Institute of Law Research and Reform

The University of Alberta

Edmonton, Alberta

RESIDENTIAL TENANCIES PROJECT

Background Paper No. 4

TERMINATION PROCEDURES
FAILURE OF TENANTS TO PAY RENT
OVERHOLDING TENANTS

November 1975

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

TERMINATION PROCEDURES

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1. Introduction

In this paper three aspects of termination procedures will be discussed:

(a) first, the requirements at common law and under the legislation in the various Canadian provinces for a landlord or a tenant to terminate the relationship which exists between them, including, the general requirements stemming from the various rules as to time and the manner in which these notices are to be given; and,

(b) second, the method to be used by either the landlord or the tenant to bring the tenancy to a close in the nature of mechanical steps; and,

(c) third, the legal procedural steps, judicial or otherwise, to be followed by the landlord or the tenant where the tenant, is granted such a right and in the more common area where the landlord is granted the right upon failure of the tenant to move, having been required to do so.

The emphasis is on these three aspects rather than on other matters related to termination of tenancies and which are dealt with separately, like "security of tenure", the overholding tenant situation and the landlord's remedies in case the tenant fails to pay rent. Some overlapping however was hard to avoid.

2. Statutory Provisions in Canada

(1) The present law in Alberta

Sections 6, 7, and 8 of the Alberta Landlord and Tenant Act set out the various notice requirements for termination of a weekly, monthly, or yearly tenancy.

Subsection (1) of section 6 requires that a notice to terminate a weekly tenancy shall be given on or before the last day of one week of tenancy to be effective on the last day of the following week of the tenancy. Subsection (2) provides that, for the purposes of this section, "week of the tenancy" means the weekly period on which the tenancy is based and not necessarily a calendar week and, unless otherwise specifically agreed upon, the week shall be deemed to begin on the day upon which rent is payable.

Subsection (1) of section 7 sets out that a notice to terminate a monthly tenancy shall be given on or before the last day of one month of the tenancy to be effective on the last day of the following month of the tenancy. Subsection (2) of section 7 states that for the purposes of this section, "month of the tenancy" means the monthly period on which the tenancy is based and not necessarily a calendar month and, unless otherwise specifically agreed upon the month shall be deemed to begin on the day upon which rent is payable.

Subsection (1) of section 8 provides that a notice to terminate a year-to-year tenancy shall be given on or before the sixtieth day before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy. Subsection (2) of section 8 states that for the purposes of

this section, "year of the tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and unless otherwise agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

Respecting the notice provisions to terminate a tenancy, section 4 of the Alberta legislation is similar to that in Manitoba, which will be considered below, in that the notice may be oral or in writing, except that notice by a landlord to a tenant must be in writing if the landlord intends to take judicial proceedings for possession if the notice is not effective.

Provisions for substitutional service are not out of the ordinary, the only exception to the regular process is that provided by section 5(4), whereby a notice given to a corporation is not to use the procedures set out in the Landlord and Tenant Act, but must proceed in the manner outlined under section 289 of the Companies Act. As this particular subsection deals with all manner of tenancies, and not just residential tenancies, it can be seen why such a provision would be inserted. If new legislation is drafted in Alberta respecting residential tenancies only, it would be difficult to imagine a situation in which a corporation would be a "tenant" in a residence. Such a provision may accordingly become unnecessary in the future.

It is interesting to note that judicial proceedings in Alberta commence by an originating notice of motion to the Supreme Court for an order of possession rather than to the District Court or a magistrate as is the case in the other provinces. Three days notice of such hearing are required, and the application is to be supported by an affidavit. The hearing is held in summary session, and the court may, after hearing the evidence of the parties,

give an order for possession coupled with judgment for rent in arrears and costs. The order shall, if it is requested direct the tenant to deliver up possession of the property on a specific date, and if this is not complied with the landlord is entitled under the provisions of section 14, without any further order, to a writ of possession. Section 14 provides as follows:

> Where the order is not obeyed by the specified date or within the specified time, the landlord is entitled, without any further order, to be issued a writ of possession on filing an affidavit showing service of the order and that it has not been obeyed.

(2) Ontario

A landlord or a tenant may give notice to terminate either orally or in writing, but if a landlord is going to have to apply under section 106 for an order terminating the lease, the notice terminating the tenancy must be in writing. Section 99(1) of the Ontario Landlord and Tenant Act states the following:

> A landlord or a tenant may give notice to terminate either orally or in writing, but a notice by a landlord to a tenant is not enforceable under section 106 unless it is in writing.

If a landlord is going to give written notice then the notice must comply with the provisions of section 99(2). The requirements apply to notice by either the landlord or the tenant. The notice must be signed by the person giving the notice or by his authorized agent. It must identify the premises, and state the date of termination of the tenancy. Subsection (3) of section 99 states that

the notice may, in the alternative or in addition to a specific termination date, use words to terminate the tenancy "on the last day of the period of the tenancy next following the giving of a notice". Lamont, in his book Residential Tenancies, at p. 56, has suggested that these words have probably been introduced because many landlords and tenant have misunderstood when notice must be given and the length of a notice period required, and so tenancies have sometimes continued to the surprise and disappointment of the person giving the notice. The subsection also states that when the quoted words are used along with a specific termination date and if the latter is incorrectly stated, the notice is nevertheless effective to terminate the lease on the last day of the period of the tenancy next following the giving of the notice. Forms of notice using the quoted words are added as forms to the Act, Form 4 for use by a landlord to a tenant and Form 5 by a tenant to a landlord. These forms are attached herewith in Appendix "A". Subsection (4) of section 99 states that a notice need not be in any particular form, but a notice by a landlord may be in Form 4 and a notice by a tenant may be in Form 5.

The Ontario legislation makes statutory provision for service of a notice.

If the notice is by a tenant to a landlord he must either serve personally the landlord or his agent, or send it by ordinary mail to the landlord's address. Clause (a) of subsection (1) of section 109 states as follows:

> Except as otherwise provided in this Part
>
> (a) any notice, process or document required or permitted to be delivered or given by a tenant to a landlord is

> sufficiently given or delivered if delivered personally to the landlord or his agent or sent by ordinary mail addressed to the landlord at the address posted under section 104.

Landlords of apartment houses must post up conspicuously the notice of termination provisions of the Act and the landlord's address for service. Section 104 provides for the following:

> Where a landlord rents more than one residential premises in the same building and retains possession of part for use of all tenants in common, the landlord shall post up conspicuously and maintain posted a copy of sections 98 to 103 and section 109, together with the legal name of the landlord and his address for service, and any proceeding taken by or on behalf of a tenant may be commenced against the landlord in the name so posted.

If the notice is by a landlord to his tenant, it must be served personally, but if the tenant is absent or is evading service, the landlord may effect service by:

(a) giving notice to an apparently adult person on the tenant's premises; or

(b) posting up the notice in a conspicuous place on the rented premises, presumably on the door; or,

(c) registered mail to the tenant at the address where he resides.

Respecting the above, section 109(1)(b) provides as follows:

> (1) Except as otherwise provided in this Part,
>
> (b) any notice, process or document required or permitted to be delivered or given by a landlord to a tenant shall be given or delivered personally to the tenant.

When service is by mail, section 109(2) states that the notice shall be deemed to have been given on the third day after the date of mailing. Subsection (3) of section 109 provides that a judge may order any other method of service in respect of any matter before him.

Sections 101 to 103 of the Ontario legislation specifically state when notices should be given to terminate weekly, monthly or yearly tenancies. For a weekly tenancy, notice must be given on or before the last day of one week of the tenancy to be effective on the last day of the following week. A weekly tenancy is deemed to commence on the day when rent is payable. For a monthly tenancy, the notice is to be given on or before the last day of one month of the tenancy to be effective on the last day of the following month. A monthly tenancy is deemed to begin on the day upon which rent is payable, and so a monthly tenancy is not necessarily by calendar month. With regard to terminating a tenancy from year to year, section 103(1) provides that notice shall be given on or before the sixtieth day before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy. As 60 days from and including the last day of the term may not coincide with a day upon which rent is payable, there may be confusion about the last day by which notice must be given. If notice is improperly given, it will only be effective at the end of the next year of the tenancy. Lamont, at p. 58, has sugested that it might have been better to have provided

that a year-to-year tenancy could be terminated upon two months' notice given at any time to take effect on the last day of a month of the tenancy. Subsection (2) of section 103 attempts to define from what date a year-to-year tenancy shall be deemed to run. It provides as follows:

> For the purposes of this section, "year of the tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and unless otherwise agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

Respecting the above provision, Lamont states the following at p. 58:

> Prior to the amendment, a year-to-year tenancy was considered to run from the expiry of the lease term. The amendment states that a year-to-year tenancy is to run from the anniversary of the date upon which the tenant first became entitled to possession. When the original lease is for a period of two or more years, the reference to "the anniversary of the day, on which the tenant first became entitled to possession" must mean any anniversary of the day, and if so, the section will produce the same result as before the section was passed. In other words the year-to-year tenancy runs from the date of expiry of the lease, or from an anniversary date of the commencement of the lease which is another way of stating or producing the same result.

The problem is how to interpret or apply section 103(2) to an overholding of a lease that is for a year and a number of months. Lamont has suggested the following problem at p. 58. If we take the example of a lease for 18 months from October 1, 1972, the lease will expire on March 31, 1974, and yet the anniversary of the day the lease

commenced would be October 1, 1973, and the section would not make sense because the original lease term is still running. If we take the anniversary date to be October 1, 1974, then what is the status of the overholding from March 31, 1974, to October 1, 1974? Possibly another interpretation would be to consider that the first year-to-year tenancy of the overholding, although properly computed from October 1, 1973, and expiring September 30, 1974, is in actual fact just with respect to the period March 31, 1974, to September 30, 1974, and by this interpretation the first year-to-year tenancy is only for a period of six months.

The above problem which has been raised by Lamont is somewhat a stretching of the words of the section beyond ordinary interpretation. However, if a similar section is again included in new residential tenancies legislation in Alberta, it should be more clearly worded so that it can apply without question to an overholding when a lease is for a year and a number of months. It should also be noted that most of the provisions in Ontario have been adopted from the Alberta legislation. Since there do not appear to be any reported cases from either Alberta or Ontario we do not have the benefit of any judicial statements respecting these provisions.

The Ontario legislation provides for a judicial procedure for termination of tenancies in the following manner:

(a) The landlord or the tenant may apply by summary application to a County Court judge for an order declaring that the tenancy agreement is at an end. Such application is to state the grounds upon which the tenancy agreement is alleged to be terminated.

(b) The judge before whom the application is heard then appoints time and place for hearing, and such is then served by

a notice on the opposite party at least fifteen days before the date fixed.

(c) The hearing is then held and the judge determines the question of termination.

(d) An order for a writ of possession is then granted unless there is some reason why it should not be granted.

Section 107 provides that the landlord is not to gain possession of the premises unless he obtains such a writ under the above outlined procedure or proceeds under the non-residential provisions.

The Sinclair Report, at p. 182, has noted that one of the problems which has arisen in urban areas is that situation that arises where the tenant has chosen to exercise what he considers to be his rights in either joining a tenant's association or complaining to a body set up to receive such complaints, either municipally or provincially, and as a result of such action on behalf of the tenant the tenant the landlord has seen fit to require the tenant to vacate the premises in a form of reprisal for the action so taken by the tenant. The Ontario Law Reform Commission dealt extensively with this problem, and recommended that section which now appears as subsection (2) of section 107, as follows:

In any proceeding by a landlord for possession, if it appears to the judge that,

(a) the notice to quit was given because of the tenant's complaint to any governmental authority of the landlord's violation of any statute or municipal by-law dealing with health or safety standards, including any housing standard law; or

(b) the notice to quit was given because of the tenant's attempt to secure or enforce his legal rights,

the judge may refuse to grant an order or writ for possession and may declare the notice to quit

> invalid and the notice to quit shall be deemed not to have been given.

Provisions similar to the above Ontario provision may be found in the other reform legislation, not only in Canada but also in the United States. However, Professor Sinclair, in his report at p. 183, has noted that there is a potential hazard here. He has stated the following:

> It is tempting to provide in this type of section that there is a time limit beyond which the landlord may move so that if the tenant has complained to an authority of actions by the landlord, then the landlord may not make a move to dispossess the tenant within, say, a period of sixty or ninety days. It has been made clear to some legislatures that beyond, say, a ninety day period the landlord should be free to do as he pleases, and a number of states in the United States have, in fact, chosen this route. New Jersey, for example, has a ninety day provision so that the tenant only has a defence that he is being dispossessed because of complaint, if a complaint was made within the last ninety days. The situation has so worked out in New Jersey that complaint has to be made now every ninety days, say, to the Department of Health or some other municipal agency, in order to keep the tenant's rights alive, and the landlord cannot proceed to remove him.

Having due regard to the above it may be worthwhile not to specifically state a time limit and that the Ontario procedure be adopted in new legislation in Alberta.

(3) British Columbia

Sections 14 to 23 of the new British Columbia legislation respecting residential tenancies provides for the termination of tenancy agreements. In British Columbia, no tenancy may be deemed to be terminated unless the landlord or the tenant terminating the tenancy gives to the other party notice of termination in accordance with Part III,

of the residential premises are abandoned by the tenant.

Section 15 provides for the form of notice of termination in the following terms:

> (1) A notice of termination of a tenancy must
>
> (a) be in writing and signed by the landlord or tenant giving the notice of termination;
>
> (b) specify the date on which the tenancy is to terminate;
>
> (c) identify the residential premises in respect of which the tenancy is to terminate; and
>
> (d) where a notice of termination is given by a landlord,
>
> (i) specify the right of the tenant under section 21 to request the landlord to provide written reasons and particulars respecting the termination of the tenancy; and
>
> (ii) specify the right of the tenant under section 23 to dispute the termination and the time limitation under that section, in respect of an application to the rentalsman for a review of the notice of termination and the reasons and particulars respecting the termination.

Subsection (2) of section 15 provides that subject to the above noted subsection, a notice of termination need not be in a particular form, but may be in the form of the notice of termination prescribed in the regulations.

Subsection (1) of section 21 referred to in section 15(1)(d)(i) provides that where a landlord gives to a tenant, other than under section 19, a notice of termination of a tenancy agreement, the tenant may, not later than the date

the termination may specify to be effective, give to a landlord a notice demanding written reasons and particulars respecting the termination of the tenancy agreement. Subsection (2) of section 21 states that the landlord shall give to the tenant, not later than two days from the date the tenant is given a notice under subsection (1), within reasons and particulars respecting the termination of the tenancy agreement.

Section 16 provides for time limitations for notice. A notice of termination of a weekly tenancy shall be given not less than twenty-eight days before the date the termination is specified to be effective, and, specified to be effective on the last day of a week of the tenancy. A notice of termination of a monthly tenancy agreement must be given not less than 30 days before the date the termination is specified to be effective, and, specified to be effective on the last day of a month of the tenancy. A notice of termination of a yearly tenancy agreement must be given not less than sixty days before the date the termination is specified to be effective, and, specified to be effective on the last day of a year of the tenancy. Subsection (4) of section 16 provides that for the purposes of the above noted time limitations for notice, "week of the tenancy", "month of the tenancy", and "year of the tenancy" means the weekly, monthly, or yearly period, as the case may be, upon which the tenancy agreement is based and not necessarily a calendar week, month, or year, and, unless a landlord and tenant otherwise specifically agree the week, month, or year shall be deemed to commence on the day, or on the weekly, monthly, or yearly anniversary, as the case may be, of the day, upon which the tenant first became entitled to possession of the residential premises.

Notwithstanding section 16 of the legislation, section 17 provides that where a landlord bona fide requires

residential premises for the purpose of occupation by himself, his spouse, or a child or parent of his or his spouse, the period of notice of termination required to be given to a tenant is sixty days.

Section 18 of the new British Columbia legislation provides for early termination in that case where the tenant fails to pay rent in accordance with the tenancy agreement. That provision has already been dealt with in the paper "Failure of Tenant to Pay Rent". No further comment will be made respecting that provision here.

Section 19 provides for early termination with consent. Subsection (1) provides that where the rentalsman, upon application by a landlord and after such investigation and hearing as the rentalsman considers necessary, is of the opinion that the landlord is justified in terminating a tenancy by reason that the tenant's conduct is such that the quiet enjoyment of safety or neighbouring tenants is impaired to such an extent that it would be inequitable to them to allow such conduct to continue, or the tenant is causing extraordinary damage, the rentalsman may, in writing, consent to the landlord giving to the tenant notice of termination of the tenancy. Where the rentalsman consents to a landlord giving to a tenant notice of termination under the above subsection, the landlord shall, give notice of termination in such form and manner, and subject to such terms and conditions, including the period of notice and the effective date of termination, as the rentalsman may direct.

Section 22 provides for the renewal of the tenancy agreement in specified circumstances. It is set out below as follows:

(1) Subject to subsection (2), upon the expiration of a tenancy agreement for a specified term, the landlord and tenant shall be deemed to have renewed the tenancy agreement as a monthly tenancy agreement upon the same terms and conditions, subject to subsection (3), as are provided for in the expired tenancy agreement.

(2) Subsection (1) does not apply where,

(a) the landlord and tenant enter into a new tenancy agreement before the expiration of the terms specified in the old tenancy agreement; and

(b) the landlord or tenant gives to the other person, not less than thirty days notice of termination specifying a termination date that is the same as the expiration date specified in the tenancy agreement.

(3) Where a tenancy is deemed to be renewed as a monthly tenancy under subsection (1) and the landlord is entitled, under Part IV, to increase the rent payable in respect of the renewed monthly tenancy agreement, the landlord may increase, subject to Part IV, the rent payable in respect of the renewed monthly tenancy agreement.

Section 23 of the British Columbia legislation provides for the review of the termination of the tenancy agreement by a rentalsman. In that case where a tenant is given a notice of termination other than pursuant to section 19, the tenant may give to the rentalsman not less than fifteen days before the termination date specified in the notice of termination a notice of dispute in the form and manner prescribed in the regulations. Upon receipt of a notice of dispute, and after such investigation and hearing as the rentalsman considers necessary, the rentalsman shall set aside the notice of termination unless he is of the opinion that:

- the notice of termination was given in respect of unpaid rent in accordance with section 18;
- or the tenant failed to comply with an order of a court respecting his occupation of the residential premises;
- or the conduct of the tenant, or a person permitted in the residential premises by him, is such that the quiet enjoyment of other tenants in the residential building is disturbed;
- or occupancy by the tenant is resulting in, or has resulted in, the residential premises being damaged to an extent that exceeds reasonable wear and tear;
- or the landlord bona fide requires the residential premises for the purpose of occupation by himself, his spouse, or a child or parent of his or of his spouse, and the notice of termination was given in accordance with section 17;
- or the landlord intends to demolish the residential premises, convert them into a strata lot or unit in a cooperative corporation, or enter into a tenancy agreement for a term exceeding three years, and the landlord has complied with section 20 and has obtained the approval required under section 20(4);
- or the tenant fails to give, within thirty days from the date he enters into a tenancy agreement, a security deposit required to be made under the tenancy agreement;
- or the tenant knowingly misrepresents the residential premises to a prospective tenant or purchaser of the residential premises;
- or the tenancy agreement is, in respect of residential premises, in a hotel, motel, or

other similar transient or recreational premises and clearly specifies that the term of the tenancy agreement is an "off season period" and the date upon which the period expires;

- or the residential premises were not, at the time the tenancy agreement was entered into, ordinarily occupied by a person under the age of 19, and were, after that time, ordinarily occupied by a greater number of persons under the age of 19 than permitted by an express limitation in the tenancy agreement;
- or the safety or other bona fide and lawful right or interest of the landlord or other tenant in the residential building is or has been seriously impaired by an act or omission of the tenant or a person permitted in the residential premises by him;
- or the notice of termination was given in respect of caretaker's premises;
- or the tenant was an employee of an employer who provided the tenant with residential premises during his employment, and his employment has terminated;
- or the number of persons permanently occupying the residential premises is unreasonable.

Where the rentalsman sets aside a notice of termination under any of the above outlined circumstances, the notice is void and unenforceable. Furthermore, pursuant to section 14(2), whether or not an application is made under the circumstances above outlined by section 23(2), the rentalsman may, upon application, and after such investigation and hearing as he considers necessary, make an order respecting a right, under the Landlord and Tenant

Act or a tenancy agreement, to possess or occupy residential premises. An order of the rentalsman respecting a right to possess or occupy residential premises may be filed with the Supreme Court, or with the County Court of the County in which the premises are situated, and, thereupon, the order has the same force and effect, and all proceedings may be taken thereon, as if it were an order of the appropriate court.

(4) Manitoba

Section 103 of the Manitoba legislation make a split between those tenancies which are to last over and under a period of twelve months. With respect to tenancies to last less than twelve months, then in all cases, whether weekly, monthly, or otherwise, the landlord and the tenant are to give each other one month's notice effective on the expiry date if this expiry date is predetermined by the parties at the time the leasing arrangement is entered into. If no such predetermined date has been selected, then one picks the rental period which cannot in any case, by the statute, exceed one month, but may be one week or one month, and gives notice before the last day of any such rental period to be effective on the last day of the next ensuing rental period. Furthermore, where the tenancy agreement is for a period in excess of twelve months, or is exactly twelve months, then two months notice must be given by a landlord or a tenant prior to the predetermined expiry date.

Section 103(5) provides that where the tenancy is for twelve months or more, then three months prior to the predetermined expiry date the landlord must advise the tenant of his responsibility to give his two months notice if he wishes to terminate the agreement. If the landlord fails to give such notice then the tenant may terminate on the predetermined date without notice or may stay in

the residential premises.

The tenant, in Manitoba, may, even if the landlord has followed the obligations to give the required period of notice, continue on provided he is not in default of his obligations. A further provision should be mentioned in that, where an apartment, for example, is occupied by a janitor who performs services for the landlord, the landlord may give only one month's notice regardless of other conditions of the leasing arrangement under the provisions of section 103(8).

The Manitoba legislation is one of the most simplified in Canada. Accordingly, it merits close study for adoption in Alberta. It should be pointed out that further simplification could be established if the dual requirements of predetermined date and no predetermined expiry date were eliminated. Furthermore, it may be possible to avoid the lengthy provisions which are contained in the new British Columbia legislation.

Section 101 of the Manitoba legislation provides that if the landlord is to proceed against the tenant by notice in order to bring the relationship to an end, such notice must be in writing; in all other cases, any notice required to be given, for example, notice by a tenant to a landlord that he is going to quit, may be done either in writing or orally. If the notice is to be in writing, then it is to be signed by the person giving it, or his agent, must identify the premises, state the date on which the tenancy is to terminate, and, as under the Ontario provisions, is to provide the additional information in the nature of the reason why the tenancy is to be terminated. Forms, which are optional, are provided in the Schedule to the Act.

Section 101(5) expressly provides that the landlord

may not charge any fee for notice to vacate.

The manner in which a tenant gives to a landlord notice is by personal delivery or registered mail at the address where the rent is payable. The landlord may give notice to the tenant personally or by registered mail to the address of the tenant. Substitutional service is similar to that in the other jurisdictions as to delivery to adult persons on the premises, by posting, or by delivery by registered mail. There is no provision in Manitoba requiring the landlord to post in a conspicuous place in the apartment building an address for service and his legal name. This requirement which is contained in many of the other provinces is supplanted by the requirement in Manitoba of delivery, if it is to be in writing, by registered mail to the place in which the rent is to be paid, and as the tenant would obviously have that address on hand, the posting of a notice would be superfluous. The provision would be workable except in those cases where the landlord personally collects the rent and no address for service is thus provided. If this situation were to exist then the posting of notice provisions as contained in the Ontario legislation are worthwhile.

Respecting judicial proceedings in Manitoba there are a number of provisions, e.g., failure to pay rent, which constitute termination under the Manitoba legislation. The mistake should not be made that because there are some rather severe provisions for the landlord to terminate the tenant's right to occupy the property, e.g., after the lapse of five days in which the rent has not been paid, then termination may be had, with immediate right to possession then in the landlord. This does not mean that the tenancy has come to a close so that the landlord now has the right to occupy and possess the property himself. Such termination only gives rise to the right of the landlord to

enforce his claim under succeeding provisions of the Act in that the landlord may proceed by summary application before a judge of the County Court to apply for an order for possession. Section 108(1) provides that if the application is based on failure of a tenant to pay rent, then four days must have elapsed between the date on which the landlord may demand payment in writing under the provisions of the Act and the application before the court. A further five days has to elapse between the time of service and the time appointed for hearing before a judge. The application of the landlord is to be by affidavit setting out the terms of the tenancy and the reasons for termination. There are detailed provisions as to how the application and supporting affidavit are to be served. There are no specific provisions for substitutional service, only a requirement that it shall be in the manner in which the court directs.

The judge at the time of the appointed hearing may render an order for possession and include within it claims for arrears of rent, give judgment for such amount and for damages and costs. If such an order for possession is then granted it is to include a statement that if the tenant does not obey, then an order for eviction will issue. This last mentioned order is the final step and puts the landlord back into possession of the property once it has been fulfilled. The tenant may stay the eviction order by payment of all arrears and costs, and such payment will allow the tenant to continue in possession under the terms of his former tenancy.

Under the provisions of section 113, the judicial proceeding is the only method allowed for a landlord to recover possession.

Manitoba has some different corollaries to actions for possession by a landlord. They are outlined below:

(a) If the notice to quit was given because of the tenant's complaint to governmental authority of a landlord's violation or alleged violation of statutes or of municipal by-laws, then the court will refuse the order for possession.

(b) There is a specific provision under section 113(3) whereby, if the landlord requires the building for demolition purposes, or repairs, as requested and required by a tenant, are too costly having regard to the nature of the premises, and the court agrees with it, then an order for eviction, subject to terms and conditions as the court deems fit, will issue. Of course, if the order for demolition or repair is given, and the landlord does not proceed with such, for example, demolition, after the tenant leaves, but rents it to a further tenant, there is a specific provision for penalties of not less than $500 and not more than $1,000 for such practice.

(c) The specific provision is included within section 113(4) that where school children are present on the premises the landlord is not to terminate or evict during any school year in which that child or children is or are attending school. This right of the tenant does not apply where he is, in fact, in arrears of rent.

(d) Where the landlord has sold the property to a bona fide purchaser, he may give to the tenant one month's notice to vacate the premises.

(5) Saskatchewan

Sections 18 to 25 of the 1973 Saskatchewan legislation respecting residential tenancies provide for the termination of the tenancy agreement.

A weekly, monthly, yearly or a year-to-year tenancy may, unless otherwise mutually agreed upon, between the landlord and tenant, be terminated by the landlord or the tenant upon written notice to the other. The written notice must be signed by the person giving the notice or by his duty authorized agent, must identify the premises in respect

of which the notice is given, and state the date on which the tenancy is to terminate or state that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice. The notice may state both the date on which the tenancy is to terminate and that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice, and if it does state both, the date on which the tenancy is to terminate is incorrectly stated, the notice is nevertheless effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.

A notice to terminate a weekly tenancy must be given not later than the last day of any week of the tenancy to be effective on the last day of the immediately following week of the tenancy. The expression "week of the tenancy" means, according to subsection (2) of section 20, the weekly period on which the tenancy is based and not necessarily a calendar week, and unless otherwise specifically agreed upon by the landlord and the tenant, the week shall be considered to begin on the day upon which the rent under the tenancy agreement is payable.

A notice to terminate a monthly tenancy must be given not later than the last day of any month of the tenancy to be effective on the last day of the immediately following month of the tenancy. According to subsection (2) of section 21, the expression "month of the tenancy" means the monthly period on which the tenancy is based and not necessarily a calendar month, and unless otherwise specifically agreed upon by the landlord and the tenant, the month shall be considered to begin on the day upon which the rent under the tenancy agreement is payable.

A notice to terminate a yearly tenancy or a year-to-year tenancy shall be given not later than the sixtieth day

before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy. Pursuant to subsection (2) of section 22, the expressions "yearly tenancy" and "year-to-year tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and unless otherwise agreed upon by the landlord and the tenant, the year shall be considered to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession of the residential premises.

According to subsection (2) of section 18, any tenancy, other than a weekly tenancy, monthly tenancy, yearly or year-to-year tenancy, that is determinable on notice may, unless otherwise agreed upon, be terminated by the landlord or the tenant by service of a notice of termination in writing, signed by the person giving the notice or his agent, identify the premises, and state the date upon which the tenancy is to terminate.

A notice is not required to be in any particular form but a notice by a landlord or a tenant may be in the form prescribed and appended to the residential tenancies legislation, namely, Form A and Form B.

Section 23 provides that a landlord may terminate a tenancy agreement upon seven days notice to the tenant if the tenant after written notice of a contravention of statutory condition 7 of section 16, respecting the tenant's duty to keep the interior of the premises clean or to repair damage caused by him or a person permitted on the premises by him, which written notice was served on the tenant by the landlord within a reasonable time after the contravention, and the tenant again contravenes statutory condition 7. The landlord may also terminate a tenancy agreement upon seven days notice in other circumstances (a) where the tenant, after written notice of a contravention of statutory condition

8 concerning certain uses of the premises by the tenant which are prohibited, and the written notice was served on the tenant by the landlord within a reasonable time after the contravention or, where the contravention is a continuing one, during, or within a reasonable time after the cessation of, the contravention, and the tenant again contravenes statutory condition 8 or continues to contravene that condition, as the case may be; and, (b) the landlord may terminate the tenancy agreement upon seven days notice to the tenant if the tenant is in arrears in payment of the rent under the tenancy agreement for a period of thirty days or more.

Subsection (2) of section 23 provides that the notice of termination in any of the above circumstances shall state the date on which the tenancy agreement was entered into, the term granted by the agreement, the amount of rent payable under the agreement and the date or dates on which the rent is payable; and, where the notice is sent in respect of a contravention of the above noted statutory conditions, the nature of the alleged contravention must be set out with full particulars, or, where the notice is sent in respect of a default of the tenant to pay rent, the date on which the default arose and the amount of rent that is in arrears at the time of the sending of the notice must be included.

Where a landlord has entered into a tenancy agreement with a tenant only by reason of the tenant's employment by the landlord in respect of the premises in which the residential premises are situated, the tenancy of the tenant is terminated on the day on which the employment of the tenant is terminated and the tenant shall within one week thereafter vacate the residential premises occupied by him. Pursuant to subsection (2) of section 24, if the tenant fails to vacate the premises in these circumstances, the landlord may apply to a judge for an order for immediate possession

of the residential premises occupied by the tenant.

Section 25(1) provides that unless a tenant has vacated or abandoned the residential premises, the landlord shall not regain possession of the residential premises on the grounds that he is entitled to possession except under the authority of an order obtained pursuant to section 25.

Where a landlord requires the possession of the premises or the building in which the premises are situated for the purposes of demolition or requires the premises or the building in which they are located on the ground that the order to be carried out by the landlord in respect of the building or the premises are too costly or of such a nature that they cannot be carried out while the tenant continues to occupy the premises, the landlord may apply to a judge under section 35 for an order of possession of the building in which the premises are situated or of the premises themselves, as the case may be. The judge, if satisfied from the evidence adduced of the validity of the application, may grant an order to the landlord for possession of the premises in respect of which the application was made, subject to such terms and conditions, if any, as the judge may see fit to impose.

According to the provisions of section 35, an application authorized in respect of any matter under the Residential Tenancies Act or an application for an order for possession of residential premises must be made to a judge of the Magistrates Court and shall state the relief applied for and the grounds on which the application is made. A person who considers himself aggrieved by any order made by the judge, decision or judgment, under section 35 may appeal therefrom to the District Court under section 36. In respect to any matter in which a summary application to a judge under section 35 is authorized under the Residential

Tenancies Act, a landlord or tenant, under section 38, instead of applying to a judge under section 35, may apply to the Provincial Mediation Board to mediate the dispute.

(6) New Brunswick

Section 19 of the New Brunswick Landlord and Tenant Act, provides as follows:

> (1) Subject to any express agreement to the contrary, sufficient notice to quit shall be deemed to have been given if there is given:
>
> (a) in the case of a weekly tenancy, a week's notice ending with the week;
>
> (b) in the case of a monthly tenancy, a month's notice ending with the month;
>
> (c) in the case of a tenancy from year to year, three months notice ending in the case of a tenancy originally from year to year, with an anniversary of the last day of the first year thereof, and in the case of all other tenancies from year to year, with an anniversary of the last day of the original tenancy;
>
> provided that, in the case of an agricultural lease not less than six months notice to quit shall be given.

The above notice requirements are quite general as to common law. The Sinclair Report, at pp. 164-165, has noted that there has been problems with it in the past, and there are a number of cases dealing with construction and interpretation of what the provisions mean. There are various problems which stem from trying to make an objective appraisal of what is meant by "ending with the week", and in trying to determine under clause (c) what is meant by "the anniversary of the last day of the first year thereof", contrasted with "anniversary of the last day of the original

tenancy". The difficulty has been somewhat resolved in that the distinction between these two last quotations under clause (c) of subsection (1) of section 19 is to deal with that situation where the original tenancy was a term of years which existed for a number of months rather than a number of years. For example, if the original tenancy was for a term of say, 18 months, one could not say that the tenancy was to end on the last day of the first year and it has to conclude, therefore, with the last day of the original tenancy in such cases.

The Sinclair Report, at p. 165, has noted that this leads to confusion, and if the purpose of legislation is to cure problems rather than to create them, then some new method of providing times for termination of tenancies should be provided in New Brunswick.

In New Brunswick, the procedural steps for the landlord to exercise his right of re-entry are limited. Section 8 of the Act gives to a landlord a right of re-entry where the rent has remained unpaid for a period of fifteen days; under the provisions of that section no formal demand whatsoever has to be made. The rights are conditioned by the application of section 14 in that in those situations where there is a right of re-entry under a written or oral agreement, and where section 8 does not apply, that is, in cases where the right of re-entry is being exercised for those things other than non-payment of rent, then the landlord must serve on the tenant a notice, and no remedy capable of being compensated by money payments shall be used by a landlord unless the tenant fails with any reasonable time after the service of such notice to make compensation or remedy the breach. In other cases, and in particular in the non-payment of rent case, and, therefore, under the provisions of section 8, the tenant, himself, may proceed, and the manner in which he may do this is to apply to the court for relief, and wide

discretionary powers are given to the court to grant such relief if it sees fit.

The tenant can avoid the action of a landlord to enforce his right of re-entry by payment into court of the arrears of rent and costs. One of the problems of this section is its exception in that in the important case of the lease of furnished property, it does not apply. There are provisions under section 14(10) for posting of a notice requirements where the tenant is unavailable.

Under the provisions of section 61, if the tenant fails to pay his rent within seven days of the time agreed upon, holds over after the termination of the term after having been given notice under section 56, or, having given notice under section 57, that the landlord may proceed in the following manner:

(a) The landlord serves upon the tenant a demand for possession, which normally would take the form as set out in the Schedule to the Act.

(b) If the tenant fails to obey the provisions of the demand for possession, then the landlord may take the next step of commencing summary proceedings against the tenant for possession, and for payment of the amount owing. The landlord does so by applying on affidavit, which is to set forth those things as required under the provisions of section 64.

(c) A summons is issued by the judge seized of the case, which summons is served on the tenant at least three clear days before

its return.

(d) When returned, the judge hears both the landlord and the tenant, and if he agrees with the landlord, issues an order for possession for which, again, a form is provided in the Schedule.

(e) The order for possession is handed to the sheriff, who puts the landlord in possession of the property, and section 70 gives to the sheriff permission to use elements of force. The sheriff is entitled, as well, to levy on the property found therein for satisfaction for any arrears of rent.

(f) Appeal procedures are provided to appeal to the Court of Appeal.

Aside from the overholding tenant procedure, the provisions for notice to terminate under normal circumstances, that is, in the non-overholding cases, is non-existent. In those cases, therefore, where a periodic tenancy is in effect, no notice requirements being necessary under a tenancy for a term of years, there are no provisions by way of legislation for such notice. It is left entirely up to to the parties as to the manner in which this is done and this has led to a number of problems, not the least of which is the question in the mind of the tenant as to whether notice has been properly given, and, as well, is the case in the mind of the landlord as to whether he has, in fact, taken the proper steps to correctly apprise the tenant of his intention to terminate the relationship (see: Sinclair Report, at pp. 176-179).

The 1974 New Brunswick bill respecting residential

tenancies provides for termination of tenancies in sections 24 and 25.

Section 24(1) provides that a notice of termination of a tenancy is to be served if the premises are let from year to year, by the landlord or the tenant at least three months before the expiration of any such year to be effective on the last day of that year; if the premises are let from month to month, by the landlord at least three months, and by the tenant at least one month, before the expiration of any such month to be effective on the last day of that month; and, if the premises are let from week to week, by the landlord at least three weeks, and by the tenant at least one week, before the expiration of any such week to be effective on the last day of that week. Where the premises are let for periods that are greater than a week and less than a month, they will be deemed to be let from month to month. The period of a tenancy from a year to year, month to month, or week to week, begins and ends pursuant to subsection (3) of section 24, on the day specified in the tenancy agreement.

Any notice, process or document to be served by or on a landlord or a tenant is sufficiently served if it is delivered personally or sent by ordinary mail to the landlord at the address given in the lease or to the address posted under the provisions of subsection (4) of section 25, or to the tenant to the address of the premises, or to a rentalsman to the address of his office. Where any notice, process or document is sent by mail, it is deemed to have been served on the third day after the date of mailing. Where a notice cannot be delivered personally to a tenant by reason of his absence from the premises or by reason of his evading service, the notice may be served on the tenant in the following manner:

(a) by serving it on any adult person who apparently resides with the tenant;
(b) by posting it in a conspicuous place upon some part of the premises or door leading thereto; or,
(c) by sending it by ordinary mail to the tenant at the address where he resides.

Subsection (4) of section 25 provides that where demised premises are located in a building containing more than two premises and the landlord does not reside in the building, the landlord shall post conspicuously and maintain so posted within the building the legal name of the landlord or his agent and an address for service and any notice is sufficiently served if delivered or mailed to the address so posted and any proceeding taken by or on behalf of a tenant may be commenced against the landlord in the name so posted.

Section 21 of the 1974 New Brunswick bill deals with eviction. In that case where a tenant has not vacated the demised premises as required in a notice to quit and the landlord so requests, a rentalsman, without further investigation, may issue an eviction order in the form prescribed by regulation. Where a landlord has served on the tenant a notice to terminate the tenancy or a tenant has served on the landlord a notice to terminate the tenancy, and the tenant has not vacated the demised premises on the day stated on such notice of termination, the landlord may apply to a rentalsman for an eviction order. Where the landlord applies for such an order, a rentalsman shall conduct an investigation and issue an eviction order in the form prescribed by regulation. The sheriff upon receiving an eviction order, shall put the landlord in possession of the premises and for that purpose the sheriff and his deputies and officers have full power, after reasonable demand for

admission, to force open both outer and inner doors of the premises. Where the sheriff or his deputies or officers put the landlord in possession of the demised premises, any chattels of the tenant may be removed and delivered to a rentalsman to be dealt with by him.

(7) Newfoundland

The provisions in the Newfoundland legislation for termination of tenancies are radically different from the common law, and the other jurisdictions examined above.

With respect to weekly tenancies, the tenant is to give one week's notice prior to the end of the week, but the landlord is required to give four weeks' notice before the expiration of any week. With respect to monthly tenancies, the tenant is to give one month's notice before the end of any month, and the landlord is required to give three months' notice before the end of any such month. With respect to yearly tenancies, both landlord and tenant are treated the same in that each must give three months' notice before the end of any tenurial year in order to bring the tenancy to a close. Finally, with respect to those tenancies that fall within a week and a month then the tenancies are deemed to be monthly, and the provisions for notice by both landlord and tenant, namely, three months and one month respectively, are to apply to these tenancies.

A number of comments should be set out respecting the above. Firstly, the landlord and tenant may agree to change these arrangements but may only do so by agreeing on longer periods of notice. In other words, the parties cannot contract out of the provisions of the statute unless they give more latitude by providing a longer period. Secondly, section 15(6) provides, that if the rent is in arrears for one rent period, then the landlord may give notice to quit,

effective at the end of the next period so that if the tenancy was weekly in nature and the rent was payable at the rate of, say, $50 per week, then the landlord does not need to follow the requirements of clause (c) of section 15(1) in giving four weeks notice, but may give one week's notice only.

Under the provisions of section 17(1), if the landlord intends to increase the rent then three months' notice must be given before demanding such an increase, and, of course, the tenant under this provision could, himself, decide not to accept the proposed increase, and leave at the end of that period.

There are no provisions contained in the Newfoundland statute defining what is meant by weekly, monthly and yearly periods insofar as what are the anniversary dates of such periods. Presumably there are a number of suppositions that one could make, the most compelling being that where the Act speaks of premises being let from month to month and that, therefore, the tenant must give one month's notice before the expiration of any such month, that the determination of what is a "month" is done, as in Ontario, specifically by legislation determining when the rent is paid. The clarity of the Newfoundland provision could be improved if such were specifically set forth as has been the case in Ontario. It might be concluded that the dual requirements fastening a longer period on a landlord than on a tenant appear to be included for the reason that the landlord has more control over the property and thus should be required to give longer notice than the tenant is obliged to give, and that tenants evidently do not have as much notice of the fact that they are to move or to be moved as landlords do in knowing when they shall require the property to be handed over. Professor Sinclair, at pp. 171-173 of his Report, stated that he was somewhat apprehensive of this

dual requirement in that it not only, perhaps, could be stated to be more favourable to one side than to the other, but, looking at it as objectively as possible, it appears to create a problem where no problem should exist.

The procedural requirements for giving notice are not unlike those in Ontario examined above. The notice must be signed by the person giving it, or his agent, must identify the premises, and state the date on which the tenancy is to terminate, or that the tenancy is to terminate on the last day of the next ensuing period. Section 15 includes procedures for the dual requirement as to termination dates, as in Ontario. Forms are set out which may be used, and the notice may be given by a tenant to the landlord personally or by mail, whereas the landlord must give the notice to the tenant personally. Similar provisions for a tenant who has vacated or who is evading service are included, and there is added the notice provision with reference to registered companies whereby the tenant may serve notice on a director, manager, or other officer of that company, or send it by registered mail to the registered office of the company. Similar provisions are also contained in the Newfoundland legislation similar to those in Ontario for a tenant who has complained about his landlord in that the magistrate to whom the landlord appears to dispossess the tenant may refuse on the basis that the landlord is doing it because of such complaint.

Respecting judicial proceedings, a landlord or tenant may proceed by way of complaint under the provisions of the Summary Jurisdiction Act. In addition, one party is to give to the other written notice at least five days before the complaint is made. The magistrate seized of the case may make an order requiring payment of the money by a landlord or tenant to the other, requiring the performance of any act by one or the other, providing for the termination of

the tenancy, and in some cases that the landlord be put into possession of the premises. Any peace officer may enforce the latter provision.

(8) Nova Scotia

In regard to the Nova Scotia provisions respecting termination of tenancies, they are similar to those in Newfoundland and no further comment will be made here.

Section 10 of the Nova Scotia Act provides for judicial proceedings to be taken by way of complaint under the Summary Convictions Act. Five days notice by either party to the other of such a complaint is required. Any order of the magistrate following such complaint is to be enforced as a judgment under the terms of the Municipal Courts Act. Forms are prescribed by regulation. The Nova Scotia legislation also contains the provision for grounds for the magistrate to refuse a landlord on his request for a demand for possession where the reason for such complaint stems from the landlord's objection to a tenant's legitimate complaint.

(9) Prince Edward Island

The Prince Edward Island legislation insofar as it relates to the termination of tenancy agreements is similar to that in Ontario and no further comment is merited.

It should be noted that there is some confusion in the Prince Edward Island legislation between a provision under subsection (1) of section 111, which provides that the landlord and the tenant are to give notice to each other of termination of the tenancy, and that such notice must be in writing, and subsection (1) of section 114, which provides that any notice required to be given by a tenant

to a landlord is sufficiently done if delivered personally or sent by ordinary mail, whereas notice to be given by a landlord to a tenant must be delivered personally to such tenant or, if he is absent or evading, then to an adult person on the property, by posting it on the premises, or by sending it by registered mail to the address where the tenant resides. The Sinclair Report, at pp. 186-187, has stated that it would be preferable, even though section 114 is prefaced with the words "except as otherwise provided in this Part", and subsection (1) of section 111 is within this Part and, therefore, would govern, and would avoid potential confusion if there was a single section dealing with the form of notice requiring that it be in writing. Subsection (3) of section 111 does provide that the parties may use optional forms as set out in Schedules to the Act. There are provisions in other statutes relative to the question of mail which has gone astray, and while the rules for the common law for years have fought with the problem of undelivered mail, it is much more sensible if the statute provides where mail is required, for failure to deliver. Subsection (2) of section 114 states that mail is deemed to be delivered the third day after mailing where in fact it has never been received.

There is a similar provision providing that a landlord, where he rents more than one apartment in the same building is to post his legal name and address for service by the tenant upon him.

In regard to judicial proceedings, judges of the County Court are the form to which applications are made with the provision that the applicant is to serve a notice of the appointed time and place of hearing upon the other party at least ten days before such time. Apparently the most common cause of action anticipated is a demand for possession by a landlord, for this is specifically covered whereby the judge

is authorized to issue a warrant in the form provided, again, in the Schedule, directed to the sheriff or peace officer to command him to give possession of such premises to the landlord. The provision is contained, as it is in other areas, whereby no repossession by the landlord can take place except under the authority of such an order. As well, the provision is included that if the reason for the landlord's move to dispossess the tenant is because of bona fide complaints to a governmental authority of alleged landlord violation of statute or by-law, then the judge may refuse to grant the order. An appeal is provided for to the Supreme Court of the province.

(10) Quebec

Articles 1660 and 1661 of the Civil Code provide that when the lessor or lessee wants to avoid the automatic extension of the lease he must give the other party a notice of termination in writing.

In case of a lease of twelve months or more notice has to be given at least three months before the expiry of the term. In case of a week to week or month to month tenancy notice has to be given respectively a week or a month before expiry. If the rent is payable according to another term, the notice must be given with a delay equal to such term, but the maximum requirement is set at three months.

Deviation of those notice provisions may be made with the permission of a judge in chambers and will be granted provided the other party does not suffer serious prejudice therefrom.

Articles 1663 to 1664c provide for cancellation of the lease. The lessor may cancel the lease when

- the lessee is in arrears of rent for three weeks or more;
- the dwelling is ruinous and becomes dangerous for the public or the occupants;
- the lessee leaves the dwelling before the expiry of the lease, taking his moveable effects with him. The lessor may in that case make a lease with a new lessee, but he retains his recourse for damages against the former lessee.

The lessee may cancel his lease if he has obtained permission to lease a dwelling in low rental housing. The heir or legatee of a deceased lessee may also cancel the current lease.

3. Issues

(1) Should the law provide that the landlord and the tenant have to give notice to terminate the tenancy? Should the notice be in writing?

(2) How much time in advance should notice be given in case of a weekly, monthly and yearly tenancy?

(3) Should the law provide for different requirements for a notice, depending on whether it is the landlord or the tenant, who terminates the tenancy?

(4) Should there be a standard notice form attached to the law and should the use of this form be mandatory?

(5) Should the law provide for specific requirements with respect to the delivery of the notice of termination by the landlord or by the tenant? Should the notice be delivered personally or by mail and when is the notice deemed to have reached the other party?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

FAILURE OF TENANTS TO PAY RENT

TABLE OF CONTENTS

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1. Introduction

We will in this paper consider the different remedies a landlord has in case a tenant fails to pay rent. One of the remedies of course is distress, but because of its specific character we thought it better to deal with distress seperately (see background paper No. 6).

We can distinguish between two situations. The first one being a situation where the lease is expired, but the tenant overholds and fails to compensate the landlord. The second one being a situation where the tenant fails to pay rent during the term of the tenancy agreement.

Common remedies for the landlord are in those situations a request:

(i) for compensation for use and occupation;
(ii) for re-entry; and
(iii) for accelerated rent.

The situation where the tenant overholds will more extensively be discussed in the paper on overholding tenants.

2. Statutory Provisions in Canada

(1) The Present Law in Alberta

(i) Compensation for use and occupation

Generally, in those cases which are described as overholding tenancies, the tenant is often required by legislation in many jurisdictions, after he has been given notice to quit by the landlord, or in those cases which may be described as periodic tenancies where the tenant himself has

given notice that he will terminate, and the tenant overholds beyond the time when he is required to leave, that the landlord is entitled to double the rent that would normally have been due under the old tenancy agreement for the period of overholding.

In this province, section 9 of the Landlord and Tenant Act provides in subsection (1) that a landlord is entitled to compensation for the use and occupation of the demised premises after the tenancy has expired or has been terminated and the acceptance of a landlord of arrears of rent or compensation after the expiration of the tenancy or after notice of termination of the tenancy has been given does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree. Subsection (2) provides that the burden of proof is upon the person so claiming. Subsection (3) provides that a landlord's claim for arrears of rent or compensation for use and occupation by the tenant after the expiration or termination of the tenancy may be enforced by application to a court, whereupon the court may grant an order for possession if the tenancy has expired or has been terminated; may give judgment for the amount of rent proven to be arrears where a claim for rent is made; or, where a claim for compensation is made, give judgment in such amount as the court may determine as compensation for the use and occupation of the premises after the expiration or termination of the tenancy, having regard to the nature of the use and occupation and the rent payable during the tenancy; and, may make such other order as to costs as is just.

Under the existing Alberta provisions, if there is an overholding tenancy terminated by notice as required, the landlord is only entitled to compensation for use and occupation. It appears that such compensation is based on the

normal rental provisions and double rent provisions do not exist.

(ii) Re-entry by the Landlord

Section 10 of the Alberta legislation provides as follows:

> (1) Where a tenant, after his tenancy has expired or has been terminated, does not go out of possession of the premises held by him the landlord may apply for originating notice of motion to the Supreme Court for an order for possession.
>
> (2) The originating notice shall be served at least three days before the day named in the notice for hearing of the application.
>
> (3) The application of the landlord shall be supported by an affidavit
>
> (a) setting forth the terms of the tenancy,
>
> (b) proving the expiration or termination of the tenancy,
>
> (c) stating the failure of the tenant to deliver up possession and the reasons given for the failure, if any were given, and
>
> (d) stating any other relevant facts.

This provision gives the landlord a right to regain possession of the demised premises by resort to judicial process. However, it appears that there is no other provision which gives the landlord a right of re-entry. It may be concluded that section 10 is the only method which the landlord may utilize.

(iii) Acclerated Rent

From this writer's reading of the Alberta legislation, acceleration clauses for non-payment of rent are not specifically covered. Accordingly, it may be concluded that the parties are free to contract for such arrangements.

(2) Ontario

(i) Compensation for use and occupation

Section 105(1) provides that a landlord is entitled to compensation for the use and occupation of premises after the tenancy has been terminated by notice. Since the landlord is only entitled to compensation for use and occupation, such compensation would probably not be any more than that which would have been the normal rent if the tenant had been there under the terms of the original lease.

Subsection (2) of section 105 provides that the acceptance by a landlord of arrears of rent or compensation for use or occupation of the premises after notice of termination of the tenancy has been given does not operate as a waiver of the notice or as a re-instatement of the tenancy or as the creation of a new tenancy unless the parties so agree. The burden of proof that the notice has been waived or that the tenancy has been re-instated or a new tenancy created is upon the person so claiming.

Subsection (4) provides that a landlord's claim for arrears of rent or compensation for use and occupation may be enforced by action or on summary application to a judge of the County or District Court of the county or district in which the premises are situated.

Lamont, in his book Residential Tenancies, at p. 14, notes that formally when the landlord gave the tenant notice and the tenant did not vacate, the tenant would be liable to pay at the rate of double the yearly value of the land. If the notice to quit had been given by the tenant who then did not vacate, the tenant would have to pay double the rent. Both of these provisions are apparently made ineffective by section 105(1) for residential tenancies.

(ii) Re-entry by the landlord

The Ontario Law Reform Commission recommended against the use of self-help by landlords to regain possession. The Ontario reform legislation has followed this recommendation and provides that the only procedure for re-entry is by application for an order pursuant to section 106 declaring that the tenancy is terminated. A writ of possession may be ordered. Also, a lease can still be terminated and the landlord may re-enter if the tenant consents. Furthermore, there is an exception where a tenant has vacated or abandoned the premises. In such a case a landlord has the physical right of re-entry without a court order. Section 107(1) of the Ontario Landlord and Tenant Act provides as follows:

> (1) Unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds he is entitled to possession except under the authority of a writ of possession obtained under section 106.

The above provisions reveal that judicial methods are the only ones that can be used by a landlord to regain possession of the property where the tenant has failed to pay rent. Of course, this does not apply in those instances where the landlord and tenant have agreed that the premises

are to be given up, or where the tenant has unilaterally abandoned the property. Aside from these two exceptions, the landlord is required to proceed in the manner outlined.

(iii) Accelerated rent

Many written leases contain a common clause whereby, in the event of default in payment of rent, breach of covenant by the tenant, vacating the premises, or bankruptcy of the tenant, three months rent become immediately due. As such a clause does not effect a forfeiture, nor is it a penalty, there is no power in the court to grant relief.

Accordingly, section 97(1), has been enacted to relieve tenants from having to pay accelerated rent when there has been default in the payment of rent or in the observance of any obligation of the tenant. If the tenant pays up the arrears of rent or performs any outstanding obligation, and pays any expenses incurred by the landlord, he will not be required to pay accelerated rent.

Section 97(1) provides as follows:

> (1) Where default has occurred in the payment of rent due under a tenancy agreement or in the observance of any obligation of the tenant and under the terms of the tenancy agreement, by reason of such default, the whole or any part of the remaining length for the term of the tenancy has become due and payable, that any time before or after the commencement of an action for the enforcement of the rights of the landlord and before judgment, the tenant may,
>
> (a) pay the rent due, exclusive of the rent not payable by reason merely of lapse of time;

> (b) perform the obligation, and pay any expenses necessarily incurred by the landlord,
>
> and thereupon he is relieved from the consequences of the default.

Section 97(2) provides for a summary application to a County or District Court judge to determine any dispute as to whether a tenant is entitled to the relief.

Lamont, at p. 76, has noted that it may be possible for a landlord to avoid the relief effect given to tenants against accelerated rent by stipulating in the lease clause in question that in the event of default, a sum of money shall become payable as liquidated damages and not as a penalty and not as rent. It seems possible to argue that what has to be paid is therefore not accelerated rents, and so is not covered by section 97(1).

(3) British Columbia

(i) Compensation for use and occupation

Section 57(1) of the new British Columbia legislation provides that where a tenancy agreement expires and is not renewed pursuant to section 22 or where a tenant gives notice of termination in accordance with the Act and he continues to occupy the residential premises after the date the tenancy agreement expires, or after the date the termination is specified to be effective, the landlord is entitled to claim compensation for the period of time the tenant continues to occupy the residential premises. Subsection (2) provides that where a landlord is entitled to claim compensation and a person brings proceedings against the landlord to enforce the person's right to occupy the residential premises being occupied by the tenant, the landlord may add the tenant

as a third party to the proceedings.

(ii) Re-entry by the landlord

Section 33 of the new British Columbia legislation which deals with the landlord's right of entry does not contain a specific provision respecting the landlord's right to re-enter in that case where the tenant fails to pay rent. However, section 18 of the new legislation contains a provision for early termination of the tenancy agreement. It provides as follows:

> (1) A landlord may give to a tenant, not less than seven days, and not more than twenty days, from the date the tenant fails to pay rent in accordance with a tenancy agreement, a notice demanding payment of the rent.
>
> (2) A notice demanding payment of rent under subsection (1) shall be in form prescribed by the regulations.
>
> (3) Where
>
> (a) a tenant is given a notice demanding payment of rent under subsection (1); and
>
> (b) the tenant does not pay, in accordance with the notice and within five days of the date he is given the notice, the rent demanded,
>
> the landlord, notwithstanding section 16, may give to the tenant a notice of termination in the form prescribed in the regulations terminating the tenancy effective
>
> (c) on the last day of the rental period in respect of which the rent demanded is not paid;
>
> (d) where the tenancy is a weekly tenancy, on the tenth day after the date notice is given under subsection (1).

(iii) Accelerated rent

Section 24(1) and (2) of the new British Columbia legislation prohibit acceleration provisions in leases. That section provides as follows:

> (1) Notwithstanding any other Act and notwithstanding any agreement to the contrary, no tenancy agreement shall provide that, by reason of default in payment of rent due or in observance of an obligation of a tenant under a tenancy agreement, all or any part of the rent remaining for the term of the tenancy agreement becomes due and payable.
>
> (2) A provision of a tenancy agreement that contravenes subsection (1) is void and unenforceable.

(4) Manitoba

(i) Compensation for use and occupation

Section 107 of the Manitoba legislation provides that, if there is an overholding tenancy terminated by a notice then the landlord is entitled to compensation for use and occupation. It appears that such compensation would be based on the normal rent provisions and the older double rent provisions do not exist. That section provides as follows:

> (1) A landlord is entitled to compensation for the use and occupation of premises after the tenancy has been terminated by notice.
>
> (2) The acceptance by a landlord of arrears of rent or compensation for use or occupation of the premises after notice of termination of the tenancy has been

given, does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless parties so agree.

(3) The burden of proof that the notice has been waived or the tenancy has been re-instated or a new tenancy created is upon the person so claiming.

(4) A landlord's claim

(a) for arrears of rent; or

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

(c) for damage caused to the premises by the tenant or by any person allowed on the premises by the tenant while the tenant is in occupancy of those premises

shall be enforced by summary application in accordance with the procedure set out in section 108.

(ii) Re-entry by the landlord

Section 104(1) of the Manitoba legislation provides that if the tenant fails to pay his rent within three days from the date on which it is due, and the landlord makes a demand in writing on him to pay the rent, the landlord may decide to terminate the agreement. The termination will be effective on that date when the rent fell due and was not paid (S.M. 1972, c. 39, s. 5).

The obvious harshness of the above remedy is mitigated by section 103(9). It provides for instances in which the tenant is unable to pay the rent because of physical condition of himself or his spouse, or death of one of the parties, and other conditions whereby the tenant is given

further rights than those contained in the lease (S.M. 1971, c. 35, s. 15).

The above outlined right of the landlord to terminate the tenancy does not give the landlord a right of re-entry. It only permits him to terminate the tenancy, and, accordingly, if the tenant still refuses to quit, the landlord must comply with further provisions of the Act.

Section 108(1) provides that where the tenant after his tenancy has expired or has been terminated, does not go out of possession, the landlord may apply to a judge of the County Court for an order for possession. Where the application is made because the tenant has failed to pay his rent, then the landlord may not so act until at lease four days have elapsed following the date on which the demand for payment in writing was made. Upon five additional days having elapsed after notice of the hearing is served on the tenant, a hearing is held. The landlord proceeds by way of affidavit which is to be served in accordance with the required procedure. The application may also include a claim for the arrears of rent and if the claim is successful the order may include the necessity of payment of the arrears as well as the requiring of the tenant to deliver up the premises on a specified date. If the order is not complied with, the landlord is entitled to an eviction order by filing an affidavit with the court disclosing service and disobedience. That is provided for in section 111. The tenant may stay the proceedings by paying the arrears and costs. Section 111(4) provides that once the payment is made the former tenancy is continued (S.M. 1971, c. 35, s. 20).

Section 113(4) provides that where the tenant has a child of compulsory school age and the child is living on

the premises, the landlord may not terminate the tenancy. Accordingly, the landlord is unable to evict the tenant from the premises during the school year if the child is attending school. This does not substantially alter the effect of the provisions examined above for section 113(5) provides that subsection (4) does not apply where the tenant is in arrears of his rent and accordingly the tenant is deprived of this protection in that one instance.

(iii) Accelerated rent

Section 99 of the Manitoba legislation, as amended by S.M. 1971, c. 35, s. 11, provides as follows:

> Where default has occurred in the payment of rent due under a tenancy agreement or in the observance of any obligation of the tenant and under the terms of the tenancy agreement, by reason of such default, the whole or any part of the remaining rent for the term of the tenancy has become due and payable, at any time before or after the commencement of an action for the enforcement of the rights of the landlord and before judgment, the tenant may
>
> (a) pay the rent due together with interest thereon exclusive of the rent not payable by reason merely of lapse of time; or
>
> (b) perform the obligation, and pay any reasonable expenses necessarily incurred by the landlord in bringing the action;
>
> and thereupon he is relieved from the consequences of the default.

It should be noted that the above Manitoba provision, unlike those examined earlier, gives to a landlord the necessary expenses incurred in enforcing it, but only in bringing an action thereon.

(5) Saskatchewan

(i) Compensation for use and occupation

Statutory condition 14 under section 16 of the Saskatchewan Residential Tenancies Act provides that in case the tenant overholds, after he has given notice of termination, the landlord may claim compensation for the use and occupation of the premises. The acceptance of arrears or compensation does however not operate as a waiver of the notice or a re-instatement of the tenancy or the creation of a new tenancy, unless the landlord and tenant agree so in writing.

The landlord is under the general obligation to mitigate his damages. It is therefore likely that his compensation claim must be based on normal rent provisions and that a double rent requirement is prohibited.

(ii) Re-entry by the landlord

Section 23 of the 1973 Saskatchewan legislation respecting residential tenancies provides that a landlord may terminate a tenancy agreement upon seven days notice to the tenant if the tenant is in arrears in payment of the rent under the agreement for a period of thirty days or more. Subsection (2)(c) of section 23 provides that the notice of termination shall state the date on which the default arose and the amount of rent that is in arrears at the time of the sending of the notice. Section 25(1) provides that unless the tenant has vacated or abandoned residential premises, the landlord shall not regain possession of the residential premises on the ground that he is entitled to possession except under the authority of an order obtained under section 35 which provides for an application to a judge of the Magistrates Court. Where the

landlord so commences proceedings to enforce a right of re-entry or forfeiture or possession of the residential premises for non-payment of rent and the tenant, at any time before judgment has been delivered, pays into court all the rent in arrears and the costs of the appeal, if any, the proceedings will be stayed.

(iii) Accelerated rent

Section 16 of the 1973 Saskatchewan legislation sets out a number of statutory conditions. Statutory condition 17 prohibits acceleration of rent clauses in the following manner:

> Notwithstanding any act or law or anything in the tenancy agreement, any term of the tenancy agreement that provides that by reason of default in payment of any amount due under the agreement or in the observance of any obligation of the tenant under the agreement the whole or any part of the amount to be paid by the tenant for the term of the tenancy becomes due and payable is void.

(6) New Brunswick

(i) Compensation for use and occupation

Section 56 of the New Brunswick Landlord and Tenant Act provides that, where a tenant overholds after having been given notice in writing to give up possession by the landlord, then the tenant shall pay to the landlord double the value of the lands so detained. Section 57 provides the alternative to this in the situation where a tenant himself has given notice of intention to quit and fails to move. Here, he is liable for double the rent although no notice has been required from the landlord.

The Sinclair Report, at p. 151, suggests that section 57 could apply only in that situation where a periodic tenancy was in effect, whereas section 57 could apply most commonly to a term of years, although it could apply to a periodic tenancy, as well. Under the present New Brunswick legislation insofar as it relates to double rent, sections 56 and 57 cover the rights of the landlord to recover the same. Professor Sinclair recommended, at p. 153, that the above sections be repealed and, in lieu thereof, that a section should be inserted in any new legislation to provide for a fair return to the landlord for use and occupation by overholding tenants.

Section 22(2) of the 1974 New Brunswick Bill respecting residential tenancies provides as follows:

> A landlord is entitled to compensation for the use and occupation of the premises by the tenant after the tenancy has been terminated.

(ii) Re-entry by the landlord

The Sinclair Report, at pp. 135-136, sets out four possible ways in which a landlord may bring a tenancy to a close in New Brunswick where the tenant has failed to pay rent.

First, in the situation in which the tenant possesses property under a determinable conveyance or by virtue of conditions subsequent, the landlord may forfeit the tenancy by taking advantage of his reversionary interest in the nature of a possibility of reverter, or a right of re-entry. These two methods do not provide a convenient means as the remedy of forfeiture is not one that has been looked upon with favour by the courts.

Second, if the tenant surrenders the property, for example, half way during the term and gives the keys to the landlord and says that he is going to leave, then the landlord may terminate by accepting the surrender. This does not present any problem for it requires, as does the previous remedy, the participation of the tenant, either voluntarily or involuntarily.

Where the tenant has simply failed to pay rent and has done nothing else and the landlord wishes to bring an end to the relationship, or at least to make a re-entry on the property, then there are two areas within which the landlord may move.

The first of these stems from section 8 of the Landlord and Tenant Act. It provides that if the rent remains unpaid after it is due for a period of fifteen days, then the landlord without any demand whatsoever, may enter upon the demised premises and have it as "of his former estate." This severe remedy is alleviated to some degree by section 14(2), whereby the tenant may, if a landlord has himself commenced an action, or if such is not the case, apply to the court for relief. If the court agrees with the tenant that re-entry should not be allowed under the provisions of section 8, and the tenant pays into court the rent in arrears, plus costs, the cause of action is at an end and the tenant is to possess the property as of his former estate.

The second manner in which the right of re-entry may be exercised is that under the amendments to the Landlord and Tenant Act which were enacted in 1955. Section 61 now provides that if the tenant fails to pay his rent within seven days of the time agreed upon, then instead of proceeding on his own without demand, etc., as under section 8, the landlord may proceed to serve upon the tenant a demand

for possession, which, if the tenant fails to comply, the landlord may commence summary proceedings against the tenant for possession.

The Sinclair Report, at p. 146, recommended that the procedure in New Brunswick for a right of a landlord to move against a tenant for non-payment of rent follow that procedure in other reform jurisdictions in restricting such moves to judicial means. It was recommended that the use of the Provincial or County Court be adopted as the only avenue to be used by a landlord for re-entry. Furthermore, it was recommended that the old provisions of the present Landlord and Tenant Act in New Brunswick, based on forfeiture, should cease to apply to residential tenancies.

Section 19 of the 1974 New Brunswick Bill respecting residential tenancies provides as follows:

> (1) Where a tenant fails to pay the rent due within a period of seven days of the date fixed in the tenancy agreement for such payment, at any time within seven days following such period the landlord may serve a notice on a rentalsman, and a copy on the tenant, requesting the service of a notice to quit.
>
> (2) Where a rentalsman is served with a notice under subsection (1), he shall investigate the manner and notify the landlord and the tenant of the result of these investigations within five days of service of such notice.
>
> (3) Following investigation under subsection (2) where the rentalsman finds that the rent has not been paid he shall notify the tenant as required under subsection (2) by serving on the tenant a notice to quit in the form prescribed by regulation.

(4) Subject to subsection (6), with respect to any tenancy agreement where the rent is to be paid once each month or less often, the notice to quit is to be effective on the last day of the month in which it is served unless all of the rent due is received by the rentalsman within seven days of service of the notice to quit on the tenant.

(5) Subject to subsection (6), with respect to any tenancy agreement where the rent is to be paid more often than once each month the notice to quit is to be effective on the last day of the week following the week in which the notice is served unless all the rent due is received by the rentalsman prior to such day.

(6) Where the landlord

(a) requests that any payment of rent received by the rentalsman is not to have the effect of continuing the tenancy as provided in sub-sections (4) and (5); and

(b) establishes to the satisfaction of the rentalsman that the tenant had been served previously with a notice to quit requested by the landlord;

the notice to quit is to be effective on the day provided in subsection (4) or (5), notwithstanding the receipt of rent prior to that day.

(7) Any payment of rent by a tenant is to be applied first to arrears of rent.

Section 20 of the New Brunswick Bill provides as follows:

Except

(a) where the tenant has vacated or abandoned the demised premises;

(b) where a notice of termination has been served under the provisions of section 24; or

(c) under authority of a notice to quit served under the provisions of this Act;

a landlord shall not regain possession of the demised premises on the grounds that he is entitled to possession.

(iii) Accelerated rent

The Sinclair Report, at p. 147, notes that there does not appear to be in New Brunswick any serious problem with respect to clauses in leases providing for accelerated rent. Professor Sinclair stated that he has not seen any such provisions in the leases which he examined, but, nonetheless, he suggested that it would be pertinent to include a provision in new legislation dealing with accelerated rent in case the practice should arise. Accordingly, he recommended that the Manitoba section be adopted in New Brunswick. As well, he recommended that the provision cover liquidated damages as was recommended by Lamont in his consideration of the Ontario provision. However, Lamont's suggestion does not appear to have found its way into the 1974 New Brunswick Bill, which contains the following provision in section 22(1):

(1) Notwithstanding any provision to the contrary, any term of a tenancy agreement that provides that by reason of default

(a) in payment of rent due; or

(b) in observance of any obligation of the tenant under a tenancy agreement;

the whole or any part of the remaining rent for the term of the tenancy becomes due and payable is void and unenforceable.

(7) Newfoundland

(i) Compensation for use and occupation

This writer's examination of the Newfoundland Landlord and Tenant Act does not reveal any section specifically dealing with compensation for use and occupation.

(ii) Re-entry by the landlord

Section 15(6) of the Landlord and Tenant Act 1973 in Newfoundland, provides that where the rent payable in respect of residential premises is in arrears for one rent period, the landlord may give to the tenant notice to quit the residential premises effective at the end of the next rent period. It appears that the landlord may terminate the tenancy upon arrears of rent of, if the tenancy is month-to-month, one month.

If, after having received the proper notice, the tenant fails to move, the landlord may proceed under the provisions of section 19, by way of judicial proceeding, and must do so by way of a complaint under the provisions of the Summary Jurisdiction Act.

The proper procedure having been taken, the Landlord and Tenant Act provides that the Magistrate hearing the complaint may make an order directing that the landlord be put into possession of the rented premises.

(iii) Accelerated rent

The Newfoundland legislation does not contain a provision respecting accelerated rent.

(8) Nova Scotia

(i) Compensation for use and occupation

The Nova Scotia Residential Tenancies Act does not contain any provision dealing with compensation for use and occupation.

However Nova Scotia has a special act dealing with overholding tenants and called Overholding Tenants Act. The Act provides that the landlord may file a complaint in the County Court, stating that the tenant is overholding. The landlord may include in his complaint a claim for any arrears of rent and for the value of the tenant's use and occupation. After hearing evidence of the claim the magistrate may give judgment for any amount not exceeding five hundred dollars that he considers proper in the circumstances. However, section 4 of the Residential Tenancies Act provides that the Overholding Tenancies Act does not apply to residential premises.

(ii) Re-entry by the landlord

Section 7(3) of the Nova Scotia Act provides as follows:

> (3) Notwithstanding the periods of notice in subsection (1), where the rent payable in respect of residential premises is in arrears for one rent period, the landlord may give to the tenant notice to quit the residential premises effective at the end of the next rent period.

Failure of the tenant to move under the notice given gives rise to proceedings under section 10 whereby the Summary Conviction Act applies to provide a system whereby the landlord may regain possession of the property.

(iii) Accelerated rent

There is no rental acceleration clause provision in the Nova Scotia legislation.

(9) Prince Edward Island

(i) Compensation for use and occupation

Section 113(1) of the Landlord and Tenant Act of Prince Edward Island provides that a landlord is entitled to compensation for the use and occupation of premises after the tenancy has been terminated by notice. Subsection (2) sets out that the acceptance by the landlord of arrears of rent or compensation for use or occupation of the premises after notice of termination of the tenancy will be given will not operate as a waiver of the notice or as a re-instatement of the tenancy or as the creation of a new tenancy unless the parties so agree. The burden of proof that the notice has been waived or the tenancy has been re-instated or a new tenancy created is upon the person so claiming. Subsection (4) provides that a landlord's claim for arrears of rent or compenstation for use and occupation by a tenant after the expiration or termination of the tenancy may be enforced by action or on application to a judge as provided for in section 115.

(ii) Re-entry by the landlord

Section 116 of the Prince Edward Island legislation provides that, except where the tenant has vacated or

abandoned the demised premises, the landlord may not regain possession, because of non-payment of rent, except under authority of an order issued by a County Court judge.

(iii) Accelerated rent

Section 100 of the Prince Edward Island legislation prohibits acceleration of rent clauses in the following terms:

> Notwithstanding any Act or law, or a term or provision of a tenancy agreement to the contrary, any term of a tenancy agreement that provides that, by reason of default in payment of rent due, or in observance of any obligation of the tenant under a tenancy agreement, the whole or any part of the remaining rent for the term of the tenancy becomes due and payable, is void and unenforceable.

The above provision is clear, except that one may question the meaning of the first few words of the section --"Notwithstanding any Act or law, . . ."

(10) Quebec

(i) Compensation for use and occupation

The provisions dealing with the lease of dwellings in the Civil Code do not deal with compensation for use and occupation. Article 1648 says that the lessor may obtain eviction of the lessee if the latter overholds. It is likely that the lessor may sue the lessee for damages and article 1664h provides that every clause in a lease, which is harsh, excessive or unconscionable is void. This article likely prohibits the lessor from asking double rent from the overholding tenant.

(ii) Re-entry by the landlord

Article 1663 provides that the lessor may demand cancellation of the lease for non-payment of the rent if the lessee is for more than three weeks in arrears.

(iii) Accelerated rent

Accelerated rent provisions in a lease are not allowed according to article 1664h.

3. Issues

1. Compensation for Use and Occupation

(1) If a tenant remains in possession after the tenancy ends or after it is terminated by notice, should the landlord continue to be able to claim only compensation for use and occupation based upon the normal rent provisions? Alternatively, should he be able to claim greater compensation such as twice the rent provided in the rental agreement? If he is to be restricted to ordinary compensation for use and occupation, should the law specifically prohibit double rent provisions in leases? If so, should the parties be permitted to contract out of any such prohibition?

(2) Should the landlord's claim for compensation be dealt with by the court or by some other authority?

(3) If the landlord accepts arrears of rent or compensation for use and occupation after notice of termination of the tenancy, should that operate as a waiver of the notice, as a reinstatement of the tenancy or as the creation of a new tenancy, or should it have any effect at all? Should it have effect only if the parties agree? Should the party who claims such an agreement have the burden of proving it?

2. Re-entry by the Landlord

(1) If a tenancy has expired or been terminated, should the landlord have to obtain a court order to evict the tenant?

(2) If so, should he be able to take possession with the consent of the tenant?

(3) Should the landlord be able to take possession of premises which have been vacated or abandoned by the tenant?

(4) Should the landlord and tenant be permitted to agree that the landlord may take possession of the rented premises immediately upon non-payment of rent? Should the law require that a certain period of time elapse before the landlord can

take possession under such an agreement, and if so, what period? Should the law require the landlord to give notice to the tenant terminating the tenancy or demanding the arrears of rent before exercising the right to take possession?

(5) If the landlord is not allowed to take possession without a court order, should the court proceedings be stayed if the tenant pays the arrears of rent and costs of the proceedings?

3. Accelerated Rent

(1) Should the law deal with leases which require tenants to pay additional rent payments upon default in the payment of rent or in the observance of an obligation under the lease? Should the law relieve tenants from having to pay such additional payments?

(2) Should the parties be permitted to contract for accelerated rent?

(3) If the law prohibits clauses requiring accelerated rent, should it also prohibit the landlord from stipulating in the lease that in the event of default a sum of money shall become payable as liquidated damages and not as a penalty and not as rent?

(4) If the law permits clauses providing for accelerated rent, should the tenant be able to avoid the consequences of such a clause by paying the rent or performing the other obligation and by paying to the landlord any reasonable expenses incurred in bringing an action for the enforcement of his rights?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

OVERHOLDING TENANTS

TABLE OF CONTENTS

1. Introduction

In the following pages consideration will be given to that situation which arises when a tenancy comes to an end either through effluxion of time or upon a notice to quit given by either the landlord or the tenant and the tenant overholds beyond that period and either does or does not pay rent. In the previous section that situation where the tenant refuses to pay any more rent was covered by considering such matters as the "use and occupation" provision. Here, the following question will be considered--"What legal relationship will exist between the landlord and the tenant when, after overholding, the tenant offers to pay rent and it is accepted by the landlord?"

2. Statutory Provisions in Canada

(1) The Present Law in Alberta

Subsection (1) of section 9 of the existing legislation in this province provides that a landlord is entitled to compensation for the use and occupation of premises after the tenancy has expired or been terminated and the acceptance by a landlord of arrears of rent were compensation after the expiration of the tenancy or after notice of termination of a tenancy has been given does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree.

Under this provision it should be noted that, regardless of which happens, the tenancy expiring of its own or notice having been given, the overholding tenant situation will then come into being.

It seems that the Alberta approach to this problem respecting new tenancies out of old, based upon payment of rent by the tenant beyond the original term, has become a model for consideration in other provinces, most notably New Brunswick and Ontario which will be considered below.

(2) Ontario

Subsection (2) of section 105 of the Ontario legislation provides as follows:

> "105.(2) The acceptance by a landlord of arrears of rent or compensation for use or occupation of the premises after notice of termination of the tenancy has been given does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree."

A number of points should be raised respecting the above-noted subsection.

First, after notice of termination has been given, the payment of rent will not, of itself, have the effect of creating a new tenancy. Obviously, this does not mean that such a result cannot be achieved. The subsection concludes by saying that a new tenancy may be created if the parties so agree.

Second, the Sinclair Report at p. 157, notes that the words "after notice of termination of the tenancy" provide the only time in which this subsection will apply. If, therefore, the term of the original tenancy was a term of years, say, one year or five years, and the tenant then overheld and made one further monthly payment, which the landlord accepted,

then section 105(2) would apply, and no new tenancy would be created unless the parties had agreed otherwise, if notice of termination had been given. If this tenancy had been a periodic tenancy rather than a term of years, then there is no question that a notice would have been given by one or the other of the parties. However, it is obvious that if the tenancy originally was a term of years, then as such a relationship comes to a close automatically it is probable that no notice of termination had been given. Such being the case, the payment by the tenant of a further month's rent beyond the period would have the effect that it would have at common law in that, as no notice of termination had been given, this section would not apply, and therefore the common law rules would be applicable.

(3) British Columbia

Section 22 of the new British Columbia legislation provides that, upon the expiration of a tenancy agreement for a specified term, the landlord and tenant shall be deemed to have renewed the tenancy agreement as a monthly tenancy upon the same terms and conditions as are provided in the expired agreement. However, this does not apply where the landlord and tenant enter into a new agreement before the expiration of the term specified in the old agreement and the landlord or tenant gives to the other person, not less than thirty days notice of termination specifying a termination date that is the same as the expiration date specified in the agreement.

Section 51 provides that where an agreement expired and is not deemed to be renewed under the above-noted section or a tenant gives notice of termination and continues to occupy the residential premises after the date the agreement

expires, or after the date the termination is specified to be effective, the landlord is entitled to claim compensation from the tenant for the period of time the tenant continues to occupy the premises.

These are the only provisions in the new British Columbia legislation respecting the renewal of the tenancy agreement. Provisions such as those in Ontario and Alberta do not appear in the British Columbia Act and it would therefore seem that if a tenant overholds in British Columbia then a new agreement based on the same terms as the old agreement will be deemed to have been created under section 22 unless the parties have entered into a new agreement or they have given notice of termination.

(4) Manitoba

Section 107 of the Manitoba legislation contains similar provisions as those in Ontario respecting that situation where an overholding tenant pays rent so as to create a new tenancy. It may therefore be concluded that the effect in Manitoba is the same as in Ontario--a new tenancy is not created by the tendering and acceptance of rent unless the parties agree otherwise.

However, some consideration must be given to subsection (6) of section 103. That subsection provides that any tenant who is not in default under the terms of the original agreement may continue to occupy the premises and will have an automatic right of renewal of the old tenancy provided that the landlord does not require the premises for his own use or they are not under the provisions of the National Housing Act. The Sinclair Report, at p. 161, states that whether or not the tenant pays any new rental amount is,

therefore, immaterial under this subsection, for he can achieve the results that he had under the common law provisions of paying rent, and, if the landlord accepts, automatically getting a new yearly tenancy.

Under the provisions of section 103(6) he can do this by simply stating that he is going to renew, and if he meets the prerequisites the landlord would seem to have no choice. However, the broader rule may still operate to the effect that no payment will bring this about and accordingly, the same situation as in Ontario, is achieved.

(5) Saskatchewan

Statutory condition 14(2) of section 16 in the 1973 Saskatchewan legislation provides that the acceptance by the landlord of arrears or compensation for the use or occupation of the residential premises after the tenant has given notice of termination does not operate as a waiver of the notice or a reinstatement of the tenancy or the creation of a new tenancy unless the landlord and the tenant so agree in writing.

As in some of the other provinces, this statutory condition specifically refers to acceptance by the landlord of "arrears for compensation for the use or occupation" of the residential premises. It does not specifically refer to that situation where the tenant overholds and offers to pay the normal monthly rent.

(6) New Brunswick

Under the legislative provisions of New Brunswick, and under the rules at common law, if the tenant overholds he

can be treated by the landlord as a tresspasser. However, until he is so treated by the landlord and is told to leave he is in the category of a tenant at sufferance. However, once the landlord takes steps to remove him he becomes a simple tresspasser. If the landlord does not take such steps, and the tenant tenders the normal rent for one month, and it is accepted by the landlord, then there is a new tenurial relationship created. Once the landlord accepts the tender of the rent, the new relationship established is a periodic tenancy, the period being a year-to-year tenancy.

This means that the relationship will continue between the parties for an additional year. Furthermore, another year may be added if neither of the parties realizes that the tenancy has changed in its nature from a term of years to a periodic one. This means that it will not come to an end of its own volition, and if the tenant wishes to leave at the end of the second year, he must, according to section 19 of the Landlord and Tenant Act, give at least three months notice of his intention to vacate to the landlord. Professor Sinclair has noted, at pp. 155-156 of his Report, that tenants often feel that one months notice is sufficient in the new relationship and accordingly give one months notice prior to the end of the second year. Of course, if this happens, the parties are again involved in a relationship which will continue to exist for a third year. This result has been described as a hindrance to both landlord and tenant.

The New Brunswick proposed Residential Tenancies Act, has attempted to avoid the above-described result. Section 23 provides that the acceptance by a landlord of rent, arrears of rent or compensation for use and occupation of the premises after the expiration or termination of the tenancy

does not of itself reinstate the tenancy or create a new tenancy.

Unlike the statutory condition in Saskatchewan, considered above, the proposed Act in New Brunswick adds the words, "...acceptance by a landlord of rent..." as well as including the traditional problems of acceptance by the landlord of, "arrears of rent", or "compensation for use and occupation".

(7) Newfoundland

There is no provision in the Newfoundland legislation similar to that in Ontario or Alberta providing for the situation wherein an overholding tenant pays an additional amount of rent. Presumably, since the Act does not cover the situation, it is covered by the previous law. However, as Newfoundland did not have a Landlord and Tenant Act prior to the present Residential Tenancies Act, it cannot be concluded, as it might be concluded elsewhere, that the provisions of a normal landlord and tenant act would apply. Professor Sinclair, at p. 158 of his Report, is of the opinion that it is conjectural as to what the common law in Newfoundland was. It would seem, nevertheless, that it may be assumed that the law is not too distinct from the common law in other provinces and, therefore, that an overholding tenant situation, whereby the tenant pays the rent after the normal period, would result, as it would under the rules at common law, in the creation of a new periodic tenancy.

(8) Nova Scotia

There is no statutory provision in Nova Scotia respecting the topic being considered here. This province

does have a statute entitled The Overholding Tenants Act but section 4 of the Residential Tenancies legislation provides that the Overholding Tenants Act does not apply to residential tenancies.

There is no provision in the Residential Tenancies legislation respecting overholding tenants similar to that in Alberta or Ontario. It would seem that the Nova Scotia law has left a vacuum in this regard and the acceptance by the landlord of a rental payment after the expiration of the tenancy would have no effect so as to create a tenurial relationship. Since the Overholding Tenants Act, which has altered the common law, has been made inapplicable to residential tenancies, then the normal rules of the common law would not apply. Of course, whether such a result would be inevitable is speculation.

(9) Prince Edward Island

Subsection (2) of section 113 of the Prince Edward Island legislation is identical to that in Ontario and therefore requires no additional comment.

(10) Quebec

Article 1659 of the Quebec Civil Code provides that every lease is extended as of right with a term equal to the term of the previous lease. Extension of the lease can be avoided by a written notice from either the landlord or the tenant to the other party, provided it conforms to the provisions in Articles 1660 and 1661 and for one of the reasons stated in Articles 1663 to 1664(c).

According to the terms of Article 1659 it may

be concluded that the overholding tenant situation is no longer a problem in Quebec. Payment of rent is not necessary to extend a previously existing landlord/tenant relationship. If the landlord has given the tenant notice of termination and this notice is not disputed, then the relationship has simply come to an end and will not be reinstated by payment of rent, arrears of rent, or compensation for use and occupation.

3. Comment

In the foregoing pages the legislation in various provinces was considered respecting the relationship between the landlord and the overholding tenant. A discussion of the position of the incoming tenant is conspicuously absent, i.e., that situation which sometimes arises when a potential tenant concludes an agreement with the landlord but is prevented from getting into possession of the premises because the previous tenant is overholding.

Obviously, such a result can cause undue hardship for the incoming tenant who may have already abandoned his previous accommodation and is therefore faced with the prospect of seeking temporary quarters and storing his chattels.

Such a situation is not dealt with in the present Alberta Landlord and Tenant Act. Also, this problem is not cured by legislation in other Canadian jurisdictions. Therefore, to assess the status of the incoming tenant recourse must be had to the rules at common law.

At common law there is an implied condition as a term of a lease that the landlord will deliver up possession of the premises to the tenant on the date promised in a lease

agreement. A breach of this condition by the landlord will allow the tenant to either repudiate the lease or sue for damages.

Until a tenant actually gets into possession, he does not acquire any rights which stem from the "estate" in land. At common law, therefore, a tenant, before gaining possession, has fewer rights than after gaining entry to the demised premises. The rights before entry are termed an "interest in a term" or interessi termini.

Although a tenant having an interessi termini could not maintain an action for specific performance against a landlord, it has been held that he can maintain an ejectment action against a third party or a person in possession of the premises under the lessor. (Cole v. Clay (1829), 5 Bing. 440; 130 E.R. 1131 (C.P.); Cleveland v. Boyce (1861), 21 U.C.R. 609.)

It has been argued that a tenant who had executed a lease but had not succeeded in gaining entry into and possession of the demised premises could not maintain an action for specific performance. (See: Laskin, Cases and Notes on Land Law (Rev. Ed., 1964), at pp. 189-191.) Although some doubt has been cast upon the accuracy of this position by the Law Reform Commission of British Columbia, there has been support from other writers such as Donald Lamont, Q.C., in his book, Residential Tenancies. That author states the following at p. 34:

> "The application of the principle...[interessi termini]...was to deprive a tenant who had not been able to obtain possession, of the right to sue the landlord for specific performance. The tenant might have signed a lease or agreement to lease, and before

> he has gone into possession, the landlord decided to refuse him possession. The tenant had no legal right arising from his interessi termini (interest in a term) to require the landlord to honor the lease and let him into possession."

This view of the effect of interessi termini on the right of action for specific performance is shared by Professor Sinclair in his Report. At p. 63, Professor Sinclair states the following:

> "...if after the lease had been signed the landlord had changed his mind and then refused entry to the tenant, as the tenant had never gone into possession, and, therefore, the estate relationship had never come about, the tenant could have none of the remedies, for example, that of specific performance of the lease, or any of the actions based on possessory rights. He was restricted at most to an action for damages for failure of the landlord to honor his obligation to let the tenant into possession."

From the standpoint of a landlord, a situation of interessi termini would prevent him from maintaining an action against a tenant for rent, since the claim for rent is conditioned upon the giving of possession. Also, the remedy of distress for non-payment of rent would be unavailable.

The doctrine of interessi termini does not play a substantial role in the modern landlord/tenant relationship, although, in those cases where it does arise, particularly in an overholding situation, an unjust result will be its obvious effect.

A landlord who wants to avoid an action for damages by the incoming tenant will attempt, of course, to obtain an order for possession to get the overholding tenant out of the premises. However, the situation is not that simple. There will always be a time lapse between the moment that the landlord realizes that his previous tenant is overholding and the time that he has given back possession. He may demand compensation for use and occupation from the overholding tenant, but he will not be able to realize a claim for rent against the incoming tenant, since such a claim is based upon the giving of possession.

Section 110 of the Manitoba Residential Tenancies legislation states that a judge may give an order for possession and judgment for the appropriate sum with respect to any claim for arrears of rent or compensation for damages. The amount awarded may include any damages or charges that the landlord may have to pay to a prospective tenant as a result of the wrongful overholding of the existing tenant. (See: Williams, Canadian Law of Landlord and Tenant, 4th ed. at p. 636.)

When the landlord is unable to deliver possession within a reasonable period after the agreed date, the tenant is entitled to consider the agreement as no longer binding.

It should be noted that the doctrine of interessi termini has been abolished in all Canadian jurisdictions except for New Brunswick and Alberta. Accordingly, all tenancy agreements in Alberta take effect from the date fixed for the commencement of the term. If a tenant overholds, and the landlord cannot get him out of possession, and the incoming tenant lands on the doorstep with a moving van filled with his personal belongings, the undue hardships, as a result of the above considerations, are obvious.