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CONTRACT OR PROPERTY LAW FORM AND DELIVERY OF LEASE RIGHT TO ASSIGN AND SUBLET

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INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

CONTRACT OR PROPERTY LAW

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1. Introduction

In considering whether the relationship of landlord and tenant respecting residential tenancies should be one of a contractual nature or should be regulated by the law of property, the following matters will be dealt with herein:

(a) whether the landlord and tenant relationship insofar as residential tenancies are concerned should be transformed to a contractual relationship;
(b) interdependent covenants;
(c) the doctrine of frustration of contracts; and,
(d) mitigation of damages.

The province by province analysis which follows reveals that the above sub-topics are dealt with by many of the statutes in the reform provinces and others are only partially considered.

2. Statutory Provisions in Canada

(a) The present law in Alberta

In this province, the common law remains untouched insofar as residential tenancies are concerned. Accordingly, the law of contract will have a very small role to play. The present law restricts the rights of the landlord and tenant to the real property remedies.

(b) Ontario

The Ontario legislation does not contain any direct statement respecting the applicability of the law of contract.

However, there are sections dealing with the application of the doctrine of frustration, the mitigation of damages and the interdependency of covenants.

Section 88 of the Ontario legislation provides that the doctrine of frustration of contract applies to tenancy agreements and The Frustrated Contracts Act applies thereto. Accordingly, the well-settled law of landlord and tenant that a tenant must continue to pay rent even though the demised property can no longer be used for the intended purpose has been altered. The doctrine of frustration is simply that contractual obligations are discharged when an unexpected event takes place which materially affects the basis of the contract, or the contractual obligations of one party become impossible of performance.

The weight of judicial authority is that the doctrine of frustration does not apply to leases, although it has been applied to contracts. This was clearly stated in Merkur v. H. Shoom & Co., [1954] O.W.N. 55 (C.A.), where the lessee was unable to use his commercial premises for the purpose contemplated, and the court stated that although the object of the lease was thereby defeated, the doctrine of frustration did not apply. A good many leases do have clauses permitting abatement of rent under such circumstances, but very few leases permit the tenant to terminate the lease.

The unfairness of this state of the law was made clear in the case of MacArtney v. Queen-Young Invts. Ltd., [1961] O.R. 41. A fire had partially destroyed a downtown office building in Toronto, not damaging the tenant's premises, but putting the heating system out of action. The tenant sought to get out of the lease because of the landlord's breach of covenant to heat. When these matters were dealt with by the court the judgment stated that the tenant had only a right to damages, and that, only if the lease terms did not exclude

the tenant's right to damages. Mr. Justice Ferguson, at p. 49, referring to Robertson C.J. in Johnston v. Givens, [1941] 4 D.L.R. 634 (Ont. C.A.) stated the following:

> The rule is of general application that in default of any express provision [in the lease] to that effect the landlord's breaches of covenants do not entitle the tenant to declare the lease at an end.

The learned judge held that he was bound by the law on this point, but went on to state:

> It seems to me, with respect, to be surprising to find that . . . [a] breach of a covenant to supply heat in a country where premises are inhabitable in winter without heat [does not give the tenant the right to treat the lease at an end] . . . one would reasonably expect such a convenant to be a condition.

The judgment concluded with the statement that a right to damages is cold comfort to a shivering tenant.

This unfair result for a tenant is altered by section 88 of the legislation in that the doctrine of frustration of contract is now made applicable to tenancy agreements. In addition, the section makes The Frustrated Contracts Act, R.S.O. 1970, c. 185, applicable. This statute permits the court to determine and adjust, on an equitable basis the respective rights and obligations of the parties in the event of an unanticipated occurrence which frustrates the lease.

Section 92 of the Ontario legislation provides as follows:

> Where a tenant abandons the premises in breach of the tenancy agreement, the landlord's right to damages is subject to the same obligation to

> mitigate his damages as applies generally under the rule of law relating to breaches of contract.

The above section relates to the landlord's obligation when a tenant vacates or abandons the premises during the term of the lease in which case the landlord's right to damages is subject to the same obligation to mitigate his damages as prevails in contract law. When read with the Ontario Law Reform Commission's Report and recommendation, the objective is clear that a landlord should only be entitled to damages and so he should be obliged to try to rerent at the best rent obtainable and only look to the tenant for any deficiency. Prior to the amendment, the position in law of a landlord vis-a-vis a tenant who had abandoned the premises would appear to include four possible alternatives. Firstly, the landlord could stand by and sue for the rent as it falls due in which case the matter of damages would not arise. Secondly, the landlord could accept the tenant's surrender, and there would be no further liability of the tenant other than for current arrears. Here, as well, the matter of damages would not arise. Thirdly, the lease could contain a clause in which it is stated that the landlord could, as the agent of the tenant, rerent on behalf of the tenant, with the tenant remaining liable for the deficiency in the rent. Here again, this does not seem to be a matter of damages but simply a contractual term of the tenancy agreement. Fourthly, the landlord could notify the tenant that he would rerent on behalf of the tenant, but will look to the tenant for any deficiency in the rent. This again does not seem to be a matter of damages. In Korsman v. Bergl, [1967] 1 O.R. 576 (C.A.), it was treated as a claim for rent, less any rent realized from the rerenting.

The above alternatives were referred to and supported in Goldhar v. Universal Sections and Moldings Ltd., [1963] 1 O.R. 189 (C.A.), as being landlord and tenant law. However,

the Ontario Court of Appeal refused the landlord's claim for damages when he had gone back into possession and relet the premises. It was treated as an acceptance of a surrender and therefore the lease and its covenants ceased with no right for prospective damages.

The Ontario Court of Appeal accepted this state of the law while at the same time expressing the view that one cannot doubt that the old rules as to the effect of surrender by operation of law, forfeiture, and eviction, as preventing the landlord from recovering his actual loss from the tenant's breach of contract, will wholly disappear and will be supplanted by the principles governing the effect of repudiation, breach and recission of other contracts.

Subsequent to the Goldhar case, the Supreme Court of Canada dealt with the question of the tenant's repudiation and the landlord resuming possession and advising the tenant of the landlord's claim for damages. In Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd., [1971] S.C.R. 562, the Goldhar case was overruled, and the landlord's claim for prospective damages as on a breach of contract was upheld notwithstanding the re-entry by the landlord. The claim for damages was for the loss of the benefit of the lease over the balance of the unexpired term. However, the court also reaffirmed the continued existence of the above four alternative rights of the landlord. Accordingly, there has been a step forward in landlord and tenant law based on principles from the law of contract. As Mr. Justice Laskin, as he then was, stated in the Highway Properties case:

> It is no longer sensible to pretend that a commercial lease, such as the one before this court, is simply a convenance, and not also a contract.

With respect to the effect of section 92, Lamont, in

his book Residential Tenancies, at p. 32, has expressed the view that it is surely no more than stating that when the landlord adopts the alternative of claiming damages as he may now do by virtue of the Highway Properties case, he must of course endeavour to mitigate those damages. But section 92 does not remove from the landlord the four alternatives noted above.

Another view about section 92 and its effect of introducing principles of contract law to the landlord and tenant relationship was expressed by Professor Gorski, Special Lectures, Law Society of Upper Canada, 1970, at p. 478. He has submitted that section 89 introducing common law rules that covenants are made mutual or independent read together with section 92, indicated the intention of the Legislature that section 92 introduced contract principles of damages. However, Professor Gorski's reasoning does not go so far as to say that the landlord now only has recourse to a claim for damages. Lamont, at p. 32, has suggested that neither the Highway Properties case, nor section 92, developed the law to the point recommended by the Ontario Law Reform Commission, that a landlord should only be entitled to damages which he must mitigate by re-renting for the best rent obtainable.

The question must be asked whether the landlord should be deprived of the four alternatives outlined above. In other words, if the tenant abandons the premises and the landlord considers the tenant as financially able to pay the rent, should not the landlord be able to simply sit back and collect the rent, leaving the tenant the opportunity to endeavour to sublet or assign the lease to a suitable person to carry on the lease contract with the landlord, or simply pay the rent as it falls due. It would be disquietening for a landlord to learn that the statute law permitted tenants to walk away at any time leaving the

landlord only a right to damages. If the direction taken in Alberta is to follow the recommendation of the Ontario Law Reform Commission to limit the landlord to damages only, then a section would have to be drafted to more clearly state that the contract principle of damages is the only remedy of the landlord when a tenant abandons the premises, a more specific statement than the Ontario section 92. At present, the Ontario provision only applies in the circumstances of a tenant who has abandoned the premises.

It might also be desirable to make a similar provision in Alberta applicable to any circumstances when a landlord is able to forfeit a lease for a breach of a tenant's covenants. No doubt it would seem unfair to a landlord that his only remedy is to forfeit the lease or claim damages. A new tenant may not be found immediately and the premises may have to be redecorated. These are matters for which a landlord should be allowed to claim damages, as well as being able to forfeit the lease by re-entry.

A look now at the Ontario provision respecting the interdependency of covenants.

Unless a lease so states, the tenant's obligations under a lease continue in full force notwithstanding that the landlord is not fulfilling his obligations. The respective obligations according to landlord and tenant law are deemed to be independent. In the MacArtney case considered above, the tenant was not relieved of his obligation to pay rent when the landlord did not or could not provide heat. The tenant's only remedy for the breach of a landlord's covenant was to sue for damages, and that only if the lease terms did not include a waiver of damages by the tenant. On the other hand, the landlord has been able to treat a breach of covenant by a tenant as a condition of the lease, and the landlord then has the right to re-enter

and terminate the lease, or the right to apply to a court for an order terminating the lease.

The usual rules of contract law make the respective covenants or obligations of the parties mutually dependent and therefore a breach of a material obligation of one party will excuse the other from further performance.

The recommendation of the Ontario Law Reform Commission was that the respective obligations of landlords and tenants should be interdependent, similar to the common law rules applicable to contracts.

Section 89 of the Ontario legislation is in accord with the recommendation of the Ontario Law Reform Commission and provides as follows:

> Subject to this part, the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements.

In other words, a breach of a landlord's covenant to heat, disregarding for the moment his statutory obligation, will relieve the tenant of his obligation to pay rent. It seems that it will have to be left to the courts to determine what is meant by a material covenant. It may be speculated that breaches of covenants to heat or to repair will relieve the tenant from having to continue to pay rent or perform his other obligations (see: The Sinclair Report at pp. 68-74; 75-80. See also: Lamont, Residential Tenancies, pp. 23-25; 30-33; 34-36).

(c) British Columbia

Section 9(4) of the British Columbia legislation provides for the application of The Frustrated Contracts Act

and the doctrine of frustration of contracts to tenancy agreements.

Subsection (6) of section 9 provides that where a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement, the landlord or tenant who becomes entitled to claim damages has a duty to mitigate his damages. Subsection (7) states that where a tenant terminates a tenancy agreement or vacates or abandons the premises other than in accordance with the legislation and the tenancy agreement, the landlord has a duty to rerent the residential premises at a reasonably economic rent.

Section 10 of the British Columbia legislation deals with the effect of the breach of a material covenant by one party to the agreement and is set out below as follows:

> (1) Subject to subsections (2) and (3), and subject to any other provision of this Act to the contrary, the common rules respecting the effect of the breach of a material covenant by one party to a contract of the obligation to perform by the other party apply to a tenancy agreement.
>
> (2) No tenant shall refuse to pay rent by reason only of a breach by a landlord of a material covenant in a tenancy agreement.
>
> (3) Where a landlord or a tenant breaches a condition or material covenant in a tenancy agreement, the other person, except where the breach is by a tenant and the rentalsman would not be entitled in an application under section 23(2) to set aside a notice of termination, may treat the tenancy agreement as terminated.
>
> (4) Every covenant, whether or not it is a material covenant, and every condition respecting residential premises contained

> in a tenancy agreement, is enforceable by or against any person in possession of, and any person having an interest in a reversion of, the residential premises.
>
> (5) Subsection (4) does not affect the rights or liabilities of persons between whom, at common law, there is privity of contract or privity of estate.

(d) Manitoba

Section 90 of the Manitoba legislation deals with the application of the doctrine of frustration of contract. Section 91 deals with the interdependency of covenants. Section 94 deals with the mitigation of damages. They are similar to the Ontario provisions and therefore require no additional comment. It should be noted that section 94 has been amended by S.M. 1971, c. 35, and by S.M. 1972, c. 39, s. 2. However, these amendments do not affect the provisions of section 94 as contained in S.M. 1970, c. 106. Those amendments deal with the storage and disposal of chattels which have been abandoned by tenants.

(e) Saskatchewan

The 1973 Saskatchewan legislation respecting residential tenancies specifically provides for the applicability of the law of contract in that section 6(1) states that the relationship of landlord and tenant whether created under a lease or under a tenancy agreement is one of contract only and does not create any interest in land in favour of the tenant. Subsection (2) of section 6 provides that a lease or tenancy agreement to which the Residential Tenancy Act applies shall be deemed not to be a lease within the meaning of The Land Titles Act or The Landlord and Tenant Act.

The doctrine of frustration of contract is made

applicable to tenancy agreements by the provision of section 12. Section 13 provides that the common law respecting the effect of a breach of a material covenant by one party to a tenancy agreement on the obligation of the other party to perform the covenants he has agreed to perform applies to tenancy agreements.

(f) New Brunswick

The present law in New Brunswick is not unlike the present state of affairs in Alberta, in that the common law remains untouched insofar as residential tenancies are concerned, and the law of contract will accordingly have a very minor roll to play. The rights of the landlord and the tenant are thereby restricted to the real property remedies. The English decisions on frustration have been upheld in the Province of New Brunswick stating that frustration as a doctrine cannot be pleaded in landlord and tenant cases (see: Foster v. Caldwell (1948), 22 M.T.R. 16). This case is indicative of a number of cases in New Brunswick from which it may be concluded that the contractual theories have no application at all. The non-residential matters are probably covered by the Supreme Court of Canada decision in the Highway Properties case, considered earlier.

This means, in the Province of New Brunswick as well as the Province of Alberta, that if a tenant leases an apartment, for example, on the fourth floor of a building and part way through the term the building is destroyed by fire, the tenant's obligation to pay rent continues as the estate, land law, is still possible as the land is still there. The application of a possible contract rule to more equitably, from the viewpoint of the tenant, solve this dilemma is precluded. Accordingly, the Sinclair Report has recommended that the reform legislation in New Brunswick

should make it categorically and emphatically clear that the law of contract is to apply and then to emphasize this legislative intent by repetition of the three principles of law of contract which are required to be applied, as reflected in the Ontario contractual applications of frustration, interdependency of covenants, and mitigation of damages. Finally, it was furthermore recommended that it would be wise to insert a caveat at the beginning of the general section, in which contract supplants property, to open up with an exception that if any of the real property concepts are to be retained that a provision expressly state that such is to be the result; that is, that contract rules are to entirely supplant real property rules to govern the relationship in the future between landlord and tenant except in those areas where continuation of a real property concept is necessary in order to effectively dispose of the problems which may arise either out of the common law or out of the legislation.

Section 11 of the 1975 New Brunswick Bill respecting residential tenancies provides as follows:

> (1) The relationship of landlord and tenant is one of contract only and a tenancy agreement does not confer on a tenant any interest or estate in land.
>
> (2) The doctrine of frustration of contract and The Frustrated Contracts Act apply to tenancy agreements.
>
> (3) Subject to this Act, the law respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party applies to tenancy agreements.
>
> (4) Where a tenant
>
> (a) abandons the premises; or
>
> (b) terminates the tenancy otherwise than as permitted by this Act or the lease;

> the landlord shall mitigate any damages that are caused by such abandonment or termination to the extent that a party to a contract is required generally under the law relating to breaches of contract.
>
> (5) This section does not apply to a tenancy agreement for a term of years entered into before this section comes into force.

(g) Newfoundland

By section 10 of the Newfoundland legislation the doctrine of frustration of contract is made applicable to the relationship of landlord and tenant and The Frustrated Contracts Act applies thereto.

Section 12(1) deals with the interdependency of covenants as follows:

> (1) Subject to this Act, the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party applying to the relationship of landlord and tenant.

Section 13 of the Newfoundland legislation deals with mitigation of damages in the following terms:

> Where a tenant abandons the premises in breach of the tenancy agreement, the landlord's right to damages is subject to the same obligation to mitigate his damages as applies generally under the rule of law relating to breaches of contract.

(h) Nova Scotia

Statutory condition 5, pursuant to section 6 of the Nova Scotia Act, requires the landlord to mitigate, as he would be required under the law of contract where the

tenant has abandoned the premises or terminated the tenancy otherwise than permitted. There do not appear to be any other provisions in the Nova Scotia legislation relative to other contractual features applying to the landlord and tenant relationship. There are, for example, no provisions for the doctrine of frustration to apply, nor are there any provisions for the interdependency of covenants. It may therefore be concluded that the common law which applies to the real property rules to these situations will continue to rule in Nova Scotia.

(i) Prince Edward Island

Section 106 of the Prince Edward Island legislation provides that where the tenant abandons the premises in breach of the tenancy agreement, the landlord is obliged to mitigate his damages as under the law of contract. Section 91(2) provides that the common law rules with respect to breach of covenant, as in the law of contract, apply to the tenancy agreement. Section 91(3) applies the doctrine of frustration as under the law of contract to tenancy agreements. Accordingly, it may be seen that insofar as these provisions are concerned they are similar to those in Ontario in that they provide for specific application of the rules of contract law to tenancy agreements. Subsection (1) of section 91 departs from the Ontario provisions and provides as follows:

> (1) The relationship of landlord and tenant is one of contract only, and a tenancy agreement does not confer on the tenant an interest in land.

With reference to residential tenancies it is clear that under the terms of section 91(1) the contractual principles of frustration and of anticipatory breach, substantial performance, etc., are the only rules at which a court may look to solve the landlord-tenant dispute; all

of the old rules respecting land law will have no application. Not only will the contract principles apply to the relationship of landlord and tenant but the rules as to real property will have no scope for application whatsoever in that the interest in land which was heretofor a prime consideration in a leasing agreement is no longer of any application. As noted above, section 11(1) of the 1974 New Brunswick Bill has followed the same course.

It should be noted that this wide sweeping subsection in both Prince Edward Island and New Brunswick has the effect of wiping out the rules of real property law completely, whether good or bad, as they relate to leasing agreements respecting residential premises.

(j) Quebec

This writer's understanding of the civil law system is that the doctrine of estates is unknown to it. The difference between contract and property relative to the demised premises is not of any concern. Accordingly, no further comment will be made herein.

3. Comment

The Landlord and Tenant Advisory Board of the City of Edmonton, in its Initial Submission, made to the Institute of Law Research and Reform, at p. 19, has stated that should the premises be destroyed by fire, for example, so that the tenant must seek other accommodation the tenant should be protected from the unlikely but, as yet, legal possibility of having to continue to pay rent. Accordingly, the Advisory Board has recommended that the doctrine of frustration of contract should apply to tenancy agreements and that a short clause in any new legislation respecting residential tenancies would be adequate. The Advisory Board

has cited the Manitoba legislation as one possible alternative. However, the Board has not made any other specific recommendations respecting the application of the law of contract. It is this writer's opinion that new legislation in Alberta respecting residential tenancies will have to do much more than simply provide for the application of the doctrine of frustration of contract. Specific provisions should be written into the legislation dealing with the interdependency of covenants and the mitigation of damages. A move in the direction of the reform bill in New Brunswick is worthwhile considering. If the new legislation merely declares that a lease is a contract, it may be insufficient to permit the courts to divest the common law notion that a lease is a conveyance of an estate in land in residential tenancy disputes. In that regard the Law Reform Commission of California has noted that, the legislative declaration of the principle that a lease is a contract has been an insufficient basis for the courts to depart substantially from the common law notion that a lease is a conveyance of an estate in land that gives rise to a tenurial relationship, the principle incident of which is the feudal service of rent that must be rendered by tenant to Lord. Some contractual remedies had been made available to landlords and tenant but the value of these remedies, according to the Law Reform Commission of California has been seriously impaired by the efforts of the courts to fit them with feudal property concepts.

4. Issues

(1) Should the law of contract rather than the rules of property law apply to residential tenancy agreements?

(2) Should the doctrine of frustration of contract apply to residential tenancy agreements?

(3) If a tenant vacates the rented premises, should the law require the landlord to re-rent the premises at the best rent obtainable and to look to the tenant only for any deficiency, or should it give the landlord any or all of the following options:

(a) to do nothing and sue for the rent as it falls due; or

(b) to accept the tenant's surrender, in which case the tenant is no longer liable for the rent; or

(c) allow the parties to agree in the lease that the landlord as agent of the tenant may re-rent the premises and look to the tenant for any deficiency in the rent; or

(d) to permit the landlord without any agreement to re-rent on behalf of the tenant and to look to the tenant for any deficiency in the rent.

(4) Should the law provide that a breach of a material part of the agreement by the landlord will excuse the tenant from the performance of his part of the agreement?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

FORM AND DELIVERY OF LEASE

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1. Introduction

The province by province analysis which follows indicates that the legislation of the various Canadian provinces does not require that all leases be in writing. However, there are numerous provisions for copies of leases to be given in those cases where written leases are entered into.

2. Statutory Provisions in Canada

(1) The present law in Alberta

Subsection (1) of section 17 of the Alberta legislation respecting residential premises provides that where a tenancy agreement in writing is executed by a tenant, the landlord shall ensure that a fully executed duplicate original copy of the tenancy agreement is delivered to the tenant within twenty-one days after its execution and delivery by the tenant. Subsection (2) provides that where the copy of the tenancy agreement is not so delivered, the obligations of the tenant thereunder cease until such copy is delivered to him.

Subsection (2) of section 17 provides that failure of the landlord to comply with subsection (1) means that the "obligations of the tenant thereunder cease until such copy is delivered to him". Statutes in other jurisdictions make it clear that the obligations of the tenant upon delivery of the copy of the lease will reflect back to the time when he first moved in. The Alberta provision, which simply states that the tenant's obligations cease until the copy of the lease is delivered to him, may be interpreted as meaning that no obligations exist until delivery is made. It may be argued that the tenant may think that no rent, for

example, may be owing until such time as delivery is made, and then only rent accruing after delivery. This conclusion may be further supported by the use of the word "cease" in the provision. That word does have a stronger meaning of to stop or discontinue and the tenant might very well argue that he only becomes liable for his obligations from the date of the receipt of the copy of the lease. It is, on the other hand, possible to read into the provision that upon receipt of the duplicate lease the tenant would have to pay any arrears of rent which had fallen due. Even though it may be possible to read this in, and it would seem to be the logical interpretation, the mere fact that it has to be read in seems to call for a more clear drafting of this provision. It should be noted that Lamont, in his book Residential Tenancies, at p. 10, has made the same comment respecting the Ontario provision which is almost identical to that in Alberta. Lamont has suggested that the point is probably not too practical, as a tenant would not likely try to avoid payment of rent for occupancy he has enjoyed, and particularly so at the outset of his lease. Also, many landlords require prepayment of the first month's rent or a security deposit at the time of signing the lease, and any delay on the part of the landlord in getting a copy of the lease to the tenant will probably only concern a landlord who takes more than a month to sign and deliver a copy of the lease to the tenant.

(2) Ontario

Section 83(1)(2) of the Ontario legislation is identical to that in Alberta. Accordingly, the same comments made above would be applicable here.

(3) British Columbia

Section 36 of the British Columbia legislation

provides as follows:

> (1) Where a written tenancy agreement is entered into after the date this section comes into force, the landlord shall give to the tenant, not more than twenty-one days after the tenancy agreement is entered into, a copy of the tenancy agreement.
>
> (2) Where a copy of the tenancy agreement is not given to a tenant in accordance with subsection (1), the obligations of the tenant under the tenancy agreement, including his obligation to pay rent, cease until a copy is delivered to him.

As in Ontario and Alberta, the above provision in British Columbia is only operative where a tenancy agreement is in writing. Subsection (2) of section 36 provides that if the tenant does not receive a copy of the agreement his obligations, including his obligation to pay rent, cease until a copy is delivered to him. It is not clear whether, upon the tenant receiving a copy, he is then required to pay the arrears of rent or any other obligation which had ceased; or, whether the tenant is only obliged to perform his obligations from the date of receipt of a copy of the agreement.

(d) Manitoba

Section 118 of the Manitoba statute provides as follows:

> (1) The Lieutenant Governor in Council may prescribe by regulation the form of tenancy agreement for residential premises and every tenancy agreement shall be deemed to be in the form so prescribed.
>
> (2) Any term or condition in a tenancy agreement

> (a) that is not permitted by or contained in, a form prescribed under subsection (1); and
>
> (b) that contravenes any of the provisions of this Act
>
> is void and has no effect.

The Manitoba Government has published a brochure as an aid to landlords and tenants. As provided for under the above quoted section, the brochure contains a "standard residential tenancy agreement".

Section 83(1) of the Manitoba legislation provides that a copy of the agreement, where it is in writing, must be delivered within twenty-one days after the tenant delivers it to the landlord, having himself executed it. This subsection comes into effect and benefits the tenant with the copy of the lease only in those cases where it has been executed by the tenant.

Subsection (2) of section 83 states that the obligations of the tenant cease until he receives a copy. As with the other jurisdictions examined to this point, this subsection does not clearly state the answer to the question as to whether the obligations are merely suspended until such time as the tenant receives a copy or whether they do not exist until such time.

As to the question whether or not all leases respecting residential tenancies should be in writing, the Province of Manitoba comes closest to such a requirement in that a verbal lease will be taken to take the written form prescribed by regulation.

(5) Saskatchewan

Sections 7, 8 and 9 of the 1973 Saskatchewan legislation respecting residential tenancies are as follows:

> 7. Where a tenancy agreement in writing is executed by a tenant, the landlord shall deliver or cause to be delivered to the tenant an executed and completed original copy of the agreement within twenty days after the execution and delivery of the agreement by the tenant to the landlord.
>
> 8. Every landlord shall within sixty days after this Act comes into force deliver or cause to be delivered to any tenant with whom he has entered into a written lease and executed and completed original copy of the lease and each renewal thereof, if any, unless the tenant has already received such a copy.
>
> 9.(1) Where a landlord does not deliver or cause to be delivered a copy of a tenancy agreement, or a lease or renewal thereof to his tenant in accordance with sections 7 or 8, the obligations of the tenant under the agreement or lease are suspended until the landlord complies with section 7 or 8, as the case may be.
>
> (2) Where a dispute arises between a landlord and his tenant as to whether the landlord has complied with sections 7 or 8, as the case may be, the onus of proof of such compliance rests upon the landlord.

The most notable difference between the above provisions in Saskatchewan and the provisions in other jurisdictions examined earlier, is that if the landlord does not deliver a copy of the agreement to the tenant, the obligations of the tenant are merely suspended. Presumably, if the tenant has refused to pay rent because he has not received a copy of the agreement, then, upon being so provided with a copy by the landlord, the tenant would then be responsible for the rent which would have fallen due had

it not been for the landlord's failure to comply with the provision.

(6) New Brunswick

There is no provision in the existing landlord and tenant legislation in New Brunswick requiring all leases to be in writing. Furthermore, there is no obligation placed on the landlord to provide the tenant with a copy of a written lease. The only requirement at law in New Brunswick for a written lease is contained in section 7 of the Statute of Frauds, R.S.N.B. 1952, c. 218. That section provides that leases exceeding three years in duration which are not reduced to writing have the status of estates at will only. It may be concluded from this that a written lease is essential for proper contracting for those relationships exceeding three years.

The Sinclair Report, at pp. 60-61, made the following recommendations:

> (a) that all tenurial relationships can come into being at law only upon the parties agreeing by signing a written, prescribed form of lease;
>
> (b) that such a provision only apply to those tenancies arising or renewed after the Act comes into force;
>
> (c) that the form should be prescribed as a schedule to the Act, and should contain provisions for the parties to enter agreements they reach which do not conflict with the rules as laid down in the Act;
>
> (d) if the requirement of written leases is not acceptable, then the pattern of the other reform legislation be followed in requiring that copies of those leases which are reduced to writing be delivered to tenants; no rent to be collected until this is observed, but all rent owing to be paid when the copy is, in fact, delivered.

Section 9 of the 1974 New Brunswick Bill respecting residential tenancies provides for a standard form of lease. It provides as follows:

(1) A landlord, with respect to every tenancy agreement entered into after this section comes into force, shall provide for both landlord and tenant to sign and retain two copies, which are to be duplicate originals, of the standard form of lease as prescribed by regulations.

(2) Subject to subsection (3), any alteration of or deletion from the standard form of lease is void.

(3) A landlord and a tenant may agree to any addition to the standard form of lease that does not alter any right or duty as stated in this Act or the standard form of lease.

(4) An addition under subsection (3) is void unless it appears on both duplicate originals of the standard form of lease.

(5) With respect to every tenancy agreement entered into after this section comes into force, a landlord and a tenant who enter into a tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply.

(6) Where a tenant is not given a standard form of lease as provided in subsection (1) any rental payment owing may be made by him to a rentalsman to be retained until compliance with subsection (1) by the landlord.

(7) Where a standard form of lease has not been signed, the possession of the premises by the tenant raises a presumption of the existence of a tenancy agreement the term of which is to be determined by the method of rental payment.

(7) Newfoundland

Section 6(2) of the Newfoundland statute dealing with residential tenancies cures at least one of the defects mentioned with respect to the Ontario and Alberta provision in that the Newfoundland section requires that the landlord, where he enters into a written lease with the tenant upon execution of the lease, provide the tenant with a duplicate copy. It will be noticed that the requirement in Ontario and Alberta is that this only applies where the lease has been executed by the tenant. This has been left out in the Newfoundland provision.

Subsection (4) of section 6 expressly provides that the tenant is not obliged to pay any rent for any period from the time of the execution of the lease to the time the landlord supplies the duplicate copy, which under the terms of subsection (2), the landlord is to do immediately upon execution of the lease.

In addition to the right granted to the tenant not to have to pay any rent for the period during which time he does not have a copy of the lease, under the terms of subsection (3) of section 6, the tenant is given the option to advise the landlord in writing that immediately or within any time he picks during the next three months he shall surrender the residential premises, and the lease upon such surrender is to be void. This puts a very strong lever into the hands of the tenant in that he may now move immediately or at any date that he himself chooses within a three month period and there is no way that the landlord can prevent this termination of the tenancy. If the landlord does not provide the tenant with a copy of the lease immediately upon its execution, he runs the risk of either no rent accruing until he does, or the tenant being in a position to unilaterally bring an end to the leasing relationship.

Subsection (5) of section 6 provides that the tenant is required, if the landlord requests, to execute an acknowledgement that he has been supplied with a copy of the lease.

Subsection (1) of section 6 requires that in every residential leasing arrangement the landlord is to supply without cost to the tenant a copy of the Landlord and Tenant (Residential Tenancies) Act.

(8) Nova Scotia

Section 5 of the Nova Scotia legislation is similar to the Newfoundland provision. However a number of differences appear which deserve comment.

First, as in Newfoundland, the landlord is required to supply the tenant with a copy of the statute. In 1970-71 the words were added "without cost to the tenant". This would appear to be a worthwhile requirement.

Second, as in Newfoundland, the tenant is permitted to give notice that he will terminate in that case where he does not receive a copy of the lease upon execution.

Third, there is a categorical statement in subsection (4) which provides as follows:

> (4) A tenant shall not be obliged to pay any rent until the landlord complies with subsection (2).

The above provision suffers from the same ambiguity on different wording as the Alberta section. If the intention of this provision is to prohibit collection of rent by the landlord in that case where he has failed to deliver a copy of the lease to the tenant, then either the Newfoundland

or Saskatchewan method of saying so is preferable.

Finally, subsection (5) of section 5, again, as in Newfoundland, makes it mandatory for the tenant to execute an acknowledgement that he has received a copy of the lease, where in fact such is required by the landlord.

(9) Prince Edward Island

Section 95 of the Prince Edward Island legislation, as amended in 1972, is similar to the Ontario and Alberta provisions. Accordingly, the comments made above would apply here as well.

(10) Quebec

The Province of Quebec has a standard form of lease in its Civil Code after article 1665. Article 1664h provides that if the parties agree to a written lease, the lessor must within fifteen days of its making give the lessee a copy of the lease reproducing in full the standard form of lease from the Code. Parties cannot contract out of the provision from the standard lease but may make additional agreements.

If the parties agree to an oral lease, then article 1664o provides that the lessor must within three days of the agreement, give the lessee a writing, reproducing in full the standard form of lease from the Civil Code.

3. Comment

One of the questions on the questionnaire which Professor Sinclair sent a number of tenants in New Brunswick asked if the tenant had a copy of the lease, and if he

understood the lease then and at the time of entering into the lease. There were a great many answers in which the tenants, even if they received a copy of the lease, denied any understanding of its terms and many, in fact, said that if they had understood from talking with the landlord in the beginning, they had now forgotten what the conclusions of those conversations were.

It seems that one of the major problems in leasing arrangements is that tenants do not fully appreciate the nature of the agreement into which they are entering and the obligations of the parties thereunder. In responding to this problem, new legislation in Alberta may take one of a number of possible directions. The situation could remain basically as it is, that is, with a requirement that landlords provide a copy of written leases to their tenants. Second, the opposite direction could be taken by requiring that all leases, regardless of their duration, in order to be effective at law must be in writing. Thirdly, forms could be provided which would be available for the use of landlords and tenants and which would contain suggested provisions in line with a proposed statute.

If new legislation in Alberta provides for a mandatory standard form of lease for use in all residential tenancy arrangements, such a proposal could be supported for a number of reasons. First, the use of prescribed forms is not entirely foreign in property law arrangements and agreements; second, although many of the reform jurisdictions require copies of the legislation to be given to the tenant, it may be argued that a copy of the lease which includes most of the remedial aspects of the legislation may be a more effective and realistic method of bringing to the attention of the tenant the various provisions of the Act; third, the provinces of Newfoundland and Nova Scotia have adopted the method of statutory conditions which are to be read into

leases and the educational aspects of such requirements cannot be underestimated; fourth, under many of the reform statutes, landlords cannot contract out of their new duties, and, therefore, the argument that might be advanced by landlords that their freedom to contract has been eroded is not nearly as valid as it would have been heretofor; fifth, landlords would probably not violently object to such a requirement if the terms are fair and if there is some latitude in order to permit the parties to make some alterations in order to meet particular situations.

While the proposal to require that all leases respecting residential tenancies be in a prescribed standard form is a radical one, it does merit considerable attention. It would serve the main functions of educating the tenant in that he would have before him a lease which would contain a summary of the Alberta law, hopefully in understandable language, which might assist in solving potential disputes in minor matters. This problem, of course, may be cured by a requirement that the landlord must provide the tenant with a copy of the legislation. However, this would have the problem that the legislation would not be written in easily understood language as may be the case in a standard form of lease.

It would seem that such a standard form must have some degree of flexibility. While the form could contain most of the material that is within the legislation relative to the rights and duties of each party there should be some room on the lease for the parties to include special agreements. The parties must have some degree of latitude to move where the Legislature has not seen fit to intervene. However, they should be limited to agreements which, in fact, do not depart from the rules as set down in the legislation. If it may be concluded that new Alberta legislation

will make the agreement that the parties so far as the rules of law are concerned as to their obligations, for example, to repair, to pay rent, etc., then it is difficult to make the argument that such a set of rules should not be put in writing in a standard form.

On the other hand, consideration should be given to possible alternatives to the development of a standard lease. It was the opinion of the "apartment group" of the Urban Development Institute of Ontario that the only satisfactory means of providing an effective flow of information to the public dealing with the Landlord and Tenant Act was to require that the landlord provide the tenant with a complete copy of Part IV of the Landlord and Tenant Act or that the landlord supply the tenant with a complete copy of Part IV of the Act together with a reasonably brief copy of those parts of the Act which are not self-explanatory, i.e., where the use of legal terminology is such that no lay person would have any hope of interpreting the intent of the legislation. It was also recommended by the U.D.I. that such explanation should be kept to an absolute minimum in order to reduce the possibility of government being put in a position of anticipating court interpretations of the legislation. The Urban Development Institute of Ontario further expressed the view that this route was the only method which would provide to the landlord and to the Legislature the essential flexibility to enable change necessitated by changing social structures and values or by court interpretations of the intent of various provisions of the Act and leases currently in use. It was also recommended that concurrent with such a program, the government should embark upon a scheme of public education to ensure the flow of accurate information to the public on their rights, privileges and responsibilities as landlords or tenants. However, if it was felt to be necessary, U.D.I. suggested that the

government might set forth certain minimum clauses which should be contained in any lease. These could include such things as a clearer statement of the parties to the lease and their respective addresses, the term of the lease, the rent, and an indication of what is included such as utilities, appliances, parking, etc., and the method of lease termination.

In summary, it is the opinion of this writer that it may be worthwhile to seriously consider moving in the same direction as the 1974 Bill respecting residential tenancies in the Province of New Brunswick.

4. Issues

(1) Delivery of Copy of Lease

(a) Should the law require a landlord to provide the tenant with a signed copy of the tenancy agreement if there is one?

(b) If so, what period of time should the law allow for the landlord to deliver the copy? Should the time commence to run when the tenant signs the agreement?

(c) What should happen if the landlord does not deliver the copy on time? Should the tenant's obligations cease, or should they be suspended so that they will have to be performed later after the copy is delivered, or should some other consequence follow?

(2) Standard Lease Form

(a) Should the law prescribe a standard form of lease and require that it be used in all residential tenancy arrangements?

(b) Should the law allow the landlord and tenant to contract out of such requirement?

(c) Should the law allow the parties to make alterations in the standard form in order to meet particular situations?

(d) Should the law, instead of providing a statutory form of lease, set out statutory conditions which will automatically be a part of all tenancy agreements?

(e) Should the law require the landlord to attach a copy of the residential tenancies legislation to all tenancy agreements or otherwise deliver a copy to the tenant without cost?

(f) Should an appendix be attached to all residential tenancy agreements explaining in layman's terms the obligations of each party under the lease?

INSTITUTE OF LAW RESEARCH AND REFORM

RESIDENTIAL TENANCIES

RIGHT TO ASSIGN AND SUBLET

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1. Common Law

At common law, it is well settled that the tenant has a complete right to either assign or sublease the property. An assignment relates to that situation where the tenant has given to his assignee the entire remainder of the term that he, himself, owns. On the other hand, a subleasing only prevails in that situation where the tenant has given to what now might be described as a sub-tenant a portion of the period of the original tenancy which remains so that the sub-tenant will then hand back to the original tenant at the end of his term. The distinction between an assignment and a subleasing is important in that, upon an assignment taking place the original landlord is the landlord of the assignee, the new tenant, and an estate relationship exists between them, whereas in the subleasing arrangement, as the reversion will work between the new tenant and the old tenant, the original landlord can have no privity of estate with the new tenant.

The Sinclair Report, at p. 122, has noted that confusion often arises in the minds of the public respecting these two terms, and the terms are freely interchanged in their minds, particularly that dealing with subleasing in that many tenants have considered that a subleasing arrangement exists between them when, in fact, an assignment has taken place. This becomes particularly important in the area of landlord's rights. If no tenure relationship based on privity of estate exists between a landlord and a tenant then no action arising out of the relationship of landlord and tenant can be had which, of course, could occur in that

instance where a sublease has taken place rather than an assignment.

2. Statutory Provisions in Canada

(1) The present law in Alberta

The Alberta legislation does not contain any provisions dealing with the right to assign or sublet. Presumably, the rules at common law apply and the tenant may assign or sublease as he desires unless the parties have agreed otherwise.

(2) Ontario

Section 91 of the reform legislation in Ontario provides as follows:

> 91.(1) Subject to subsection (3), a tenant has the right to assign, sublet or otherwise part with possession of the rented premises.
>
> (2) Subsection (1) does not apply to a tenant of premises administered by or for the Government of Canada or Ontario or a municipality, or any agency thereof, developed and financed under the National Housing Act, 1954 (Canada) (1953-54 (Can.), c. 23).
>
> (3) A tenancy agreement may provide that the right of a tenant to assign, sublet or otherwise part with possession of the rented premises is subject to the consent of the landlord, and, where it is so provided, such consent shall not be arbitrarily or unreasonably withheld.
>
> (4) A landlord shall not make any charge for giving his consent referred to in subsection (3), except his reasonable expenses incurred thereby.

> (5) A landlord or tenant may apply by summary application to a judge of the County or District Court of the county or district in which the premises are situate who may determine any question arising under subsection (3) or (4).

A number of comments should be made in regard to the above provision.

Section 91(1) is merely declaratory of the common law. Accordingly, there is no substantial difference in result from the situation in Alberta. The main difference is that the statutory provision advises tenants as to their rights prior to entering into the relationship. There can be no doubt in the minds of tenants as to what the relationship is. The Sinclair Report, at p. 125, suggests that this provision in the Ontario Act is a valuable information dispensing tool. Professor Sinclair found that in the replies to the questionnaire which he sent out to tenants in New Brunswick, many of them did not know whether they had a right to assign or sublet. Professor Sinclair has speculated that this situation exists either because the lease does not expressly say so or, in many cases, there was no lease at all.

Secondly, section 91(4), provides that the landlord may not charge any expenses except those which are reasonable. It may have been preferable had the Ontario legislation provided for a maximum charge allowable. The provision would then be more definitive.

Thirdly, section 91 (2), has probably been inserted to prevent low rental housing being assigned or sublet at a higher rate than that at which the present tenant was able

to obtain it. It probably also prevents those people from living on the premises who would not otherwise meet the income requirements.

Fourthly, the landlord and tenant may not contract out of the right to assign or sublet, but only impose limitations on it.

Fifthly, section 91(5), dealing with the settlement of disputes which may arise provides that application may be made to a judge in order to determine the reasonableness of withholding permission.

The question whether or not the landlord is unreasonably withholding his consent depends on the circumstances of each case and includes the personal relationship as between the lessor and lessee, and the nature of the user of the property (see: Cowitz v. Siegel, [1954] O.W.N. 833 (C.A.)). Another way of putting it is that the landlord should be able to withhold his consent to an assignment or subletting which might result in his premises being used or occupied in an undesirable way or by an undesirable tenant. However, the landlord is not limited to these grounds, as all the circumstances of his refusal will be considered. He cannot refuse his consent on grounds entirely personal to him and wholly extraneous to the lessee (see: Shields v. Dickler, [1958] O.W.N. 145 (C.A.)).

It is important for the tenant to realize that if he wishes to sublet or assign, he must first obtain the landlords consent to the proposed subletting or assigning. He cannot complete the subletting and then go to the landlord

for his approval. If done in that order, the landlord can forfeit the lease, and there is no right of the tenant of relief from this forfeiture (see: Wakefield v. Cottingham, [1959] O.R. 551 (C.A.)).

(3) Prince Edward Island

It is worthwhile considering the Prince Edward Island legislation respecting subleasing and assigning at length since it differs from the provisions in other jurisdictions. Section 92 of the Landlord and Tenant Act of 1972 provides as follows:

> 92.(1) Subject to subsection (2) or subsection (5), where a tenancy agreement is for a term of six months or more, a tenant has the right to assign, sublet, or otherwise part with possession of the rented premises.
>
> (2) Notwithstanding subsection (1) a tenancy agreement may provide that the right of a tenant to assign, sublet, or otherwise part with possession of rented premises is subject to the consent of the landlord, and, where it is so provided, such consent shall not be arbitrarily or unreasonably withheld.
>
> (3) Where subsection (2) applies, the tenant shall give to the landlord, in the manner prescribed in section 114 at least one month's notice of a request for the consent of the landlord to an assignment, subletting, or other parting with possession under that subsection.
>
> (4) A landlord shall not make any charge for giving his consent referred to in subsection (2) except his reasonable expenses incurred thereby.
>
> (5) A tenancy agreement that provides that the consent of the landlord is required as authorized by subsection (2) may also provide that instead of consenting to the assignment, subletting, or other parting

> with possession, the landlord may, at his option, serve one month's notice of termination of the tenancy agreement in the manner provided in this part.

Section 92(3) departs from the Ontario provisions by requiring the tenant, if he wishes to assign or sublet, and consent must be obtained, to give one month's notice of such request. Under the provisions of subsection (5) the landlord is given the right to say that he does not wish any new tenant on the property either on an assignment or subletting basis and that he may, therefore, if it is his desire, give one month's notice and terminate the tenancy agreement. Under the provisions of subsection (1) the right to assign or sublease only takes place where the tenancy is for a term of six months or more. No amount of money can be charged by the landlord except for reasonable expenses.

The tenure relationships which are referred to in section 92, i.e., those which exist for a term of six months or more, are going to be generally in the category of terms of years rather than periodic tenancies, except in the case where a periodic tenancy exists which is year to year. It is not necessary that the more normal periodic tenancies are week-to-week or month-to-month need the sub-leasing or assignment provisions. Where one month's notice to assign or sublet is required anyway, the same period of notice could be given to bring the tenancy to a close. Therefore, section 92 applies, and the right of assigning and subleasing is going to be restricted to those periodic tenancies which are year-to-year and terms of years in excess of six months.

In commenting upon the above Prince Edward Island provisions, the Sinclair Report, at p. 130, states the following:

> It appears to the writer to make eminent good sense that in the cases where subleasing and assigning is thought necessary, that is, in those tenancies which are considered under the provisions of subsection (1) of section 92, that if the tenant is to be given the right to assign or sublease, and further, if in so doing he must give one month's notice, then it is only fair that the same rights be given to the landlord to say that the person with whom he was originally dealing, the original tenant, that is, is no longer to be on the premises, and as he, himself, selected and approved such a tenant, that he should have such capacity in the future and, therefore, can himself, under the provisions of subsection (5), determine the tenancy itself. I can see no real hazard connected with this and, in fact, can see many benefits accruing to a landlord, without substantial detriment to a tenant. If the tenant is to leave in any event then it should not make any difference to him as to who the new tenant is going to be.

(4) Manitoba

Section 93 of the Manitoba legislation provides that the tenant has the right to assign or sublease except, as under the Ontario provisions, with respect to those National Housing Act administered premises. Furthermore, the landlord may provide in the lease that his prior consent is required, and where such provision is made no unreasonable withholding may be had. A charge may be made, provided it does not exceed the sum of $10, for the consent referred to.

The only difference from the previous reform legislation examined, is the amount of money which is definitively spelled out in the Manitoba Act. The sum of $10 would seem to be reasonable.

(5) Saskatchewan

Statutory condition 9 as provided for in section 16 of the 1973 Saskatchewan legislation provides for the tenant's right to assign the tenancy agreement or otherwise part with the possession of the residential premises. It may be provided in any tenancy agreement that the prior consent of the landlord must be obtained. In such a case the landlord shall not arbitrarily or unreasonably withhold his consent. The landlord is permitted to charge and collect from the tenant a sum not exceeding $10.00 to cover his expenses incurred in giving the consent. Any dispute which arises with respect to the assignment of the tenancy agreement may be determined by a judge, upon application by either the landlord or the tenant, under section 35.

(6) New Brunswick

The New Brunswick provisions give the tenant the complete right to both assign and sublease, unless the parties have contracted otherwise. The Sinclair Report, at p. 123, has noted that it is common in New Brunswick for landlords to include within the lease a provision that either the tenant may not assign or sublease at all or that he may, and this is perhaps the more common, that he may assign or sublease only with the consent of the landlord obtained in advance and in writing.

There is also the following further provision in the New Brunswick Landlord and Tenant Act, which is section 11, reading as follows:

> (1) In every lease containing a covenant, condition or agreement against assigning, subletting, or parting with the possession, or disposing of the land leased without license or consent, such covenant, condition or agreement shall, unless the lease

> contains an express provision to the contrary, be deemed to be subject
>
> (a) to a proviso to the effect that such license or consent shall not be unreasonably withheld; and
>
> (b) to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such license or consent, but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such license or consent.
>
> (2) Where the landlord refuses or neglects to give a license or a consent to assign or sublet, a judge of a County Court, upon the application of the tenant, or assignee or sub-tenant, may make an order determining whether or not such license or consent is unreasonably withheld and, where it is so withheld, permitting the assignment or sublease to be made, and such order shall be the equivalent of the license or consent of the landlord within the meaning of any covenant or condition requiring the same, and such assignment or sublease shall not be a breach thereof.

The above provision does not contain any prohibition against assigning or subleasing. It is only in those cases in which the lease contains a provision relating to assigning or subleasing that the above section will come into play. The main function of section 11 occurs within clause (a) of subsection (1) in that the consent to sublease where it is so required by a lease shall not be unreasonably withheld.

Section 13 of the 1974 bill respecting Residential Tenancies provides for assignment. A tenant may assign all of his rights obtained under the lease for the remaining term of the lease and the right to possession of the demised premises for a portion of the remaining term of the lease. Section 13(2) provides that where there is an assignment by

a tenant of all his rights obtained under a lease for the remaining term of the lease, the assignee assumes all of the obligations with respect to the tenancy and no action will lie against the assignor for any obligation with respect to the tenancy, arising after the assignment takes place.

Subsection (3) of section 13 states that a lease may provide that the tenant may not assign his rights under the lease or that the tenant might assign his rights only with the consent of the landlord. In those cases where the lease requires the prior consent of the landlord the tenant is required, by subsection (4) of section 13 to give the landlord notice of a request for his consent. The landlord shall not arbitrarily or unreasonably withhold his consent. However, as provided for in subsection (4)(d), the landlord may, instead of consenting, within seven days of service of the tenant's notice, serve on the tenant notice to quit terminating the lease to be effective on the day on which the requested assignment was to be effective. According to subsection (6) of section 13, the landlord is prohibited from serving a notice to quit instead of consenting in those cases where the tenant is seeking consent solely for the purpose of entering into a mortgage of the premises, or where the tenant wishes only to assign his right to possession of the demised premises for a portion of the remaining term of the lease.

The landlord is permitted to charge a maximum sum of $10.00 to cover his reasonable expenses incurred for giving his consent to the assignment.

In those cases where the tenant has given notice of his request for the consent, to the landlord, if the landlord does not reply by notice within seven days, he has deemed to have given his consent to the tenant's request.

Subsection (7) of section 13 provides that where a landlord transfers his estate in the real property in which the demised premises form all or a portion, the transferee assumes all of the obligations with respect to the tenancy, and no action will lie against the transferor for any obligation with respect to the tenancy arising after notification of the transfer takes place as provided for in subsection (8). Where a transferee assumes the obligations with respect to a tenancy pursuant to the above provision, he is deemed to be a landlord for all the purposes of the legislation.

Subsection (10) of section 13 is similar to the previously examined Ontario provisions in that the tenant may not assign his rights under the lease for the remaining term of the lease or his right to possession of the demised premises for a portion of the remaining term of the lease where the tenancy relates to premises developed and financed under the National Housing Act, R.S.C. 1970, c. N-10.

(7) Newfoundland

Section 7(3) of the Newfoundland reform legislation reads as follows:

> (3) The tenant may assign, sublet or otherwise part with possession of the premises subject to the consent of the landlord, which consent will not arbitrarily or unreasonably be withheld, or charged for (unless the landlord has actually incurred expense in respect of the grant of consent).

Under the above provision the tenant is given the right to assign or sublet. However, no such assignment or subletting can take place without the consent of the landlord. While there is a provision that such consent will not be withheld unreasonably, the provision is more onerous than

those examined previously and places the tenant in a less favourable position than in Ontario or New Brunswick. The Sinclair Report, at p. 127, has suggested that this is a derogation from the right of the tenant which may not have been intended.

(8) Nova Scotia

Section 6(4) of the Nova Scotia legislation is identical to that in Newfoundland. As in Newfoundland, the above Nova Scotia provision provides that the landlord and tenant cannot change this statutory condition by any provision in the lease and accordingly the matter is not open to contract.

Furthermore, the provision for charging does not differ radically from that in Ontario in that a reasonable amount of expenses which are actually incurred by the landlord in respect of the grant of consent may be charged.

(9) British Columbia

The reform legislation in British Columbia provides for the right to assign or sublet in section 35. The following brief comments may be made:

(a) Where a tenancy agreement is for a term of six months or more, the tenant may assign or sublet the demised premises with the consent of the landlord, and the landlord shall not arbitrarily or unreasonably withhold his consent.

(b) A tenant is prohibited from assigning or subletting a tenancy agreement that is not for a specified term unless the landlord consents at the time of the assignment or subletting or in the tenancy agreement itself.

(c) Any tenant who is renting public housing or receiving a rent subsidy, may assign or sublet a tenancy agreement unless the landlord consent at the time of the assigning or subletting.

(10) Quebec

Article 1619 of the Civil Code provides that the lessee may assign or sublet with the consent of the lessor. Consent may not be refused without a reasonable cause. If the lessor does not answer a request to assign or sublet within fifteen days he is deemed to have consented.

The lessor may upon consent only exact from the lessee reasonable expenses incurred because of the assigning or subletting.

3. Issues

(1) Should the law allow a tenant to assign or sublet no matter what is said in the lease or rental arrangement? Alternatively should the law continue to allow the landlord to stipulate that the tenant cannot assign or sublet without the landlord's consent?

(2) If the law continues to permit a requirement that the landlord's consent be obtained, should it provide that the landlord must not arbitrarily or unreasonably withhold such consent?

(3) Should the law provide that a tenant who has provided at least one sub-tenant who is at least as desirable as himself should be relieved from paying rent thereafter if the landlord does not accept the substitute tenant?

(4) Should a landlord be permitted to make a charge for giving his consent? If so, should the charge be limited to the "reasonable expenses" incurred by him, or should a maximum amount be provided for, or should some other form of regulation be imposed?

(5) Should the law prohibit a landlord, in a case where a tenant vacates or wishes to vacate the premises, from showing the apartment to prospective subletting tenants unless all other suites have been previously rented?