if such term exceeds one month, for payment of the final month's rent.

At first glance, the above provision would appear to give an implied right to demand a security deposit, but such an implication is rendered unnecessary by Article 1664d which makes exact provision for the payment of money in advance.

(6) New Brunswick

The Sinclair Report has recommended that for the future, security for a landlord should be restricted to protection against non-payment of rent. It has been recommended that the new legislation contained a prohibition respecting the delivery of post-dated cheques. However, this recommendation has not found its way into the Residential

Tenancies Bill No. 65 (see, Bill 65, 47th Session, Province of New Brunswick, 1974).

(7) Nova Scotia

Nova Scotia has not made any provision in its legislation, or in subsequent amendments, to either prohibit or endorse the practice of requiring post-dated cheques by landlords.

(8) Prince Edward Island

The legislation dealing with residential tenancies in Prince Edward Island contains no statutory provision prohibiting or otherwise regulating the practice of a landlord requiring post-dated cheques.

(9) Newfoundland

In its 1973 legislation on residential tenancies, Newfoundland has made provision in section 9 for the regulation of post-dated cheques. That section reads as follows:

> No lease shall, after the coming into force of this Act, provide for the delivery of any post-dated cheque or any negotiable instrument to be used for payment of rent, but if it does so provide, such provision is void and of no effect.

Unlike Saskatchewan, there is no possibility of a landlord and tenant making a private agreement for the delivery of post-dated cheques for the payment of rent which will be legally enforceable.

3. Comment

The matter of post-dated cheques does not present a large problem, at least at the present, in the residential landlord tenant relationship.

This particular facet of the residential tenancy situation has been commented upon in the Sinclair Report, at pp. 44-50, and by Lamont in his analysis of the Ontario reform legislation, at p. 20. Neither the British Columbia nor the Ontario Law Reform Commissions have seen this issue of such importance as to merit analysis.

However, when looking at reform of the landlord/tenant relationship one will likely see new statutory rights being given to tenants and new statutory obligations being placed upon landlords. The possibility exists that post-dated cheques under such future legislation could be used as a threat by a landlord to prevent a tenant from freely exercising his new statutory rights or from vigorously demanding performance of the statutory obligations of the landlord.

4. Issues

(1) Should the law prohibit a landlord from requiring a tenant to deposit with the landlord a series of post-dated cheques for rental payments?

(2) If so:

1. Should the law provide, as does the Ontario legislation, that the tenant is not prohibited from paying future rent by post-dated cheques if he wishes.

2. Should the landlord and tenant be able to contract out of the provision, that is, agree that the landlord may require post-dated cheques.