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RESIDENTIAL TENANCIES PROJECT

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RESOLUTION OF DISPUTES
LANDLORD and TENANT (Advisory) BOARDS
DISTRESS

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INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

RESOLUTION OF DISPUTES

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1. Introduction

In a number of jurisdictions in Canada Landlord and Tenant Bureaus or Rentalsmen have dispute resolving powers. Sometimes they have these powers with regard to every dispute between landlord and tenant and sometimes they share them with the courts, where the courts have kept exclusive jurisdiction in certain areas of Landlord and Tenant Law.

The reasons which have lead to establishing a special body to have jurisdiction over disputes between landlords and tenants are various. One is a general fear of courts. People don't know how to start a court action and are afraid of the expenses they will have to incur. Another reason is that, because landlord and tenant disputes often require a quick resolving, the delay experienced in Small Claims Court, where most of the disputes are dealt with, is often frustrating. And a third argument is that the courts lack expertise in and understanding of the practicalities of day to day landlord and tenant relations.

The present situation in Alberta is that the courts have exclusive jurisdiction in all areas of dispute between landlord and tenant. In considering reform of The Landlord and Tenant Act we should not exclude the possibility that the Provincial Judge's Court (that deals with most of the disputes) might develop the ability to act quickly and with the understanding which is regarded as vital. This involves probably a change in procedures and evidence rules and training of special staff, all with the purpose of making the citizen's right to access to the courts easier. Experiments in this field are

going on in British Columbia.[1]

It is noteworthy however that most jurisdictions have chosen to establish a new body with specific and well-defined functions to take jurisdiction over certain aspects of the landlord and tenant relations. The most extensive provisions are encountered in the British Columbia and Manitoba Landlord and Tenant Acts, where the power to resolve dispute in certain areas of the landlord and tenant law is conferred upon the Rentalsman.

Both provinces have opted for a province-wide body. The idea of establishing a municipal body was rejected because of the fear that the disputes would then be resolved in too many different ways, without a consistent principle, and also because of the costs involved.

None of the provinces which have special bodies with dispute resolving powers have opted for a body composed of landlord and tenant representatives. Members of those bodies are usually appointed by the Lieutenant-Governor in Council. Although representation of landlords and tenants might be considered because of their awareness of the realities of the landlord and tenant relationship it is the general feeling that this might detract from the impartiality necessary to resolve disputes in an equitable way. It is also difficult to find a true representative of those groups, given the great variety

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[1] See Interim Report Small Claims Mediation Project from the Justice Development Commission of the Attorney General's Department of British Columbia, July 23, 1975.

of interests among both groups. It might therefore be desirable to compose the body of persons with a background in law and a knowledge of legal procedures.

2. Division of Jurisdiction

If it can be concluded that the setting up of a dispute resolving body will have a positive effect on speedy and expert settlement of disputes, then we have to decide what the relation will be between such body and the courts. Manitoba and British Columbia follow the concept that their Rentalsman has jurisdiction only in those areas specifically allocated to him. General jurisdiction in landlord and tenant matters stays in the courts and is allotted to the various courts according to the ordinary monetary limits. For example the Rentalsman has the power to direct repairs to damaged premises, but an action for damages arising out of failure to repair continues to be pursued in the courts. An alternative is to let the landlord and tenant decide whether they want to bring their dispute before the courts or before the dispute resolving body. This however does not seem advisable. Determinations and orders of the courts and the bodies with regard to the same subject matter may diverge, which will create confusion among landlords and tenants and might take away the advantage of having consistency in decisions. However this might be partially solved by making appeal to the courts possible from the decisions of the dispute resolving body.

It is often said that there should be no appeal to the courts from decisions of a dispute resolving body in areas where exclusive jurisdiction is conferred upon that body. The fear is that the possibility of appeal

would undermine the whole objective of the creation of such a body that is to deal with disputes in a quick, efficient, effective way. On the other hand there is the argument that we should never deny a citizen access to the courts and that the mere existence of the right of appeal has a strong disciplinary effect on the dispute resolving body of first instance.

Assuming that the possibility of appeal is created, should the appeal be on the facts, law and merits of the case or should it be restricted to cases where the landlord or tenant alleges that the body has erred upon a question of law or jurisdiction?

The Newfoundland Act has chosen an unrestricted appeal from all the decisions, orders, determinations, etc., of its Residential Tenancies Board. British Columbia seems to have created the possibility of judicial review, although the wording of its respecting section 54 of The Landlord and Tenant Act is not clear, where subsection 3 says that the judge may vary orders, directions, etc., from the Rentalsman. Manitoba provides for the possibility of appeal of a decision to a court for review in cases where the right to continue occupancy is concerned. It is not clear what is meant by this phrase.

The last question we have to ask ourselves is whether or not the dispute resolving body should itself be able to prosecute. It is likely that such body in the course of exercising its jurisdiction will develop a clear picture of rental practices in the province and may encounter situations which are unfair to either landlord or tenant. It is therefore alleged that it is logical

to give the body power to initiate and conduct prosecutions; otherwise the legislation may not be enforced. On the other hand the body is in the first place an administrative body with only limited judicial powers and it is not desirable that it should be able to prosecute. It is also doubtful that the body could function effectively as a mediator when the parties know that information, which they may otherwise be disposed to give, may work to their disadvantage in a criminal context.

3. Powers of the Dispute Resolving Body

The dispute resolving body should, in exercising its functions, observe to the best of its ability, the rules of natural justice. To adjudicate the matter of a dispute it should have powers to inspect the premises and have access to books, records, writings or other documents related to the dispute. In Manitoba and British Columbia the Rentalsman may only enter the premises and examine books upon an order from a judge authorizing him to do so. The judge will grant such order if he is satisfied that the entry and examination is reasonable and necessary. The requirement of a judge's order is a protection for landlord and tenant and should not cause undue delay. The Rentalsman has to keep the information confidential except in Manitoba, where he for the purposes of a prosecution may communicate information.

As far as evidence is concerned, the Manitoba Act does not have any provision for admissibility of evidence. The British Columbia Act however provides that the Rentalsman, in his discretion, may receive and accept such evidence or information as he considers necessary and appropriate whether or not such evidence

or information would be admissible in a court of law. The provision is enacted upon the recommendation of the B.C. Law Reform Commission, which recommended against application of the formal rules of evidence for the reason that it would delay the Rentalsman in many cases. However it seems undesirable that the Rentalsman is not bound by any rules of evidence. It means that in deciding two cases of the same kind he may in the one case adjudicate only upon hearing of one witness and in the other case he may have inspected the premises and examined documents and heard witnesses. There is the danger that during busy times the Rentalsman will take refuge under the provision to decide the case upon minimum evidence. It is therefore advisable to lay down some rules of evidence, by making The Evidence Act applicable to landlord and tenant proceedings or by drafting simple and clear evidence rules particularly shaped for these proceedings. A matter connected with the rules of evidence is whether or not the dispute resolving body should have the power to compel the attendance of witnesses. Whether or not we choose for broader or narrower rules of evidence the power to issue subpoena's seems to be essential to the bodies function.

Should the dispute resolving body be bound by previous legal decisions? If it is bound there is the advantage of certainty for the parties to the dispute and it might increase the possibilities of settlement of dispute or mediation. On the other hand it creates the necessity of keeping a record of every dispute adjudicated upon by the body, which is quite burdensome and also expensive. It might also affect the expediency with which the body is supposed to resolve the dispute. And lastly it might affect the flexibility of the body

to decide upon the real merits of the matter under dispute. A tenancy agreement has so many different aspects, that it is hard to imagine that cases are often similar. The personal relationship between landlord and tenant plays often an important role as far as the cause of the dispute is concerned.

The whole problem of what powers to give to a dispute resolving body boils down to the question whether there is a system other than the court system which will provide a means for more efficient, expedient and satisfactory solution of disputes.

4. Issues

(1) What courts or bodies should have jurisdiction over disputes between landlord and tenant and what should their procedures be?

(2) Should a special landlord and tenant court be established?

(3) Should the law provide for a special expeditious procedure in the Small Claims Court? Alternatively should it provide for a special body or official to deal with landlord and tenant disputes, such as a "rentalsman"?

(4) If a rentalsman should be established:

(a) Should jurisdiction over general landlord and tenant law remain with the courts, while the rentalsman is given jurisdiction in certain common types of dispute such as security deposits, repairs, and failure to supply services? If so, should his jurisdiction exclude the jurisdiction of the courts?

(b) Should the office of the rentalsman be a centralized body with facilities to cope with disputes on a province-wide basis, or should there be municipal or other local bodies? If the latter course is chosen, should some arrangement be made to see that disputes will be settled on consistent principles throughout the province, and what should the arrangement be?

(c) Should the rentalsman have power to settle all aspects of the dispute, or should some aspects be reserved for the courts? For example, if he has the power to direct a party to make repairs should he also have the power to adjudicate upon damages arising out of a failure to repair?

(d) Should he be bound by the rules of evidence or should he only be bound to observe the rules of natural justice?

(e) Should he have the right of access to records and premises for investigation purposes, or should he have that right only by court order, and if so, by the order of what court?

(f) Should he be able to compel the attendance of witnesses and issue subpoenas?

(g) Should there be an appeal procedure? Should it apply in all cases or only for an error in law?

(h) Should he be a lawyer?

(i) Should he have the power to adjudicate without the consent of the parties?

(j) Should he have the power to require landlords or tenants to pay fines?

(k) Should he be bound by earlier decisions of the courts or of the rentalsman?

(5) Should legal aid services be available for the resolution of landlord and tenant disputes?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

LANDLORD AND TENANT (ADVISORY) BOARDS

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1. Statutory Provisions in Canada

(1) Alberta

Section 22 of the Alberta Landlord and Tenant Act provides:

> 22. (1) The council of a city, town, village, municipal district or county, or the board of administrators of a new town, may by by-law establish a Landlord and Tenant Advisory Board and provide for the remuneration of its members and any other matters pertaining to its procedures or incidental to the exercise of its functions.
>
> (2) The functions of a Landlord and Tenant Advisory Board are
>
> (a) to advise landlords and tenants in tenancy matters,
>
> (b) to receive complaints and seek to mediate disputes between landlords and tenants,
>
> (c) to disseminate information for the purpose of educating and advising landlords and tenants concerning rental practices, rights and remedies, and
>
> (d) to receive and investigate complaints of conduct in contravention of legislation governing tenancies.

Advisory Boards are established in Edmonton, Calgary, Medicine Hat, Lethbridge and Red Deer and there is one proposed for Fort McMurray. The Boards are composed of five to seven members appointed by Council for a term of two years. To illustrate the function and working method of the Boards, we take the Edmonton Board as example.

The by-law which established the Edmonton Advisory Board did not give the Board any other powers than advisory, educational and recommending ones, but nevertheless the Board has developed a great credibility among landlords and tenants alike. Up until the end of 1974 it received more than 60,000 enquiries, the majority of which were made by telephone, which indicates that there is certainly a need for this institution. Over 50% of the enquiries made concerned security deposits (non-refund, partial refund, no interest, disputes as to damages). About 20% are for general information and advice. Enquiries about notices to vacate (improper notice, no notice, skipping out, etc.) account for 11%. The remaining enquiries are about rent, maintenance and facilities and behaviour of tenants.

In cases of a formal complaint, filed with the Board, the Board proceeds by calling a hearing to which the parties of the dispute are invited. Upon studying the available documentation and hearing witnesses the Board makes a recommendation and explains to both parties the basis and other details of how the recommendation was arrived at. The experience of the Board is that in at least 75% of the cases heard the recommendation is carried out. If the parties don't follow up the recommendation the Board usually suggests they take civil action through the Small Claims Court.

(2) Ontario

The Ontario Landlord and Tenant Act provides that the council of a municipality may by by-law establish a Landlord and Tenant Advisory Bureau (section 110). The

function of the Bureau is described in exactly the same way as in the Alberta Act.

Apparently few municipalities have created such a bureau (according to a survey carried out by the Canadian Consumer Council) and those bureaus which are established find themselves repeatedly providing basic, routine information over the telephone.

The bureaus have no power to enforce decisions, to compel witnesses, or to inspect premises.

(3) British Columbia

The B.C. reform legislation has created a Rentalsman instead of a Landlord and Tenant Advisory Bureau. He is appointed by the Lieutenant-Governor in Council and holds office for a term of five years. The Rentalsman may appoint at any time one or more deputies who shall carry out the duties and perform the functions of the Rentalsman in such area of the province as the Rentalsman may specify in the appointment (section 49).

The B. C. Act has granted the Rentalsman exclusive jurisdiction in many areas of the landlord and tenant law. He may, according to section 50, receive an application, investigate, hear, and make an order, decision, direction or determination with regard to

a) service of notices, prescribed in the Act;
b) a right under the Act or a tenancy agreement to occupy residential premises;
c) early termination of the tenancy by reason that the tenant's conduct is such that

- the quiet enjoyment or safety of 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;

d) dispute about termination of the tenancy and security of tenure provisions;

e) hidden rent increases;

f) additional occupants of the residential premises;

g) rent increases;

h) payment of rent to the rentalsman when the landlord fails to provide essential services;

i) payment of rent to the rentalsman when the landlord fails to comply with his duty to repair;

j) security deposits;

k) transfer of security deposits, when the premises are sold or the tenant enters into a new tenancy agreement with the landlord;

l) disbursing a security deposit;

m) claims on the security deposit by the landlord;

n) chattels, which the tenant left behind upon abandonment of the premises and their disposal;

o) security agreement held by an encumbrancer in respect of a chattel.

In cases where the matter in dispute is not within the rentalsman's exclusive jurisdiction, the rentalsman may, with the consent of the landlord and tenant, act as an arbitrator for the purpose of settling the dispute. In those cases he is not bound by the Arbitration Act.

An order, decision, direction or determination by the rentalsman may be reviewed by a county court judge where a landlord or tenant alleges that the rentalsman erred upon

a) a point or question of law or jurisdiction; or
b) a finding of fact necessary to establish the rentalsman's jurisdiction that is manifestly incorrect (section 54).

Section 51 provides that the rentalsman shall make his decision upon the real merits and justice of an application or matter before him, and he is not bound to follow legal precedent.

He may, in his discretion, receive and accept, on oath, affidavit, or otherwise such evidence and information as he considers necessary and appropriate, even though such evidence or information would not be admissible in court. He may also make interim ex parte orders authorizing, requiring, or forbidding anything to be done that he is empowered under the Act to authorize, require or forbid.

Section 52 provides that the rentalsman should also perform the functions that the Landlord and Tenant Advisory Boards in Ontario and Alberta carry out.

For the purposes of investigating a complaint the rentalsman may, upon being authorized by a County Court Judge, enter any land for the purposes of examining any residential premises, books, records, writings or other documents related to the complaint (section 53).

Of all the jurisdictions in Canada, the rentalsman in British Columbia has the most extensive functions and powers. The rentalsman's function with regard to security deposits, rent review and resolution of disputes will be discussed in the respective papers, so there is no need to be explanatory about it here.

(4) Manitoba

Like B. C., Manitoba has the institution of the rentalsman. The Lieutenant-Governor in Council may designate one or more persons as rentalsman (section 85(1)). They may be designated from among persons employed in the government and they may be required to serve within a specified area of the province (section 85(2)). Notwithstanding this last provision Manitoba has only one centralized rentalsman's office in Winnipeg. It consists of the rentalsman plus eight additional staff members, who deal with landlord and tenant matters from the whole province. On occasion, one of the rentalsman's staff attends to complaints outside the metropolitan area.

The prime statutory functions of the rentalsman are outlined in section 85(3) of the Landlord and Tenant Act and are similar to those of the Alberta and Ontario Landlord and Tenant Boards. Section 87 sets out further powers of the rentalsman. Wherever a dispute arises

between a landlord and a tenant concerning the final disposition of a security deposit, the Act provides for remitting the security deposit to the rentalsman's office and further provides for mediation by the rentalsman if landlord and tenant fail to reach an agreement. As an alternative, landlord and tenant may consent to have the dispute arbitrated by the rentalsman but no appeal or review of the final decision is possible.

Section 98 deals with the creation of a nuisance or disturbance by a tenant or any person permitted on the rented premises by him. The rentalsman is specifically empowered (section 98(6)) to serve as an investigative officer in the event that his services are called upon by the court and he reports then his findings to the court.

The rentalsman may also act in a managerial capacity for any premises where the landlord fails to supply essential services such as heat, water and electricity. In such a case a tenant may pay his rent to the rentalsman who shall hold such rent either until the landlord provides such services or, if necessary, to pay for such services out of the rent received, and then refund any excess amounts to the landlord (section 98(7)(8)(9)). A similar situation prevails where a landlord has neglected to make necessary repairs (section 119). Section 120 empowers the rentalsman to either mediate or arbitrate any dispute referred to him. Arbitration is only possible with the written consent of both the landlord and the tenant. Where the rentalsman acts as an arbitrator his findings are final and binding on both parties. The Arbitration Act does not apply to the rentalsman's arbitration.

The office of the rentalsman may be designated as a Rent Review Board. We discussed this in our paper on Rent Control.

(5) Saskatchewan

The Saskatchewan Residential Tenancies Act provides for a Provincial Mediation Board to mediate and arbitrate disputes between landlord and tenant. Arbitration is only possible when the landlord and the tenant agree to arbitration in writing. The Provincial Mediation Board is established by the Provincial Mediation Board Act (R.S.S. 1965 c. 44), which Act was drafted for the purpose "to facilitate Negotiations between Certain Persons, and respecting Certain Tax Proceedings." The Lieutenant-Governor in Council appoints the members of this Board. The Board may appoint deputies at each judicial centre in the Province and may delegate powers to those deputies.

Section 38 of the Act provides that, in respect of any matter in which a summary application to a judge under section 35 is authorized, a landlord or tenant, instead of applying to a judge under that section, may apply to the Provincial Mediation Board to mediate the dispute. This provision covers the following matters:

-dispute about discontinuance of services;
-disputes about repair obligations;
-an order for possession in cases where the tenant uses, exercises or carries on in or upon the residential premises, a noxious, offensive or illegal act, trade, business, occupation or calling and does not cease his practice;

-an order for possession in cases where the tenant causes a nuisance or disturbance to other people in the building;
-disputes about right to assign;
-disputes about a landlord's claim for arrears under a tenancy agreement or for damages or compensation for the use or occupation by a tenant after expiration of termination of the tenancy agreement.

Furthermore a landlord may pay or deliver to the Board the security deposits and unpaid interest, in cases where a tenant disputes the retention of the deposit by the landlord.

Parties have to apply to the Board in writing if they want their dispute mediated, upon which application the Board sets a date for a hearing. If a settlement of the dispute is not achieved the parties may still apply to a judge to hear and determine the dispute.

If the parties choose to get their dispute arbitrated the decision of the Board is final. For the purposes of this mediation and arbitration the Board and every member thereof have all the powers that are conferred upon a commissioner under the Public Enquiries Act. The Board may view and inspect the residential premises and the landlord or the tenant, as the case may be, shall permit the Board to enter, view and inspect the premises.

(6) New Brunswick

The New Brunswick Landlord and Tenant Act does not provide for any body or person to handle the relationships between landlord and tenant. Sinclair suggested in

his paper the creation of a rentalsman's office according to the Manitoba model and this suggestion is adopted in the 1974 Residential Tenancies Bill. The Bill provides for a rentalsman with the same functions and powers as the Manitoba rentalsman has.

(7) Newfoundland

The Act respecting Tenancies of Residential Premises establishes a Residential Tenancies Board, appointed by the Lieutenant-Governor in Council, in areas designated as residential tenancies areas. The Board has five members, who hold office during pleasure and get paid a remuneration and expenses, as prescribed by the Lieutenant-Governor.

The Board has the usual investigating, advising, and mediating powers. It may review rent and accept rent payable by a tenant and hold the rent in trust, pending performance by a landlord of any act he is required to perform (section 20(7)). However it is not provided that the Board may receive complaints which is quite a deviation from the statutory provisions in other provinces. Section 19(1) says that proceedings under the Act (except under section 20) have to be made by way of complaint and that the provisions of the Summary Jurisdiction Act are applicable. Section 19(2) provides that complaints may be made in respect of:

(a) a contravention or failure to comply with any of the provisions of the Residential Tenancies Act;
(b) a contravention or failure to comply with a statutory condition provided for in section 7;

(the statutory conditions deal with the condition of the premises, obligations of the tenant, sub-letting, abandonment and termination, entry of premises and changing of locks);

(c) a security deposit, or money or other value held by or for a landlord or a tenant;

(d) failure or refusal to go out of possession of residential premises upon termination of tenancy.

Upon determination that the complaint is justified, the magistrate may make one or more orders granting relief in respect of the matter of the complaint.

It is understood that the Residential Tenancy Board does not have jurisdiction in the areas mentioned above under (a) to (d).

Furthermore the Act provides that the Board may hear the testimony of witnesses, which shall be given under oath. For the purpose of hearing witnesses, the Board is vested with all the powers that are conferred on a commissioner by or under the Public Enquiries Act and the Board is deemed to be "an investigating body" for the purposes of The Evidence (Public Investigations) Act, and there shall be full right to examine and cross-examine all witnesses called to produce evidence in defence and reply.

Within its jurisdiction the Board shall have the same power to make an order as a magistrate has under The Summary Jurisdiction Act. An order, finding or a decision of the Board may be appealed to a Judge of the

Supreme Court of Newfoundland or to a Judge of a District Court. On the hearing of the appeal the Chairman of the Board shall cause to be produced before the Judge all papers and documents in his possession affecting the matter of the appeal.

(8) Nova Scotia

The Nova Scotia Landlord and Tenant Act provides that the Governor in Council may establish a Residential Tenancies Board, in areas designated as residential tenancies areas.

The provisions in the Act with regard to powers and functions of the Board are much like the Newfoundland provisions. The Board may

- investigate and review matters affecting landlords and tenants and provide and disseminate information;
- mediate disputes and give advice and directions;
- investigate allegations of violations of provisions of the Act and the statutory conditions;
- review rents;
- accept rent and hold the same in trust.

However the provisions are extended after an amendment of the Act in 1973. The Board may also

- require the return of a security deposit or money or other value or a portion thereof held by or for a landlord or tenant, where the amount involved is $100 or less;
- provide for termination of the tenancy between the tenant where the residential premises are being physically damaged by the tenant or the tenant is conducting himself in such a manner as to unduly

interfere with the possession or occupancy of other tenants;

- direct that the landlord be put into possession of the residential premises, where the tenant is in arrears of rent for one rental period or more.

Like in Newfoundland proceedings under the Act shall be by way of complaint and provisions of The Summary Convictions Act are applicable. A complaint may be made in respect of the same matters as in Newfoundland although with regard to security deposits, etc., the amount must exceed $100 (section 10). Orders granting relief are made by the magistrate. Thus the Board does not have any judicial powers in those matters. The Nova Scotia Board has however with respect to the powers and functions of the Board (the complaints made under section 10 are excluded) the power of arbitration. Each Board member has the power of a commissioner under the Public Enquiries Act. There are no provisions with regard to appeal.

(9) Prince Edward Island

The Prince Edward Island reform legislation does not provide for the creation of a Landlord and Tenant Board. The county courts have sole jurisdiction in landlord and tenant matters.

(10) Quebec

The articles in the Quebec Civil Code with regard to residential tenancies only refer to proceedings before courts. There are no provisions for the appointment of an administrative body to handle the functions, which in other jurisdictions are usually carried out by Landlord and Tenant Boards.

2. Issues

(1) Should Landlord and Tenant Boards have the power of the existing Landlord and Tenant Advisory Boards, namely:

   (a) to advise landlords and tenants in all tenancy matters;

   (b) to receive complaints and mediate disputes arising therefrom;

   (c) to disseminate information in the nature of an educational process regarding rental practices, rights and remedies;

   (d) to receive and investigate complaints of conduct and contravention of legislation governing landlord and tenant relations.

(2) Should the functions of the Boards be extended? In particular, should they have the power:

   (a) to resolve disputes without the consent of both parties;

   (b) to review rents.

(3) Should there be a province-wide Landlord and Tenant Board, or should Landlord and Tenant Boards be established on a local basis?

(4) Should members of Landlord and Tenant Boards be appointed or elected and should they, in case of appointment, be appointed by municipal or by provincial authorities?

(5) If Landlord and Tenant Boards are established by municipalities, should there be a supervisory body over those Boards in the province?

(6) How many members should the Boards have and should they be representatives of landlords and tenants or for instance civil servants or ordinary independent citizens?

(7) For what period of time should the Board members be appointed or elected and should there be provisions regarding continuity of the Board?

(8) Should Board members be part-time or full-time employees and what should their remuneration be, if any?

(9) Should the power to mediate disputes include mediation of disputes regarding rent increases, and should new legislation expressly mention this or should special Boards be established to deal with disputes about rent increases (the so-called Rent Review Boards)?

(10) Should new legislation provide for special powers of Landlord and Tenant Boards to perform the functions of mediation and investigation like for instance the power to inspect rental premises and to compel the attendance of witnesses?

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RESIDENTIAL TENANCIES

DISTRESS

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1. Introduction

The remedy of distress has been a part of the common law from custom and from a statutory base since at least the thirteenth century. The remedy is interpreted by an endless number of cases. As well, many statutes both recent and old in most jurisdictions have codified the remedy or enlarged it.

The most important consideration, when dealing with the remedy of distress, is the problem which a tenant faces when he is unable to pay his rent and thereupon potentially subject to the distress provisions invoked by his landlord. When considered from the viewpoint of the tenant his problems are compounded when the possessions which he acquired in the nature of household effects become subject to removal by the landlord. Society as a whole and third persons are thereby affected when a bad situation is made worse.

The tenant who is unable to make his rental payments due to a depressed financial situation is not the only one on whom the remedy has been applied. The Sinclair Report, at p. 93-94, has revealed the following:

> The questionnaire that was submitted to landlords asked if the remedy of distress for non-payment of rent had been used by them and, if so, how many times during the last five years, and their opinion as to the retention of the remedy. Speaking in terms of replies in relation to number of individual apartments, the owners of 194 separate units replied that they had actually used the remedy over the last five

> years on eight occasions, and they favoured the retention of the remedy. In contrast to this, the owners of 53 units, while favouring retention of the remedy of distress, allowed that they had not used the remedy at all on any occasion within the last five years. A further group representing the ownership of 92 units stated that they neither had used the remedy, nor favour its retention; and a final group representing 217 units stated that they have used the remedy but only twice over the last five years in relation to this number, and do not favour retention of the remedy of distress.

The study which was completed by Professor Sinclair reveals that it was the opinion of a number of landlords that the remedy of distress did have a benefit to many of them from its basis as a threat although it was not that effective in relation to its use. The landlord can either hold the remedy over the head of the tenant or tenants, knowing of the remedy, may tend to carry out their obligations. It may be suggested that if the only reason for retention of the remedy is for its threat purposes other more palatable methods may be found. The security deposit for payment of rent, which was examined in background paper #3, is one such method which comes to mind.

2. Statutory Provisions in Canada

(1) The present law in Alberta

The Alberta landlord and tenant legislation does not cover the remedy of distress. However, the Seizures Act, R.S.A. 1970, c. 338, deals with the remedy in sections 18-22.

Section 18 of the Seizures Act provides that no distress shall be made or carried into effect except by a

sheriff or other person authorized by the sheriff between the hours of 5 a.m. and 8 p.m. in the case of a distress for rent. Section 19 provides as follows:

> 19.(1) A landlord shall not distrain for rent on goods and chattels that are the property of any person except the tenant or person who is liable for the rent, although the goods and chattels are found on the premises.
>
> (2) Subsection (1) does not apply
>
> (a) in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust or by way of mortgage or otherwise, or
>
> (b) to the interest of the tenant in any goods on the premises and in the possession of the tenant under a contract for purchase or under a contract by which the tenant may or is to become the owner thereof upon performance of any condition, or
>
> (c) where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, or
>
> (d) where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant or by any other relative of his if such other relative lives on the premises as a member of the tenant's family.

Section 21(1) provides that upon the levying or making of any distress or seizure a claim in writing is made to

or in respect of the property seized or any part thereof, the sheriff shall proceed as if the claim were made to or in respect of goods taken in execution under process of the court and the person directing the distraint or seizure were an execution creditor.

Section 22(1) provides that no distress shall be made unless the person entitled to cause the distress or his duly authorized agent has executed and delivered to some person authorized by the Act to make and levy a distress a proper warrant in that behalf.

The Seizures Act also contains numerous other lengthy provisions relating to entry and notice, mobile homes, writs of execution, and procedures relating to the sale of seized goods.

The Landlord and Tenant Advisory Board of the City of Edmonton, has stated that it is reluctant to support the abolition of distress in Alberta. According to the Advisory Board Submission, at p. 23, Alberta is still known as a "debtors' paradise" because of certain protections that were legislated in the depression years. The Advisory Board feels that a quick procedure for collection of rental arrears is vital to the rental industry. According to several major apartment management firms the seizure of tenant's goods and chattels "works like a charm" (see: Advisory Board Submission, at p. 23). The Advisory Board has furthermore suggested that it would be valuable to ascertain the proportion of seizures involving residential rental accommodation that result in final sale of goods as compared to collection of arrears within the fourteen day period for tenant objection.

The Advisory Board predicts that if distress was abolished for residential tenancies in Alberta, landlords

would unite across Western Canada, if not nationally, in establishing a computerized tenant reporting system to eliminate rent skippers from ever again residing in quality rental accommodation. Apparently, the Edmonton Housing Association, in conjunction with the Credit Bureau of Edmonton, has such a local scheme established in the initial stages. The potential abuses of such a scheme on the individual's privacy may be a greater evil than the present distaste for the landlord's right of distress.

(2) Ontario

The Law Reform Commission of Ontario recommended that the remedy of distress be abolished. Section 86 deals with the matter as follows:

> 86.(1) No landlord shall distrain for default in the payment of rent whether a right of distress has heretofor existed by statute, the common law or contract.
>
> (2) Subsection (1) applies to default in payment of rent under a tenancy agreement entered into or renewed after this section comes into force and to default in payment under a tenancy agreement for a periodic tenancy of rent accruing after this section comes into force.

The Ontario provisions abolishing distress are modified by the application of subsection (2). Distress may still be exercised in Ontario under a tenancy which at the time of coming into force of the Act was in existence as a term of years. Distress is abolished for leases entered into after the Act comes into force or for those terms of years renewed after the section comes into force. Subsection (2) attempts to abolish distress respecting tenancies which are periodic, and for which rent accrues after the Act comes into force. The last few words of subsection (2), namely, "a periodic

tenancy of rent accruing after the section comes into force" means a period accruing, and not the rent accruing, for, if such were not the case, it would be unfair to apply the provisions to a yearly periodic tenancy in which the rent was payable month by month, and not to do the same thing to a term of years half way through at the time the Act came into force.

No penalty is provided if a landlord distrains in breach of the above section. As noted earlier, landlords have seldom used the remedy and maybe it was felt unnecessary to add a penal section.

Lamont, in his book Residential Tenancies, at p. 80, suggests that the elimination of the remedy will probably result in landlords taking more care in checking on a perspective tenant and his credit. It may also result, when the law of supply and demand permits, in more landlords requiring prepayment of the last month's rent as a security deposit. However, as noted in background paper No. 3, such a prepayment must be specifically for the last month immediately preceding the termination of the tenancy, and not just for any month when the rent is in arrears.

Apart from the former right of the landlord to distrain, there continues to be the landlord's right to sue the tenant for the arrears of rent. There may be circumstances when the landlord considers the tenant able to pay the rent and when he may wish to keep the lease in good standing and recover his rent. Upon obtaining judgment for the rent arrears, a writ of execution against the goods and chattels of the defaulting tenant can be issued, followed by a seizure by the sheriff.

Before concluding these brief remarks on the Ontario provisions it is important to note that close attention must be paid to the last few words of subsection (1), above, in completely covering the areas from which distress comes, namely from statute, common law, or private contract. Since the common law gave birth to the remedy, the rights to distrain in a landlord still exists. The statutory provisions in general extend these rights or limit them. Similarly, many landlords, particularly in urban areas, have further extended the remedy by contract contained within the lease in providing particularly for contracting out of exemptions granted by statute. The result is in those situations where contracting out has taken place that the tenant has surrendered his rights as granted to him under the legislation (see: Sinclair Report, at p. 95).

(3) British Columbia

The 1974 British Columbia legislation provides in section 9(1) that, notwithstanding any other Act, the common law or any agreement to the contrary, no landlord shall distrain for default in the payment of rent. While distress is abolished for all tenancies it still exists in that case where the tenant has abandoned the property and has left chattels in the residential premises. Sections 46, 47 and 48 deal with the abandonment and disposal of chattels. They are set out in detail below:

> 46.(1) Unless a landlord and tenant made an express agreement to the contrary respecting the storage of chattels, where a tenant
>
> (a) leaves chattels in residential premises that he has abandoned; or
>
> (b) leaves chattels in residential premises in respect of which the tenancy agreement is terminated or the term expired,
>
> the landlord may remove the chattels from the

residential premises and store and dispose of them in accordance with this section and sections 47 and 48.

(2) Forthwith after he removes chattels under subsection (1), the landlord shall give to the rentalsman an inventory of the chattels.

(3) Where the apparent value of a chattel exceeds fifty dollars, no landlord shall sell or dispose of the chattel under section 48 until he

(a) searches the office of the Registrar General for the names and addresses of encumbrancers in respect of the chattel;

(b) gives to the rentalsman the name and address of any encumbrancer found under clause (a); and

(c) gives to every encumbrancer found under clause (a) notice of the landlord's intention to sell or dispose of the chattel in accordance with section 47.

(4) The rentalsman shall determine, upon application by a landlord, the value of a chattel for the purposes of subsection (3), and his determination is final and binding upon the landlord, tenant, and any encumbrancer found under subsection (3)(a).

(5) Where a landlord is entitled to remove a chattel under this section and he is of the opinion that

(a) the chattel has no value; or

(b) the cost of removing, storing, and selling the chattel would be more than the proceeds of a sale of the chattel; or

(c) the storage of the chattel would be unsanitary or unsafe,

the landlord may, with the consent of the rentalsman, dispose of the chattel in such manner as the rentalsman may direct.

(6) Subject to subsection (4), where a landlord removes a chattel under this section he shall store it in a safe place and manner for a

period of not less than three months and notify the rentalsman of a description of the chattel and the location at which it is stored.

47.(1) Where an encumbrancer

(a) is given a notice under section 46(3)(c) of the landlord's intention to sell or dispose of a chattel; or

(b) satisfies the rentalsman that the encumbrancer holds a valid and subsisting security agreement in respect of a chattel removed or stored under section 46,

the rentalsman, upon application by the encumbrancer and upon being satisfied that he is an encumbrancer and holds a valid and subsisting security agreement in respect of the chattel, shall order that the encumbrancer is entitled to treat the security agreement as being in default.

(2) An order made under subsection (1) is final and binding upon the tenant and the encumbrancer.

48.(1) Where a chattel is removed and stored under section 46 and, during the three months under section 46(6),

(a) no person claims title to it; and

(b) no order is applied for under section 47,

the landlord may sell or dispose of the chattel in such manner, and subject to such terms and conditions as the rentalsman, upon application by the landlord, may prescribe.

(2) Where a landlord sells a chattel under subsection (1), he may, subject to any terms and conditions prescribed by the rentalsman under subsection (1),

(a) retain such part of the proceeds of the sale as is necessary to reimburse him for his reasonable costs of removing, storing, and selling the chattel and of

making any application and search required to be made under this section or section 46; and

(b) retain such part of the proceeds of the sale as is necessary to satisfy the amount of rent payable, under this Act or a tenancy agreement, by the tenant who abandoned the chattel,

and shall pay the balance to the rentalsman, who shall hold the balance, for a period of one year, in trust for the tenant who abandoned the chattel.

(3) Where a landlord sells a chattel under subsection (1), he shall give to the rentalsman, forthwith after the sale, a written report respecting the sale and the distribution of the proceeds of the sale.

(4) Where the rentalsman does not receive a claim in respect of a balance within the period of one year referred to in subsection (2), any amount not claimed shall be deemed to be forfeited and shall be applied by the rentalsman toward the cost of administering his office.

(5) The purchaser of a chattel sold in accordance with subsection (1) shall be deemed to have acquired a good and valid title to the chattel, free and clear of all encumbrances.

(4) Manitoba

Section 88 of the Manitoba Act provides as follows:

No landlord shall distrain for default in payment of rent whether a right of distress has heretofore existed by statute, the common law or contract.

The full scope of the remedy has been abolished in Manitoba. The abolition applies to tenancy agreements entered into or renewed before and subsisting when the Act comes into force or entered into after it comes into force. This appears to be a more comprehensive section than that examined

under the Ontario provisions.

Under the provisions of section 94(2), where the tenant abandons the property, the landlord may recover any chattels he has left and place them in storage for a period of at least three months, giving to the rentalsman an inventory of the chattels removed. If the landlord is of the opinion that the chattels are valueless, or that storage would be unsanitary, he may dispose of them as the rentalsman authorizes. If the property is stored and not claimed within three months it may be sold at public auction. The landlord may thereupon deduct his costs, the debt owing, and forward the balance to the Minister of Finance.

The above provisions in Manitoba outline one procedure which may be adopted in lieu of the remedy of distress, at least respecting the problem of abandonment. However, one must question what the landlord is to do with goods that, while they cannot fall into the category of having no value, do have a measure of worth, but not sufficient to bear the costs of storage over a minimum period of three months. The Sinclair Report, at p. 100, has suggested that it would be better if the goods have little or no value within the opinion of the rentalsman, that storage and sale might be dispensed with, and a simple sale take place. Furthermore, it may be suggested that perhaps a storage period of three months is an inordinately long time and possibly a shorter period would be more practical.

(5) Saskatchewan

Section 10 of the 1973 Saskatchewan legislation has abolished the remedy of distress for rent. It provides as follows:

> (1) No landlord shall distrain for rent payable under a tenancy agreement on the goods and

chattels of any person.

(2) No person authorized by any Act or other law or any agreement to recover rent payable for, or the rental value of, land shall distrain on the goods and chattels of a tenant of residential premises for the rent payable for, or the rental value of, the residential premises occupied or formerly occupied by the tenant.

(3) Subsections (1) and (2) apply whether or not the default in respect of which the remedy of distress that might have been taken but for this section occurred prior to the coming into force of this Act.

(6) New Brunswick

Sections 20 through 42 of the New Brunswick Landlord and Tenant Act deal with the remedy of distress. It is obvious, upon reading these sections, that these provisions stem from, not only the old feudal system, but more recently from a society largely agricultural in nature. The Sinclair Report, at pp. 92-93, has characterized the New Brunswick legislation as a "wonderland excursion". The landlord may take shieves and cocks of grain, loose straw, horses, cattle, sheep, and so on, whether pasturing on the highway or not, followed by many provisions for reaping, threshing and marketing.

Professor Sinclair has recommended that the remedy be abolished in New Brunswick and that the Manitoba approach with respect to abandoned personal property be adopted, giving a landlord a right of sale.

The New Brunswick bill respecting residential tenancies has followed the recommendation of the Sinclair Report and has abolished the remedy of distress by section 14 which provides that no landlord shall distrain for default in payment of rent whether a right of distress existed by statute,

the common law or contract.

Section 15 of the New Brunswick bill provides for the situation where a tenant abandons the premises in breach of the tenancy agreement or going out of possession of the premises upon terminating or expiring the tenancy and leaves chattels on the premises. Basically, the provisions follow the Manitoba legislation incorporating the recommendations of the Sinclair Report. It should be noted that provision is made in section 15 whereby the landlord and tenant may contract out of the statutory provision. The section is set out in detail below:

> 14.(1) Except where the landlord and tenant have agreed in writing otherwise, where a tenant leaves chattels on the premises after
>
> (a) abandoning the premises in breach of the tenancy agreement; or
>
> (b) going out of possession of the premises upon termination or expiration of the tenancy;
>
> the landlord may remove the chattels from the premises and shall so advise a rentalsman.
>
> (2) Where the rentalsman determines that the chattels removed under subsection (1) are of no value or that retention of them would be unsanitary or dangerous the rentalsman may authorize the landlord to dispose of them.
>
> (3) Where the rentalsman determines that the chattels removed under subsection (1) have a value in his opinion less than any amount owing to the landlord by the tenant the rentalsman may order the sale of them at his discretion.
>
> (4) Where the rentalsman determines that the chattels removed under subsection (1) have a value in his opinion greater than any amount owing to the landlord by the tenant the rentalsman may order the chattels stored for a period of time determined by him in

accordance with the regulations and shall advise the tenant of such decision by notice.

(5) Where the tenant or any person claiming title to the chattels does not respond to the notice given under subsection (4), the rentalsman may, at the end of the storage period, sell the chattels by public auction or by private sale in the manner prescribed by regulation.

(6) The proceeds of any sale under this section accruing after the costs of the sale and storage are to be used to discharge any debt which in the opinion of the rentalsman is owing by the tenant to the landlord and the balance, if unclaimed by the tenant within one year of the sale, may be dealt with in the same manner as interest under the provisions of section 8.

(7) No rentalsman or landlord shall be liable to a tenant for any action taken by them where such action is taken in accordance with the provisions of this section.

(7) Newfoundland

The Newfoundland legislation respecting residential tenancies contains no provisions relative to distress. The remedy has not been abolished in that province and is applicable to residential tenancies.

(8) Nova Scotia

Apart from the residential tenancies legislation in Nova Scotia, that province has a separate statute relating to distress--Tenancies and Distress for Rent Act, R.S.N.S. 1967, c. 302. The statute is not unusual, providing for exemptions, clandestine removal, etc.

Section 4 of the Nova Scotia reform legislation provides that the provisions of the Tenancies and Distress for Rent Act shall not apply to residential premises in the future. Presumably, it only applies to remove the remedy of

distress with respect to residential tenancies as the remedy exists under the distress statute. As pointed out above in regard to the Ontario legislation, the remedy stems from statute, common law, and private contract. It would have been more clear had the Nova Scotia provisions stated that the remedy could not be used regardless of its source.

(9) Prince Edward Island

Section 98 of the Prince Edward Island legislation is almost identical to that in Ontario. There is, however, one major difference in that the opening words of section 98(1) provides that "except where a tenant abandons the premises", the remedy of distress is abolished. In attempting to preserve the remedy of distress in that one instance where a tenant abandons the demised premises, the Prince Edward Island legislation attempts to extend to a landlord a remedy where the tenant has disappeared and abandoned his chattels on the property. The landlord is given an opportunity to offset his loss from seizure of the tenant's effects and also to clean up the premises, and remove the chattels which have been left so that the property may be rented to another tenant.

The Sinclair Report, at p. 97, argues that on a theoretical basis, if the tenant has in fact abandoned the premises and left the chattels behind, it would be difficult to say that he had not as well abandoned his personal property. The theory of abandonment of personal property is that one abandons ownership and not just possession. Having abandoned ownership, the landlord, being the first one to enter, would become the owner. Accordingly, the landlord gains more rights than he would if he was simply a custodian, as under the distress provisions where possessory rights only are gained. The Sinclair Report, at pp. 97-98, notes that many landlords would have preferred to have been put into the

position of the owner of abandoned property under the normal rules of the common law rather than be faced with the result under the present statutory provisions in Prince Edward Island whereby the remedy of distress is all that is available toward this "abandoned" property.

Two further aspects of the Prince Edward Island legislation should be noted. First, the remedy of distress is probably the most traditionally disliked prerogative of the landlord, by tenants. It may be more acceptable to most tenants if the remedy were swept away completely. The Sinclair Report, at p. 98, states that many landlords have the same feelings. Second, the remedy of distress being applicable in Prince Edward Island to abandoned property only moves the landlord into the position where he may sell whatever is left behind, probably of little value, only on a distress basis, i.e., he may do so only where non-payment of rent is involved and under the rigid rules which distress allows.

If the reasoning behind the exception in this province is solely to permit the landlord to clean up the property and remove whatever has been left behind then it may be argued that the procedure is not effective. That procedure which has been adopted in Manitoba and examined above seems to be a much more efficient means to deal with this problem.

(10) Quebec

The Civil Code provides in the articles 1637 and 1638 that the lessor has, to secure his rights, a privilege on the moveable effects found on the premises and belonging to the lessee, and that this also applies to moveable effects belonging to the sublessee, insofar as he is indebted to the lessee.

Provisions for enforcement of this privilege of the lessor are found in the Code of Civil Procedure. This Code deals with the procedure for seizures of moveables from a debtor. The provisions are general, but are applicable to a lessor-lessee relationship. It may therefore be concluded that a remedy similar to distress, although not under that name, exists in Quebec.

3. Issues

(1) Should the landlord continue to be able to have a tenant's property seized and sold for unpaid rent?

(2) If the landlord is to continue to have the right to have the tenant's goods seized and sold, are the existing safeguards sufficient to protect the tenant?

(3) If the law is changed so that the landlord cannot have the tenant's goods seized and sold, should it provide some other mechanism to protect the landlord's interest in collecting the rent?

(4) Should Alberta law, as does Manitoba law, allow the landlord to sell a tenant's belongings if the tenant has abandoned the rented premises and the belongings? If so, should the law require the landlord to keep the abandoned belongings in storage for three months or some other period of time? Should it require the landlord to give an inventory to a rentalsman or other official to sell the belongings at public auction?