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Introduction

Much of the landlord and tenant law today reflects its origins in the feudal system and the master-servant concept. During the medieval period serfs were bound to the land and obligated to supply their liege lord with military service, produce and labor, which were later converted into money payments. Thus the lord in turn was able to fulfill his responsibilities of protecting his tenants from invading armies and of paying taxes to the king. Real property being the source of wealth and power, the landlord always held the dominant position. Only within the past few years, perhaps as urban development has forced more people to accept the role of tenant, has there been any sort of legislative awakening to the residential tenant's plight.

Naturally a conflict of interests will always exist so long as individual, private owners continue to sell such a fundamental human necessity as housing for a profit-making purpose. The demand in the housing field, particularly for some types of accommodation and for some classes of tenants, sufficiently surpasses the supply that competition does not result in improved conditions for tenants. However, with enforceable legislation many of the landlord-tenant conflicts could be resolved more equitably.

This report will attempt in Part I to give a skeleton outline of some of the basics of landlord-tenant law as it exists today under common law and under statute. In Part II the writer has isolated principle problem areas pervading Alberta landlord and tenant law and indicated to some extent how they have been dealt with in other jurisdictions.

Readers will note the heavy emphasis on residential tenancies. Certainly the law of landlord and tenant is much broader in scope, including such specialized aspects as agricultural leases, oil and gas leases, and communal property leases as are found in parking structures and shopping centers. However, in attempting to limit the scope of this preliminary survey, a detailed study of these areas was abandoned. This is certainly not to suggest that they do not warrant attention in further studies.

November 30, 1971

LANDLORD AND TENANT

PART I

Nature of the Tenancy Relationship

A landlord-tenant relationship may arise by way of a lease or a tenancy agreement, the latter being defined as "an agreement between a landlord and a tenant for possession of residential premises, whether written, oral or implied."[1] The lease is for a fixed period of time whereas a tenancy agreement usually regulates a periodic tenancy which will continue for an indeterminate length of time.

Although a lease or tenancy agreement must fulfill the requirements of a contract in that the parties, property and rental payment must be certain or ascertainable, it is more than an ordinary contract (except in the province of Quebec) because it also grants an estate in the property. The incidents of this privity of estate as well as contract between lessor and lessee have a far-reaching effect.

These dual concepts were recently discussed in the Supreme Court of Canada in the case of Highways Properties Ltd. v. Kelly Douglas and Co. Ltd.[2] The respondent had leased property in a shopping centre for a period of fifteen years,

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[1] Landlord and Tenant Act, R.S.A. 1970, c. 200, s. 16(1)(c). For a definition of "residential premises", see section 16(1)(a), as amended by S.A. 1971, c. 59, to include ". . . land leased as a site for a mobile home used for residential purposes, whether or not the landlord also leases that mobile home for the tenant."

[2] (1971) 17 D.L.R. (3d) 710.

agreeing to carry on a grocery business throughout the term. After nineteen months the respondent closed down their business to the detriment of all other businesses in the shopping centre. When the appellant owners commenced action for damages for breach of the covenant in the lease, the respondent repudiated the lease entirely. The appellants repossessed the premises and eventually were able to lease it to other businesses, thus surrendering the lease with the respondent. However, they proceeded to claim damages for loss of rental income prior to the recision and for prospective damages from the loss of the benefits of the lease over the unexpired term.

Mr. Justice Laskin upheld the appellant's claim, maintaining that although the property aspect of the lease had been terminated by the appellant's election to re-enter, this should not defeat the claim to damages to which they would have been entitled had they kept the tenancy in existence. The Supreme Court of Canada indicated its willingness to move commercial leases at least out of the feudal realm of property law into one of pure contract.

A landlord with an interest in realty demises to a tenant an exclusive right of possession, retaining a right of reversion on the expiration of the term. Again the dual concepts of estate and contract create difficulty as certain rights in rem will run with the lease regardless of who holds the reversionary interest, while other rights in personam merely create personal obligations between the original parties to the lease.

Apart from common law certain statutory rights are accorded the tenant, one of which relates to the document itself from which the tenancy relationship arises. According

to section 17 of the Alberta Landlord and Tenant Act, where the tenant has executed and delivered to the landlord a written tenancy agreement for residential premises, he is entitled to a fully executed, duplicate copy within twenty-one days. Should the tenant fail to fulfill this requirement, the tenant's obligations under the agreement cease until delivery of the copy.

A lease must be distinguished from a license which is a purely personal, contractual relationship giving no right to exclusive possession. A lodger occupies premises under a license and consequently has fewer rights and less protection than a tenant. It is often a difficult question of fact to distinguish between a lodger and a tenant, the key being the degree of dominion and control that the landlord retains over the premises. A person who does not have a separate apartment or who resides in his employer's building for the purposes of his job is a lodger, but a landlord may have control over common entrances and passageways without the renters of separate apartments in the building losing their status as tenants.

The position of the licensee was somewhat advanced in the case of Ervington v. Ervington[3] where a contractual or equitable right to remain in possession was granted to a licensee so long as certain conditions (i.e., payment of installments) were fulfilled. In addition, some recognition has been given to the position of a married woman, deserted by her husband and left in possession of the matrimonial home of which he is the owner. She is entitled to greater

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[3] [1952] 1 K.B. 290.

rights than a bare licensee, and should be deemed to have some "estate" in the property thereby preventing the husband from succeeding in an action for possession.[4]

However these cases merely provide some narrow bases for resisting eviction. In the amendments to their Landlord and Tenant Act S.M. 1970, c. 106, s. 123, the Manitoba legislature made the statutory provisions dealing with residential premises applicable where room and board is provided in residential premises for five or more tenants, thus conferring on such tenants positive rights regarding notice of termination of tenancy and of rental increases.

Leases Under the Land Titles Act

The Alberta Land Titles Act R.S.A. 1970, c. 198, makes provision for leasing land for which a certificate of title has been issued, where the lease is for a term of more than three years (or for a life or lives) in which case the lease form (Form 16) in the Schedule of the Act must be used and registered. This document must be signed by the lessor and the lessee and must contain a description of the property, the names of the parties, words of demise, the exact period of the lease and the date of commencement.

The lease may stipulate the lessee's right to purchase, a right which is enforceable by specific performance if all the requirements are fulfilled. A mortgagee or encumbrancer of land is not bound by any subsequent lease unless he gives his consent prior to its registration or later adopts it.

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[4] Carnochan v. Carnochan, [1953] O.R. 887, 894.

Where the Registrar has proof of a lawful re-entry and recovery of possession by a lessor or his transferee, he makes a memorandum to that effect on the certificate of title (and the duplicate when presented for that purpose) thereby determining the lessee's estate, but not releasing him from any liability for the breach of any express or implied covenant.

Unless a contrary intention appears in the document, certain covenants on the part of the lessee are implied by law:

1. payment of rent in the amount and at the times stipulated in the lease;

2. payment of all rates and taxes levied against the property during the period of the lease;

3. maintenance of the land in good and tenable repair (damage by acts of God and normal wear and tear excluded).

The lessor is also given implied powers under the lease:

1. to inspect the land and order repairs to be made within a reasonable time;

2. to enter upon and take possession of the land where:

   (a) rent is in arrears 2 calendar months,

   (b) a covenant has been breached for 2 months,

   (c) repairs required by notice are not completed in the time specified.

Form 17 of the Land Titles Act provides short forms for lessees' covenants which may be introduced expressly into a lease, subject to any desired exceptions or qualifications: not to assign or sublet without written leave; to fence; to cultivate; not to cut timber; not to carry on offensive trade. When the short form of the covenant is stipulated on the lease it will be construed as if the long form were thereby incorporated.

Where a surrender of a lease is made otherwise than through the operation of a surrender in law, the lessee's estate will terminate and revert to the lessor on submission to the Registrar of Form 18 showing surrender for consideration. No lease subject to a mortgage or encumbrance can be surrendered without the creditor's consent.

Application may be made to a judge for a certificate to the effect that a lease has expired, and upon this being presented to the Registrar the lease will be cancelled in the register and upon the certificate of title of the land affected.

A Court of Equity will uphold a parol lease of more than three years if there has been part performance, e.g., entry into possession by the tenant plus payment of rent.

The Statute of Frauds (1677) is of course still in force in Alberta, subject to statutory modifications. Parol leases of less than 3 years are enforceable where "the rent reserved to the landlord, during such term, shall amount to two thirds at the least of the full improved value of the thing demised."[5] However, the Landlord and Tenant Act does

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[5]Statute of Frauds (1677) 29 Car. 2, c. 3, ss. 1 and 2. See S. 64 (1)(d) of the Alberta Land Titles Act where every certificate of title is impliedly subject to subsisting leases of less than 3 years.

recognize the validity of an oral or implied tenancy agreement.[6]

Since an agreement to lease at some future time is a contract concerning an interest in land, it must be in writing and signed by the party to be charged in order to be enforceable under the Statute of Frauds.[7] However, these provisions of the Statute will not come into play unless pleaded as a defence in an action; a lease or an agreement to lease is not rendered void by reason of its non-compliance with the Statute.[8]

Types of Tenancies and Notice of Termination

Tenancies which need not be registered and to which the Land Titles Act is inapplicable may take several forms:

1. Tenancy at Will: arises from an express or implied contract of tenancy determinable at the will of either party without notice. Because of its personal nature, it will terminate with the death of either party or with the assignment of either party's interest.

A tenancy at will is often created in the following situations: (a) a purchaser of property under an agreement for sale takes possession before completion of the sale, (b) a person is given permission to occupy the premises until

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[6]Landlord and Tenant Act (supra, n. 1).

[7]Statute of Frauds (supra, n. 5), s. 4.

[8]Re Landlord and Tenant Act; International Associated Hairdressers and Glasgow (1957-58) 23 W.W.R. 49, 62.

the happening of an event, (c) a lessee remains in possession after the expiry of his term with the lessor's permission, (d) a lessee takes possession under a lease which is void.

2. Tenancy at Sufferance: arises where the tenant remains in possession after the expiry of his term without the authority of the person entitled to possession. The overholding tenant may be removed without notice and charged a use and occupation fee, although no rent may be levied for this period.

3. Periodic Tenancy: arises where tenancy continues on a weekly, monthly or yearly basis[9] and may be terminated by either party on giving proper notice as agreed to by the parties or as specified in the Landlord and Tenant Act, R.S.A. 1970, c. 200, ss. 3-8.

According to the statute, notice may be oral or written, although the landlord must give written notice before it will be enforceable in any further action for possession, rent in arrears, or compensation for use and occupation. Written notice must be signed by the party giving notice, identify the premises, and state the date on which tenancy will terminate (or stipulate that it will be the last day of the period of tenancy next following the giving of notice).

Forms of giving notice are provided in the Schedule to the Landlord and Tenant Act. The tenant may deliver his

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[9]At common law reference to "months" were judged according to a lunar month, but the Interpretation Act, R.S.A. 1970, c. 189, s. 21(1) states that a "month" in an enactment means a calendar month and a "year" is a calendar year.

notice personally or send it by regular mail to the address where rent is payable. A landlord must deliver his notice personally where possible. Alternatively it may be given to any adult person apparently residing with the tenant, posted in a conspicuous place on the premises, or sent by registered mail to the tenant's residence. The Companies Act, R.S.A. 1970, c. 60, s. 289 provides for giving notice to a corporation incorporated in Alberta.

A notice to terminate a weekly or monthly tenancy must be given on or before the last day of one tenancy period to be effective at the end of the next tenancy period. A notice to terminate a yearly tenancy must be given on or before the 60th day before the last day of any year of the tenancy to be effective on the last day of that year.

The tenancy period is that on which the individual tenancy is based and not necessarily the calendar period. A week or month will be deemed to have begun on the date that the tenant was first entitled to possession (unless otherwise agreed upon).

4. Tenancy for a Term Certain: arises by express contract to continue for a specified period ending automatically on the final day without need for formal notice. However, many leases do contain notice provisions with regard to renewal or termination for breach of covenant.

The period may be of any duration except perpetuity (although a perpetual renewal clause may be included). Where the term is for more than 3 years, the provisions of the Land Titles Act (discussed supra) must be complied with.

A tenant remaining in possession after the expiry of his term of years will be presumed to become a tenant from

"year to year" (especially where rent is payable on a yearly basis) subject to the requirements of giving notice to quit.

Attornment

A lease may stipulate that it will terminate on the sale of the leased property. However, in many cases the lessor has the right to grant or convey his property together with his right to rents or his reversionary interest. No formal attornment is necessary between the tenant and the grantee, i.e., the tenant's consent to the grant is not required. Attornment between a purchaser and a tenant takes place simply by the latter recognizing the former as landlord, usually through making rent payments. Until notice of such a conveyance, the lessee will not be liable if he continues to make his payments to the grantor.

Where leased property is subsequently mortgaged, the lease continues in force but the right to reversion and future rents passes to the mortgagee. Land encumbranced by a mortgage cannot be leased without both mortgagor and mortgagee joining in the lease. Without the mortgagee's consent, a lease given by a mortgagor is invalid and the tenant may be evicted without notice.

Attornment clauses are often written into mortgages or agreements to sell to give the mortgagee or vendor the rights and remedies of a landlord as against the mortgagor or purchaser in possession. Such attornment clauses creating tenancies of residential premises are null and void unless the Canadian Farm Loan Board or the Farm Credit Corporation is the mortgagee or vendor, or unless the mortgage is to secure loans for the purpose of building a house or houses

and the mortgage form has been accepted by the Lieutenant Governor in Council.[10]

The mortgagor or purchaser of business premises (i.e., land or premises from which revenue is derived other than farm land) may establish a landlord-tenant relationship with the mortgagee or vendor if installment payments are made and if no part of the premises is used as a residence. Only a reasonable and fair rent may be charged under such a tenancy.[11]

Doctrine of Frustration

Some difficulty arises in determining who will bear the risk should there be a total failure of consideration. When the premises are totally destroyed before the tenant enters into possession, the lease or agreement is avoided. However, once in possession and in the absence of any express warranties to the effect that the premises would continue to be available for a specified time or purpose, the lessee is at full risk for the quantity and value of the subject matter.[12] However "where there is total destruction or exhaustion of the subject matter of a lease, then the lessee is entitled to abandon it."[13]

The destruction of the property demised through fire or storm will not terminate the lease, nor will it afford a

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[10] Land Titles Act, R.S.A. 1970, c. 198, s. 118.

[11] Id., s. 119.

[12] Cherrier v. McCreight [1917] 2 W.W.R. 8.

[13] Gowan v. Christie (1870) L.R. 2 H.L. Sc. 273.

defence to an action for rent when the tenant has covenanted to repair. The situation is not altered even where the lessor holds insurance on the property. However, most leases make some provision for abatement of rent where fire has destroyed the premises, and it has been suggested that where the premises demised are rooms in a building which is completely destroyed by fire, that the liability to pay rent will cease until the premises are rebuilt.[14] Thus the doctrine of frustration, traditionally held to be inapplicable in lease situations, may be given some limited role. Statutory extensions of its applicability will be discussed in Part II infra.

Covenants

As was already discussed in reference to the statutory provisions for a lease of more than 3 years, a lease may contain both express and implied covenants. Each covenant imposes a burden on one party to the tenancy agreement for the benefit of the other. The Alberta Landlord and Tenant Act is silent as to the mutual obligations created in a tenancy relationship, but the common law is applicable where the obligations are not expressly qualified in the lease or agreement. Implied covenants are often referred to in a lease or tenancy agreement as "usual covenants".

Implied Obligations of the Lessor

1. Possession: A lessor undertakes to give possession on the date the term of the lease commences. In default he may be liable for damages.

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[14] Dunkelman v. Lister [1927] 4 D.L.R. 612.

2. Quiet Enjoyment: whether express or implied, a covenant for quiet enjoyment protects the tenant from the consequences of a defective title, from any disturbance on the premises, and from any substantial interference by the covenantor (or those lawfully claiming under him) with the enjoyment of the premises for all usual purposes.

Since the covenant only extends to situations where the landlord is himself involved, either as a participant or by giving authority to others to commit certain acts, no action may be brought where other tenants in a building are creating a nuisance. "Quiet" as used in the covenant does not pertain to the noise factor, but rather to undisturbed possession.

The implied covenant ends with the estate of the lessor, whether or not the term has ended, unless the lessor loses his estate through default and the person interfering obtains title to the leased property from or under the lessor (e.g., a mortgagee).

Whether or not the covenant has been breached is a question of fact and the authorities are divided as to the test to be applied. Earlier cases required that there be a substantial interference with possession of a direct and physical character (e.g., locking the door to the premises to prevent entry). However, in a more recent English decision[15] it was sufficient that the tenant suffered from persistent and delibertate intimidation and persecution by the landlord, thereby breaching her right to freedom of

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[15] Kenny v. Preen [1963] 1 Q.B. 499.

'action in exercising her right of possession. Eviction because of expropriation does not constitute a breach.

The tenant may seek his remedy either by injunction or in a suit for damages, where the measure of damages is the loss naturally resulting from the breach (which may include anticipated profits from a business operated on the premises if the tenant is evicted or his business is affected in any way).

3. Derogation from Grant: where the lessor has knowledge of the purpose for which a lease is procured, there is an implied covenant that he will not do anything nor allow anything under his control to occur which is inconsistent with this purpose. The lessee may sue for damages and/or an injunction.

4. Premises Reasonably Fit for Habitation: only where premises are rented as "furnished" is there an implied covenant that at the time of the demise they will be fit for human habitation. Otherwise the lessee takes them as he sees them and at the risk of their becoming uninhabitable through disrepair.

Where an accident results from some dangerous condition or disrepair of the premises leased, a landlord is only responsible for damages when he is guilty of fraud or misrepresentation as to the state of the premises, or if he retains sole control over some appliance (e.g., a furnace) which causes the damage.

5. To Repair: there is no implied covenant that premises are in a state of good repair at the commencement of a term except in the case of furnished premises where the

principle of caveat emptor is qualified. However, if a lessor makes a verbal collateral warranty as to the condition of the premises or promises to make certain repairs before commencement of the term, he can be sued for damages resulting from breach of the warranty.

Without an express agreement to repair the landlord is under no liability to make repairs throughout the term, nor is he responsible when the state of disrepair results in damage to the tenant's person or property while on the premises. Even when the landlord covenants to repair, his liability for damages extends only to the tenant himself and not to other persons (e.g., family, guests, employees, lodgers, customers) who come on to the premises. Such persons are not a party to the contract containing the covenant and the principle of Donoghue v. Stevenson[16] has not been extended to cases involving landlord-tenant responsibilities.[17]

An obligation to repair does not arise by practice, i.e., where the landlord voluntarily repairs one time, he does not undertake thereby to do all repairs. However, those areas under the landlord's control (e.g., common entrance, hallways, staircases, elevators, roofing) must be free from any defects discoverable with reasonable inspection.[18]

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[16] [1932] A.C. 562.

[17] Morgan v. Barley (1952) 6 W.W.R. (N.S.) 503, 506.

[18] See Occupiers Liability, infra p.94.

Implied Obligations on the Lessee

1. Not to Commit Waste: waste is a tortious act or omission by the tenant in possession resulting in destruction of or injury to the house, gardens, woods, trees, land, etc. which causes lasting damage to the reversion.[19] There must be privity of estate between the holder of the reversionary interest and the person charged with waste, and the acts complained of must not have been permitted under contract.

Waste is of two types: voluntary, where the tenant has wilfully or negligently caused damage (or improvements in the case of meliorating waste), and permissive, where the tenant merely fails to act and in consequence the premises are allowed to deteriorate.

Commission of voluntary waste will not terminate the tenancy and give a right of re-entry to the landlord unless stipulated as such in the lease, or unless it is a lease under the Land Titles Act.[20] The landlord's remedies will be by way of injunction or in a suit for damages. In the absence of an express covenant to repair, tenants from year to year or for a term of years are liable for permissive waste, but tenants for life, tenants at will, or monthly or weekly tenants are not.

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[19]For the statutory origins of liability for waste, see Statute of Marlborough (1267) 52 Hen. 3, c. 23, the Statute of Gloucester (1278) 6 Ed. 1, c. 5, and the Statute of Westminster II (1285) 13 Ed. 1, c. 22.

[20]R.S.A. 1970, c. 198, s. 99(a).

Difficulties arise in determining what constitutes waste, as each case must be decided on its own particular facts. Many of the common law rules are inapplicable because of different circumstances in Canada from those existing in England, e.g., with respect to cutting trees. Felling timber trees is considered waste in England, but in Canada it is often necessary for the purpose of bringing land under cultivation. Opening mines or pits or changing the course of husbandry were other acts of waste at common law.

Where the property is destroyed by fire resulting from the tenant's negligence, voluntary waste has been committed, but because of the applicability in Canada of the Fires Prevention (Metropolis) Act (1774) 14 Geo. 3, c. 78, s. 86, subject to any contract or agreement between landlord and tenant, no action is maintainable against any person in whose house, building, or on whose estate any fire should accidentally begin, nor can any recompense be claimed for damage suffered thereby.

Where the tenant has covenanted to repair without excepting damage by fire, he is under an obligation to rebuild the premises if they are destroyed accidentally.[21] However the landlord is under no obligation to rebuild if damage by fire is excepted.[22]

2. To Keep Premises in a Tenant-like Manner; there is an implied obligation that a tenant will use the premises in a tenant-like manner, including such minor duties as

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[21] Bullock v. Dommitt (1796) 6 Term R. 650.

[22] Weigall v. Waters (1795) 6 Term R. 488.

turning off lights and water taps, closing doors, cleaning drains and taking precautionary steps to prevent plumbing from freezing if the house is left vacant in winter.

3. To Repair: unless stipulated in the lease, there is no obligation on the tenant to repair, but in most leases or tenancy agreements provision is made that the premises should be delivered up in good and clean condition, reasonable wear and tear excepted. The interpretation of these words leads to an enormous amount of conflict and litigation.[23]

In a relatively recent Ontario decision[24] where the lessee had given a limited covenant to well and sufficiently repair and maintain the premises in good and substantial repair, he was held to be responsible only for delivering up the premises in the same condition as he found them. However, where an absolute covenant is given to keep the premises in thorough repair and good condition, the premises must be delivered up in good repair even if it means replacing structures which have given way through effluxion of time.[25]

Fair wear and tear refers to the delapidation caused by the natural elements (e.g., discoloration of paint), but not damages caused by extraordinary occurrence or by accidents whether or not they were within the tenant's control (e.g.,

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[23] Taylor v. Webb [1937] 2 K.B. 283; Bartram v. Rempel [1949] 2 W.W.R. 1183.

[24] Manchester v. Dixie Cup Co. [1951] O.R. 686, 702.

[25] Lurcott v. Wakeley [1911] 1 K.B. 905; Hall v. Campbellford Cloth Co. [1944] 2 D.L.R. 247.

unclean oven, deep scratches on the walls or floor). The tenant may only use the premises for their ordinary purpose: a house cannot be converted into a store for example, but where vibrating machines on business premises cause the walls to crack it is deemed to be fair wear and tear.[26]

The lessor claiming that damage exceeded fair wear and tear may sue for damages for breach of covenant or for damages in tort for voluntary waste. Although the cases are conflicting in regard to the measure of damages for breach of a covenant to repair, the general principle is that the amount will be limited to however much the value of the reversion was diminished by the breach.[27]

In order to avoid the difficulties of bringing an action for damages and of trying to collect a judgment debt, many landlords require that the tenant pay a "damage" or "security deposit" in advance. On the termination of the tenancy this money is refunded in whole or in part if no damage is done or if damages are less than the amount of the deposit.

The 1970 amendments to the Alberta Landlord and Tenant Act contained two sections to govern the handling of these security deposits for residential premises. Section 18 deems the landlord a trustee of the security deposit for the tenant, with power to invest the funds only as authorized under the Trustee Act R.S.A. 1970, c. 373. The tenant is entitled to a minimum of 6% interest on his deposit annually, but the landlord may retain any excess interest or profits derived from investment of the funds.

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[26] Inverarity v. Muller (1926) 31 O.W.N. 339.

[27] Joyner v. Werks [1891] 2 Q.B. 31.

Section 19 deals with the time limits within which the landlord is obligated to return the deposit. Where no damage has been done, the tenant is entitled to his deposit within 10 days of delivering up possession. Where the landlord is entitled to make deductions in accordance with the conditions agreed to by the tenant, he must render an account of damages and return the balance of the deposit within 10 days. If the landlord is unable to determine the correct amount of the repairs needed, he must deliver an estimated statement of account and return the estimated balance of the deposit within 10 days. Within 30 days he must deliver a final statement of account and return the exact balance.

Pursuant to s. 19(2) a landlord who violates these provisions is liable upon summary conviction to a fine of not more than $100. The aggrieved tenant must first swear out an information against him in the magistrate's court.

A tenant who is unable to recover all or part of his deposit to which he thinks he is entitled may initiate proceedings in Small Claims Court in accordance with the provisions set out in the Small Claims Act R.S.A. 1970, c. 343. The judge will determine what deductions should be allowed to the landlord and order payment of any balance to the tenant.

4. To Pay Rent: once a lease is executed and delivered the tenant is under a common law duty to pay the rent as and when it becomes due, until termination of the lease or until lawful eviction. Where no place of payment is specified, the onus will be on the tenant to find the landlord, unless by established practice the landlord comes to the premises to collect the rent.

Apart from any express agreement to the contrary, there will be no abatement or suspension of rent even though the buildings on the premises are destroyed by fire or become unfit for habitation.

According to the Landlord and Tenant Act, a landlord is not entitled to recover any rent in addition to that agreed upon in the tenancy agreement without giving 90 days written notice prior to the date on which the increase is to be effective. This applies only to residential premises of course; there appears to be no controls on rental increase for business premises.

Crop Payments Lease

Rent need not be paid in money in all cases. Under the Crop Payments Act R.S.A. 1970, c. 77, provision is made for leases where rent is paid in whole or in part by the delivery of a share of the crops grown on the demised property or from the proceeds of the sale of such share. The lessor is deemed to be the owner of the share of the crop from the time of seeding until delivery, and he has priority over all other creditors of the lessee.

The Act does not operate to vest in a lessor more than a 1/3 share in the crops. A form of crop payment lease may be prescribed by Order-in-Council setting out the covenants, conditions, stipulations and agreements which are expressly or impliedly included in such a lease.

5. To cultivate; in agricultural leases there is an implied covenant to cultivate the land in a husbandlike manner in accordance with the custom in the district. Relief

from forfeiture for breach of this covenant may be granted where exceptional weather conditions prevail. The onus lies on the landlord to establish that the method of cultivation and management are substandard, and the tenant is usually given an opportunity to remedy the breach before forfeiture.

Express Covenants

The following are obligations frequently imposed on a tenant but which must be stated expressly in the lease:

1. Not to Assign or Sublet without Leave: every tenant (except a tenant at will or at sufferance) may dispose of his estate in the demised premises unless there is an express agreement to the contrary.

Where the consent of the landlord is required before the tenant can grant the legal right of possession to an assignee (for the entire balance of the term) or to a sublessee (for a portion of the remaining term or for a part of the premises for the balance of the term) it is usually also stated that the landlord will not withhold his consent unreasonably. Should he refuse without just cause, the tenant may proceed with the assignment without fear of forfeiture.

A covenant not to assign is not broken by an assignment through operation of law, by an assignment passing no legal title, by a sublease, by an assignment of part of the term or a part of the premises. Conversely, a covenant not to sublet is not broken by an assignment.

A license given by the tenant for someone to occupy his premises must be distinguished from an actual assignment

or sublease. Such a license does not require the landlord's consent since no exclusive right of possession is transferred.

Relief from forfeiture for breach of the covenant may be granted where the tenant acts bona fide in not securing the landlord's consent because of difficulty in interpreting the lease. However, mere forgetfulness of the covenant will not justify relief.

2. Other Common Express Covenants: include the obligation to pay taxes or to insure, and on agricultural leases they may extend to repairing of fences and summer-fallowing.

Forfeiture

Leases frequently contain forfeiture clauses providing that should the tenant breach any of the covenants, all benefits of the lease (including options to renew or to purchase) plus advance payments of rent and security deposits would be forfeited and the lessor granted a right of re-entry. Covenants are often difficult to distinguish from conditions of the lease, although the courts tend to construe in favour of the former since a right of re-entry on breach of a covenant must be expressly reserved.

Forfeiture may also result from breach of a condition of re-entry, i.e., where the landlord is given a right of re-entry on the happening of an event, e.g., insolvency of the tenant. The lease (written or parol) or a statute must stipulate the condition imposed on the lease, but breach of the condition will automatically give the lessor a right of re-entry without express reservation.

A third means of forfeiture is through disclaimer, i.e., the tenant repudiates his tenancy by breaching the condition implied in every lease not to impugn the lessor's title. Although the tenant is estopped from disputing the title of the lessor who first consented to his taking possession of the premises, he may contest that of a person claiming title from the original landlord. In addition, no estoppel will be raised where a tenant was induced by force, fraud or misrepresentation to enter into a lease.

The courts are reluctant to uphold forfeiture clauses and are given power to grant relief where forfeiture would be unconscionable. Such a case might arise where the tenant has acted in good faith in performing what he thought were his obligations under a somewhat ambiguously worded lease, or where provision is made for forfeiture for non-payment of rent on due date.[28] However, relief will not usually be granted more than once with respect to the same condition or covenant.

The court's jurisdiction to grant relief is derived from the Judicature Act R.S.A. 1970, c. 193. Section 18 deals specifically with relief from forfeiture for a breach of a covenant or condition to insure against loss or damage by fire.[29] However the more general provision in section 32 allows a plaintiff, petitioner or defendant in a civil action before the Supreme Court to be granted any equitable

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[28] In Re Ostanek and Schwartz [1943] 1 W.W.R. 506.

[29] The origin of this section was in Lord St. Leonard's Act (1859) 22 & 23 Vict. c. 35.

relief against a deed, instrument or contract or against a right, title or claim asserted by the other litigant as would be granted by the High Court of Justice in England. In addition under section 15(1)(a) the Supreme Court of Alberta was given the rights and powers vested in the English Court of Chancery on July 15th, 1870, part of which was the equitable jurisdiction to grant relief from forfeiture.

Although the tenant should raise this plea in the landlord's action for possession, relief may be granted even where the landlord has re-entered and taken possession.[30]

Whether a lease will be forfeited because of breach is a matter left to the discretion of the lessor. Otherwise the tenant would be able to break his lease by merely performing a deliberate breach.

The landlord may waive his right to declare a forfeiture by performing some act inconsistent with the lease being void. Estoppel through actions is a valid defence to a charge of forfeiture even where the lease stipulates that a waiver must be in writing.[31] However, the landlord must have knowledge of his right to forfeit before there is a waiver. The question of election is one of fact and the lessor must perform some unequivocal act indicating his intention not to determine the lease, e.g., action for rent for a period

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[30] Snider v. Harper [1922] 2 W.W.R. 417; Risvold v. Scott [1938] 1 W.W.R. 682; Re Rexdale Investments (1967) 60 D.L.R. (2d) 193.

[31] Scarf v. Jardine (1882) 7 A.C. 345, 361.

subsequent to the acts giving rise to forfeiture; distress for rent before re-entry[32] before he will be deemed to have waived the forfeiture.

Assignment

A tenant wishing to vacate premises before the expiration of his lease may, subject in some cases to the landlord's consent, make an assignment of the remainder of his term. Whether the original lease was oral or written, the assignment must be in writing since it is an agreement relating to the sale of an interest in land within the meaning of the Statute of Frauds. In the case of a company the assignment to be effective must be executed in compliance with the articles of association.

Where a number of people are co-lessees of premises, they will probably be required to make an assignment to one individual before bringing action on the lease.

The express and implied rights and obligations of the lease will pass to the assignee only if they "touch or concern the land" (e.g., to pay rent, pay taxes, make repairs, obtain landlord's consent to an assignment or sublease). The nature of the covenant itself must be examined to determine whether it directly affects the use of the demised premises. Express covenants relating to matters that are to occur in the future (e.g., to rebuild in the event of destruction by fire) will not affect the assignee unless he is named in the lease. Covenants which are of a personal nature (e.g., an option to purchase; a covenant to build a house on other lands) will not

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[32] R. v. Paulson (Alta.) [1921] A.C. 271.

(b) where title is claimed by way of purchase, transfer, assignment or gift from the tenant,

(c) the interest of the tenant in goods sold under Conditional Sale,

(d) where goods are hired or exchanged between tenants for the purpose of defeating the landlord's claim,

(e) where property is claimed by the spouse, child, son-in-law or daughter-in-law residing on the premises.

A person lawfully executing a distress warrant may break open the door to premises (other than a private dwelling house) where that is the only possible means of entry. To break into a private home requires a court order.

Once a notice of seizure and a form for objecting to seizure have been served to the debtor or attached to the goods or posted on the premises, the tenant has 14 days within which to object before the landlord may apply by way of notice of motion for an order for removal and sale. Unless otherwise ordered the sale will be by public auction.

The Exemptions Act, R.S.A. 1970, c. 129, s. 3, specifies what goods and chattels are not liable to seizure under distress by a landlord:

(a) beds and bedding in ordinary use,

(b) necessary wearing apparel,

(c) a cooking and a heating stove,

(d) basic household furnishings, including refrigerator, freezer, washer, dryer,

(e) fuel and food for 30 days,

(f) tools used for trade up to a value of $1,000,

(g) one axe and one saw.

Where the tenant has absconded from the province, leaving no wife or infant children, the exemptions do not apply.

The sheriff has a duty not to seize what is exempt under the Act, i.e., the tenant need not apply for exemption, but in case of a dispute the sheriff will refer the matter to a judge of the District Court for summary determination.

A distress for rent suspends the right of the landlord to recover the rent by action so long as the goods distrained remain in his hands unsold, regardless of what value the goods bear in relation to the amount due.[38] However where the proceeds from the sale of distrained property do not equal the rent due, the landlord may sue for the balance.[39]

The right to distrain ends if the tenant surrenders the lease or if the lessor elects to re-enter and forfeit

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[38] Lehain v. Philpott (1875) L.R. 10 Exch. 242.

[39] Philpott v. Lehain (1876) 35 L.T. 855.

the lease, because either event terminates the tenancy.[40]

Compensation for Use and Occupation

The Landlord and Tenant Act, s. 9, gives the landlord a right to claim compensation for use and occupation of his premises where the tenant remains in possession after the termination of his tenancy (i.e., as an overholding tenant).

The action may be brought by ordinary statement of claim or in combination with an application for possession according to the provisions set out in the Act.

Unless the parties so agree, the acceptance by the landlord of compensation or arrears of rent after a notice of termination has been given or after the tenancy has expired does not operate as a waiver of the notice nor does it revive or create a tenancy.

Effect of Bankruptcy Proceedings

The rights of a landlord to recover rent from a tenant after a declaration of bankruptcy is explicitly outlined in the Landlord's Rights on Bankruptcy Act, R.S.A. 1970, c. 201. Once the assignment or receiving order is made the landlord cannot distrain for rent, but the trustee will give him priority over other creditors to the amount of 3 months rent accrued due prior to the assignment (so long as it

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[40]The Administration of Estates Act, R.S.A. 1970, c. 1, s. 56, gives the legal representative of a deceased lessor the power to distrain for arrears of rent to which the lessor was entitled during his lifetime. Arrears may be distrained for within 6 months after determination of the term.

does not exceed the value of the debtor's distrainable assets).

The landlord will be a creditor for the balance of rent accrued due and for any accelerated rent to which he is entitled up to a maximum of 3 months rent. Beyond this the landlord has no claim for rent for the unexpired term of the lease.

The trustee is entitled to remain in occupation of the leased premises so long as is necessary for the purposes of the trust estate vested in him, but if he remains beyond 3 months he is required to give 3 months notice of surrender (or pay 3 months rent). The trustee may elect to assign the lease for the unexpired term to a person who agrees to abide by the covenants and is "fit and proper" to be put in possession according to a Supreme Court judge.

The law related to bankruptcy is also governed by the federal Bankruptcy Act, R.S.C. 1970, c. B-3, and the dominion statute will prevail where it conflicts with the provincial statute. The provincial act is considered intra vires under s. 92(14) Property and Civil Rights.

Winding up of Companies

The federal Winding-up Act, R.S.C. 1970, c. W-10, s. 71(1) holds admissable to proof against any company being wound up under the Act all debts payable on a contingency and all claims against the company. This would include a landlord's claim for rent. No priorities are listed except that preference is given to claims for wages and salaries.

The Alberta Companies Act, R.S.A. 1970, c. 60 (Part 10) Division 7, s. 266, stipulates preferential payments on the

winding up of a provincial company: claims for municipal or provincial taxes; wages or salaries; amounts owing to Workmen's Compensation. These rank equally and are paid in full as far as possible after meeting the costs of winding-up. Where a landlord distrains on goods of the company within one month before the date of winding up, the first charge on the goods distrained on or the proceeds of the sale of the goods are the preferential payments aforementioned. However, with regard to money paid under such charge, the landlord has equal priority.

Surrender

Where the tenant relinquishes possession prior to the quitting date or without adequate notice, he remains liable for the rent for the balance of the term unless the landlord has surrendered the lease either by written agreement or impliedly through his actions. The actions must be of an unequivocal nature and inconsistent with the continuation of the lease, e.g., re-letting to a second tenant without giving notice to the first tenant, or the landlord making use of the premises himself. Merely giving a license to someone to occupy the premises for free or advertising the premises for rent does not constitute a surrender.

Action for Possession

Where a tenant does not vacate the premises after the termination or expiration of his tenancy, the landlord may apply by originating notice of motion to the Supreme Court for an order for possession.

The application must be supported by affidavit evidence setting forth the terms of the tenancy, proving the expiration

of the tenancy, stating the failure to give up possession (and any reasons therefor). Claims for rent in arrears or for use and occupation may be included. The notice must be served to the overholding tenant at least 3 days prior to the hearing.

The Court may grant or dismiss the application in whole or in part and may direct the trial of an issue to determine any matter in dispute. Where the application is granted, the tenant will be ordered to vacate by a certain date or within a specified time. Should he fail to comply, the landlord will be entitled to a writ of possession which is equivalent to a writ of assistance whereby the landlord may recover possession physically.

The Limitation of Actions Act R.S.A. 1970, c. 209, ss. 28-30, stipulates at what point of time the right to take proceedings to recover land accrues to the landlord. When rent is wrongfully received by a person appearing to have authority to lease, the right to recover possession accrues to the person actually entitled to the rent. Where a tenant occupies premises from year to year or on any other periodic basis without a written lease, the right to take proceedings to recover the land will be deemed to have first accrued at the determination of the first of such periods or at the last time that the claimant received payment.

The right to recover possession from a tenant at will accrues at the determination of the tenancy. The tenancy will be deemed to have been terminated after the tenant has been in possession for a year.

PART II

SPECIAL PROBLEM AREAS IN LANDLORD-TENANT LAW

Standardized Lease

Freedom of contract has of necessity been qualified in many areas of the law. More recognition is being given to the frequent lack of parity in bargaining power between the parties involved. A prime example is a contract for the purchase and sale of a car, where the purchaser is forced to either accept the terms stipulated by the manufacturer/dealer or not buy that particular type of car. As a consequence, Sale of Goods Acts in most jurisdictions imply warranties and conditions in such a contract for the protection of the purchaser.

A lease or tenancy agreement is another type of contract where the legislature has seen fit to modify, to some extent at least, the terms that a landlord can stipulate (e.g., with regard to notice provisions for termination of the tenancy[41]). However, where the parties are ignorant of their statutory rights they may be deceived into acting according to prohibited provisions in a lease.

A mandatory provincial-wide standardized lease form and tenancy agreement form for fixed and periodic tenancies of residential premises could be adopted to guarantee that the parties would be aware of their legal rights and obligations. The onus would remain on the landlord to supply the tenant with a copy within a certain period of time; otherwise the tenant's obligations under it would cease.

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[41] R.S.A. 1970, c. 200, ss. 3-8.

Included in the standardized forms would be a clear statement of the rights and obligations of both parties, thus eliminating the difficulties of implied covenants and ensuring that covenants such as the responsibility to repair are uniform and equitable.

The format and phraseology alone of many leases make them difficult to read and to understand. Rather than incur a lawyer's fee to interpret the document, a tenant will often sign without realizing the full implications of technically-worded clauses and relying solely on the explanation given him by the landlord. In a standardized form comprehension could be facilitated through such measures as larger type, subject headings, simplified language, summaries of clauses and a clear division between the rights and obligations of the landlord and those of the tenant.

No province in Canada has yet adopted such a standardized form, apart from Short Form of Leases Acts, Real Property Acts or Land Titles Acts which merely simplify and shorten texts for usual covenants. Manitoba has a new provision allowing the Lieutenant-Governor in Council to prescribe by regulation a standardized tenancy agreement for residential premises, thereby making void any provision in an agreement which is inconsistent with or additional to the form.[42]

In Nova Scotia certain satutory conditions are deemed to apply to tenancies of residential premises "notwithstanding any lease, agreement, waiver, declaration or other statement

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[42]S.M. 1970, c. 106, s. 118.

to the contrary."[43] These include requirements for the condition and maintenance of the premises at the commencement and during the tenancy; sub-letting; mitigation of damages on abandonment and termination; entry of premises by the landlord; locks on entry doors. Should the landlord and tenant decide to enter into a written lease of the premises, these conditions must be reproduced exactly in the document.[44]

The adoption of a standardized lease for commercial premises would be considerably more difficult and perhaps inadvisable because of the greater variation in terms desired and types of premises. Most businesses of reasonable size can afford and usually make it a practice to request legal advice before entering into major contracts such as a lease, and almost invariably the agreement will be reduced to writing. Since the opportunities to exploit are considerably fewer than in the case of residential premises, the necessity of a standardized commercial lease is highly questionable.

Rent Regulation

Rent regulation is probably one of the most controversial topics in relation to landlord and tenant. The Canadian experience with rent regulation was primarily under federal wartime and post-war legislation[45] when it formed a

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[43] S.N.S. 1970, c. 13, s. 6(1).

[44] Id., s. 6(2).

[45] Order in Council 9029 approved on the 21st of November, 1941, under the provisions of the War Measures Act, R.S.C. 1927, c. 206, gave authority to the Wartime Prices and Trade Board to make regulations governing maximum rents and giving tenants greater security of tenure.

part of all other price fixation schemes. Because of construction slowdown during wartime the demand for urban housing far exceeded the supply and would have resulted in highly escalated rents if the controls had not been imposed.

In 1951 when the federal government withdrew the rent controls, some provincial governments entered the field. The legislation in Quebec is worth examining as an example of the protection that can be given to low income tenants in urban areas without stifling investment in and construction of housing premises.

A statute was passed in Quebec in 1951: "An Act to Promote Conciliation between Lessees and Property Owners"[46] which is only applicable in specified parts of the province[47] and only to premises for which rent is less than $100 per month. An amendment in 1962[48] provided that by a vote of absolute majority of a municipal council, the municipality could withdraw from the provisions.

Where the Statute is operative a Rental Office has been established with a Rental Administrator. Either the landlord or the tenant may appeal to the Rental Commission which has power to alter the Administrator's decision.

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[46] S. Que. 14-15, George Vi, c. 20.

[47] By an amendment passed in 1963, section 35 of the Act sets out the municipalities where the Act applies, generally those areas of greater population density.

[48] 16-17, Eliz. II, c. 79.

The scheme is designed as a liaison between landlord and tenant and application can only be made to the Rental Administrator where the parties themselves are unable to reach an agreement with regard to renewal of a lease or rent to be charged. The Administrator also has power to order a reduction in rent or a termination of the lease where the premises are in a state of disrepair through no fault of the lessee. With the Administrator's authorization a tenant may be removed if he has broken covenants in the lease or if his rent is in arrears 3 weeks. Authorization is also needed before a higher rent can be charged a new tenant than that received from the former tenant.

In Ontario it appears possible for certain municipalities (i.e., those in which the wartime regulations were still applicable in 1953 when the Rent Controls Act was passed) to pass by-laws adopting the regulations and altering them in any way necessary. However, the regulations were repealed federally (1951) and then provincially (1954) after they had been embodied in the Ontario Leasehold Regulations Act, 1951. The constitutionality of by-laws reviving these regulations might be open to question.

The Nova Scotia Residential Tenancies Act[49] makes provision for the Lieutenant-Governor in Council to designate an area of the province as a Residential Tenancy Area and to appoint a board of at least three persons which would have the power inter alia to review the rent charged for residential premises at the request of the landlord or tenant and to determine whether the rent should be approved or varied.

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[49]S.N.S. 1970, c. 13, s. 11.

Under the Newfoundland Rent Restrictions Act, R.S.N. 1952, c. 158 a government Minister has the power to investigate complaints with regard to rent and to fix maximum rental for any dwelling unit to which the Act applies. Application may be made by a landlord to the Minister if he feels that a rental increase is justified (e.g., because of increased tax or insurance rates).

The Act also provides some security of tenure for the tenant: the Court will not grant an application for possession nor for eviction of a tenant where suitable alternative accommodation is not awaiting the tenant at the time of judgment. However this protection will not extend where the tenant has failed to fulfill his obligations under the tenancy with regard to rent or otherwise; improperly conducted himself while in possession; sub-let without the landlord's consent; given notice and the landlord acts on that notice to his prejudice; overcrowded the premises in an unnecessary and unhealthy way.

The Ontario Law Reform Commission Report on Landlord and Tenant Law (1968) discussed the issue of rent controls, ultimately deciding that the Ontario housing situation did not warrant rent fixing. While they recognized that hardships are created by landlords who exploit housing shortages in certain areas, they did not feel that conditions were in the acute stage that had been reached in Britain and in New York where rent controls have been instituted. The feeling of the Commission was that rent is merely one aspect of the cost of living and that to fix rents would necessitate fixing other costs of construction and maintenance of housing accommodation. This would not be possible without a major economic study and fundamental policy alterations.

The Commission's recommendation was to appoint Rent Review Officers at a municipal level who would investigate complaints and mediate between landlords and tenants. Should either party be dissatisfied or fail to comply with his decision, the matter could be brought before a Rent Review Board who could investigate and issue a written resolution to all parties. Should the landlord choose to ignore the Board's decision he would be reported to the municipal council who would be authorized to publish a copy of the Board's report and the landlord's response.

The Commission suggested two alternative measures should this conciliatory scheme prove ineffective:[50]

(1) To confer power on the Rent Review Board to fix rents subject to appeal;

(2) To set up a system of rent regulation under which rents in specified areas would be frozen at levels current on a given day or during a given period. In order to be able to increase the rent chargeable for a particular unit a landlord would have to appear before a Rent Review Board and show cause why the rent should be increased. Only if the board gives its approval would it be possible for the landlord to collect a higher rent.

The Ontario Law Reform Commission recommendations deserve due consideration. The administrative aspects could be handled by the already existing Landlord and Tenant

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[50] Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies, Ontario Law Reform Commission (1968) pp. 70-71.

Advisory Board.[51] However proposals such as these which place the onus on the tenant to enforce his rights must be combined with measures prohibiting retaliatory eviction and must be widely publicized.

Another proposal that has been put forward as an alternative to a government administrative body controlling rents is to organize tenants' unions to bargain collectively with the landlord over rental increases and other matters of controversy.[52] This idea might be feasible in large apartment buildings but the problems of organization and operation of such a scheme, particularly with a tenant group which is continually changing, would limit its effectiveness.

Rent Acceleration

It is commonly provided in leases for a specified term, as it is in mortgage agreements, that on default of one installment, the entire balance with interest will become due and payable at the option of the lessor. The underlying reason for this is to prevent the landlord from expending much time and money in suing for each month's payment where the tenant is a reluctant payor. It would also serve as a reasonably effective deterrent against breach of covenant or delay in making payment.

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[51]Provision was made for such a Board in the 1970 amendments to the Landlord and Tenant Act R.S.A. 1970, c. 200, s. 22.

[52]See Tenant Rights, Canada Council on Social Development (1971) 38-39. For an example of attempts at collective bargaining by a tenant association, see the case of In the Matter of Vivene Developments Ltd. v. Jack K. Tsuji (Unreported) discussed in 48 C.B.R. 323.

However, the provision made for mortgagors to redeem themselves by performing their obligations or paying the amount owing has in some jurisdictions been extended to lessees, i.e., rather than a lessee having to tender rental arrears plus the balance owing for the remainder of the term, he may discharge an action or stay proceedings against him under the acceleration clause merely by paying the rent in arrears or by complying with the covenants in the lease.

In this way the landlord is not prohibited from including an acceleration clause in the lease but it is only available as a remedy where the tenant absolutely fails to meet his normal obligations even when a judgment against him for accelerated rent is imminent.

The Ontario provision granting relief against acceleration clauses reads as follows:[53]

> 96. (1) Where default has occurred in the payment of rent due under a tenancy agreement or in the observance of any obligation of the tenant and under the terms of the tenancy agreement, by reason of such default, the whole or any part of remaining rent for the term of the tenancy has become due and payable, at any time before or after the commencement of an action for the enforcement of the rights of the landlord and before judgment, the tenant may,
>
> (a) pay the rent due, exclusive of the rent not payable by reason merely of lapse of time; or

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[53] S.O. 1968-69, c. 58, s. 96.

> (b) perform the obligation, and pay any expenses necessarily incurred by the landlord,
>
> and thereupon he is relieved from the consequences of the default.
>
> (2) 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 as to whether a tenant is entitled to relief under this section.

Manitoba legislation[54] was patterned on Ontario's with two alterations:

> (1) under sub-section (a) the tenant must "pay the rent due <u>together with interest thereon</u>" [emphasis added];
>
> (2) under sub-section (b) the tenant is only liable for "any <u>reasonable</u> expenses necessarily incurred by the landlord" [emphasis added].

These modifications would in all likelihood be read into the Ontario statute, but it is submitted that in drafting legislation it would be better to opt for the more explicit language used in Manitoba.

British Columbia has taken a more radical approach to this problem in completely nullifying any attempt to demand accelerated rent under a tenancy agreement (i.e., a rental

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[54] S.M. 1970, c. 106, s. 99.

contract of residential premises for less than $500 monthly[55]):[56]

> 50. Notwithstanding any Act or law, or a term or provision of a tenancy agreement to the contrary, any term of a tenancy agreement that provides that, by reason of default in payment of rent due, or in observance of any obligation of the tenant under a tenancy agreement, the whole or any part of the remaining rent for the term of the tenancy becomes due and payable, is void and unenforceable.

Total abolition of acceleration of rent clauses bears some serious consideration. A tenant remains liable for the rent agreed upon under the lease until its termination through eviction or lapse of time. Consequently a lessor will always be entitled to judgment as the debt becomes due. It seems somewhat inequitable that where a tenant is in default on payment of his rent and for some reason cannot raise the money needed in order to be granted relief (assuming such a relieving provision exists), that a lessor should be given the right to recover judgment for the whole term and to levy execution against and seize the tenant's property to satisfy that judgment. In theory at least he is able to recover immediately that which would ordinarily not be payable until a future date.

Recognition should also be given to the tenant's distinct lack of bargaining power. The contract of tenancy is dictated by the lessor, giving him maximum security against

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[55] S.B.C. 1970, c. 18, s. 34(d).

[56] Id., s. 50.

default by the tenant, and one means of doing this is to insert a rent acceleration clause. It is certainly not a term arrived at through bargaining between the parties in the classic contractual sense where, in exchange, the tenant could demand certain concessions.

Perhaps initially the more conservative approach should be followed, i.e., retain the landlord's right to accelerated rent subject to the tenant's opportunity to obtain relief on fulfilling certain conditions. Should abuses continue to be apparent it would be advisable to follow British Columbia's lead in abolishing such clauses.

Post-dated Cheques

Another technique adopted by landlords to protect their interests is to demand post-dated cheques or promissory notes either personally or under the tenancy agreement. Situations have arisen however where the cheques were sold together with the premises, where the landlord declared bankruptcy or where the landlord's mortgagee foreclosed on the leased property. In such a case the tenant will end up paying double rent: the negotiable instruments will be valid in the hands of a holder in due course or will form part of the bankrupt's assets for general distribution to creditors, but the new legal owner of the premises will also demand rent regardless of the personal cheques issued to the original landlord.

Ontario has prohibited landlords from demanding this type of security:[57]

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[57]S.O. 1968-69, c. 58, s. 83(3).

> 83. (3) After this Part comes into force, a landlord or a tenancy agreement shall not require the delivery of any post-dated cheque or other negotiable instrument to be used for payment of rent.

A person who knowingly contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding $1000.[58]

British Columbia[59] and Manitoba[60] have similar provisions, although in Manitoba the prohibition does not appear to extend to personal demands made by the landlord so long as post-dated cheques are not a term of the tenancy agreement.

Distress

Although common law distress for rent as a self-help remedy has been modified by the provisions of the Seizures Act R.S.A. 1970, c. 338, ss. 18-22, it still provides security for landlords with regard to rent collection.

In several jurisdictions in the U.S., Australia and Canada distress has been completely abolished on the basis that the interests of the landlord do not justify the disruption to the tenant resulting from distress proceedings. Following

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[58] Id., s. 107

[59] S.B.C. 1970, c. 18, s. 37(3); s. 62.

[60] S.M. 1970, c. 106, s. 84(3); s. 117(1).

the recommendation of the Law Reform Commission, the Ontario legislature abolished distress for default in payment of rent as a statutory, common law or contractual right.[61] British Columbia also legislated against distress "except where a tenant abandons the premises."[62] Manitoba abolished distress as a means of recovering rental arrears for farm property[63] as well as residential premises[64] and enforces the latter by a $1,000 fine for violation.[65] It has been suggested that in B.C. and Ontario a distress could result in a conviction for theft,[66] but this is probably not the most effective or suitable enforcement measure.

Numerous arguments may be propounded in support of both retention and abolition of distress. Landlords contend that although there are few occasions when distress is pursued, especially to the point of sale, they are entitled to some special remedy since they are not able to secure their credit as a merchant could.

Where a distress is levied, the tenant is of course entitled to have certain necessities exempted.[67] However the

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[61] S.O. 1968-69, c. 58, s. 39.

[62] R.S.B.C. 1970, c. 18, s. 39.

[63] R.S.M. 1970, c. 106, s. 80.

[64] Id., s. 88.

[65] Id., s. 117(1).

[66] Tenant Rights in Canada, supra n. 52, p. 5.

[67] Exemptions Act R.S.A. 1970, c. 129, s. 3, subject to s. 10 (the case of an absconding tenant).

property that is seized and sold brings considerably less money at the sheriff's sale than the replacement cost would be to the tenant. The tenant will also be required to pay the costs of the distress which is a significant amount of money to anyone already in financial straits. In most cases a distress results in the tenant relinquishing possession although he is not required to do so.

Abolition of distress would place a greater onus on landlords to ascertain the credit risk of a certain tenant before renting to him. The landlord would still be able to sue for rental arrears and then proceed with execution on a judgment like any other creditor. In most cases (where the arrears are less than $500) this could be done in Small Claims Court where the costs are small and the procedure relatively informal. Naturally this wouldn't be as direct or as summary a procedure as procurring and levying on a distress warrant, but it would provide the tenant with a better hearing.

Interesse Termini - Rights Prior to Taking Possession

Interesse termini ("interest in the term") refers to the common law obligations of parties to a valid lease prior to entry into possession, i.e., for the landlord to make available[68] and for the tenant to enter the rented premises on a specified date. However, the remedies available in the case of breach are highly disparate as between the two parties.

The landlord may sue on the covenant to pay the rent reserved despite the tenant's refusal to take possession. On

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[68] Coe v. Clay (1829) 5 Bing. 440.

the other hand a tenant's rights under interesse termini are recognized for purposes of assignment and inheritance, but they provide little protection where a landlord refuses to grant possession or where an overholding tenant (or one rightfully in possession[69]) prevents entry.

The tenant's "estate" interest in the leasehold is not considered to vest until after entry. Hence he may withdraw from the lease and sue the lessor for breach of an implied promise to give actual entry on the day stipulated,[70] but the award of damages will be nominal, limited to the difference between what the tenant agreed to pay in rent and the actual rental value of the premises.[71] In addition the action for damages for failure to give possession is one involving an agreement for an interest in land and therefore must be in writing to be enforceable under the Statute of Frauds.

The court will not enforce any covenants under the lease dependent upon the existence of the lessor's estate (e.g., right to quiet enjoyment), nor will it grant an order for possession against the lessor, the reasoning being that a person who had never had possession could not claim to recover it when he had no estate on which to found his claim. However

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[69] Bain v. Fothergill (1874) L.R.H.L. 158.

[70] Reaume v. Lalonde [1939] O.W.N. 167 (action in deceit where lessee was refused entry because of lessor's defect in title); Commercial Finance Corp. v. Dunlop Tire and Rubber Goods Co. [1942] 3 D.L.R. 150; Yakchuk v. Holgate [1951] O.W.N. 894.

[71] Special damages may be available where the parties contemplated them in drafting the lease, i.e., where the premises were rented for a special or extraordinary purpose.

where entry into possession is prevented by an overholding third party the lessee does have an alternative remedy at common law of bringing an action of ejectment against that third party.

It is submitted that where possible the court should grant specific performance of a lease or tenancy agreement; in other words, permit the tenant to sue for possession.

Ontario followed the English precedent of abolishing interesse termini; the amendment to their Landlord and Tenant Act (which was duplicated in B.C.[72]) reads as follows:[73]

> 86. (1) The doctrine of interesse termini is hereby abolished.
>
> (2) All tenancy agreements are capable of taking effect at law or in equity from the date fixed for commencement of the term, without actual entry.
>
> (3) This section applies to tenancy agreements entered into or renewed after this section comes into force.

The Manitoba provision is substantially the same:[74]

> 89. The doctrine of interesse termini is abolished and all tenancy agreements are capable of taking effect at law or in equity from the date fixed for commencement of the term without actual entry or possession.

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[72] S.B.C. 1970, c. 18, s. 40.

[73] S.O. 1968-69, c. 58, s. 86.

[74] S.M. 1970, c. 106, s. 89.

The Model Residential Landlord-Tenant Code would impose an obligation on the landlord to make available to the tenant full possession of the dwelling unit on the date agreed upon,[75] and on breach of this duty the following remedies would be available to the tenant:[76]

1. rent abatement during period when entry is prevented,

2. termination of the rental agreement,

3. where the inability to enter is caused wrongfully by the landlord, the tenant may recover (by way of appropriate action or set-off from rent) reasonable expenditures necessary to secure adequate substitute housing for up to one month so long as it does not exceed one-half the rent reserved,

4. where inability to enter is caused by wrongful holdover of a prior tenant, the tenant may maintain a summary proceeding for possession against such wrongful occupant and the expenses involved can be charged against future rent.

In drafting any future Alberta legislation, some consideration might well be given to not only abolishing interesse termini but also to granting the tenant some positive rights such as rent abatement for the period during which he is denied possession and recovery of at least a portion of the costs involved in securing other housing. The tenant should be entitled to damages equal to his actual

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[75] Model Residential Landlord-Tenant Code, American Bar Foundation (1969) Part II, s. 2-201, p. 39.

[76] Id., s. 2-202, p. 39.

loss suffered, not just a nominal award. Where it is an overholding tenant who prevents entry, the landlord should be able to recover back from him the amount he was obligated to compensate the new lessee.

Security Deposits

Much could be said regarding the wisdom or folly of allowing landlords to collect security or "damage" deposits from their tenants. From the landlord's point of view it not only provides compensation in the event that the premises are damaged or the tenant disappears with rent in arrears, but it ought also to deter such practices, presuming that the tenant wishes to recover the money. However in the study done by the Ontario Law Reform Commission little evidence could be found of the deposit's deterrent value[77] and many abuses prevailed.

Recognizing that the majority of residential tenants, especially those occupying apartment buildings, are required to pay the lessor a security deposit before occupation, the Alberta legislature passed provisions to protect the tenant's right to recover his money under the proper circumstances.[78] Although the tenant now has a right to an accounting and payment with interest within a specified time, a right to subject a defaulting landlord to a summary conviction and fine, and a right of action to recover the money in Small Claims Court, problems still arise in the construction of leases and tenancy agreements as

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[77] Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies (supra, n. 50), p. 23.

[78] R.S.A. 1970, c. 200, s. 19.

The maximum that can be assessed as a security deposit in Nova Scotia or Manitoba is one-half a normal month's rent, and this must be repaid at a rate of 6% and 4% interest respectively. Where a dispute arises, the landlord must seek the permission of the Rentalsman in Manitoba or the provincial court in Nova Scotia before he is entitled to retain any part of the deposit. In Manitoba, B.C., and Ontario fines may be imposed up to a maximum of $1,000 for violation of these provisions.[81]

Thus the legislative trend is to shift the onus from the tenant, who in Alberta must instigate proceedings to recover the deposit, over to the landlord who would have to make a case for retention of the money before a court or other arbitrator unless the parties are able to reach a satisfactory settlement on their own.

Under the 1970 amendments to the Alberta Landlord and Tenant Act a landlord receiving a security deposit is deemed to be a trustee of the funds, subject to the terms of the Trustee Act, R.S.A. 1970, c. 373. In jurisdictions where the onus to establish damage has shifted to the landlord, further control could be placed on the trust funds by requiring that the landlord present a court order before extracting any money.

In order to prevent situations such as arose in Re Dollar Investments (supra) a purchaser of leased property who acquires a reversion of the leases should be under an onus to have the funds transferred into his name and he should be held liable to repay the deposits to non-defaulting tenants.

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[81] S.M. 1970, c. 106, s. 117(1); S.B.C. 1970, c. 18, s. 62; S.O. 1968-69, c. 58, s. 107.

(f) except in the case of a single family residence, or where the building is not equipped for the purpose, supply water and hot water as reasonably required by the tenant and supply adequate heat between [October 1] and [May 1].

Where the duty imposed by clause (a) is incompatible with, or greater than, the duty imposed by any other clause of this subsection, the landlord's duty shall be determined by reference to clause (a).

(2) The landlord and tenant of a single family residence may agree by a conspicuous writing independent of the rental agreement that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling, but only if:

(a) the particular work to be performed by the tenant is for the primary benefit of his dwelling unit, and will be substantially consumed during the remaining tenancy; or

(b) adequate consideration apart from any provision of the rental agreement is exchanged for the tenant's promise. In no event under this subsection may the landlord treat performance of this agreement as a condition to any provision of the rental agreement.

(3) The landlord and tenant of any other dwelling unit may agree by a conspicuous writing independent of the rental agreement that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling, but only if:

(a) the work is not necessary to bring a non-complying dwelling unit into compliance with a building or housing code, ordinance, or the like; and

(b) the agreement is supported by adequate consideration apart from the rental

> agreement. In no event under this subsection may the landlord treat performance of this agreement as a condition to any provision of the rental agreement.
>
> (4) Where a single family residence which is the owner's usual residence is rented during a temporary absence of the owner, the landlord and tenant may agree in writing that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling.

Numerous reasons can be cited for imposing the duty of repair on the lessor. The owner of the premises can not only deduct such expenses from his rental income for tax purposes, but he also derives long term benefit from the outlay in the form of increased resale value of the property, possibly higher rents, or at very least, greater ease in finding renters.

The lessor is usually better able to make the initial expenditure and has more financing avenues open to him than the tenant. In addition he is in a position to distribute the cost of repairs or renovations over many successive tenants who are all beneficiaries of the outlay, whereas the average tenancy is too short for a single lessee to adequately recover on any substantial investment into the premises.

At the present time where no mention is made in the lease or tenancy agreement with regard to either the landlord or tenant's responsibility to repair, it would appear that the tenant would have the choice between undertaking the repairs himself or letting the condition persist. However, every tenant at common law is under a duty to use the premises in a tenant-like manner. Should he fail to make a minor repair which results in major decay or destruction of the

property he will be liable to the full extent of the damage. Apart from normal wear and tear the tenant basically must maintain the premises in the same state of repair as existed at the time of occupation.

If the burden of repairing and maintaining rented premises were shifted entirely to the lessor (with the aforementioned exceptions of wilful or negligent damage and routine housekeeping), some enforcement machinery would be necessary. A regular inspection scheme would involve a huge bureaucracy and other administrative problems. Instead, the tenant himself must be given a right of action.

The systems devised in four other Canadian provinces warrant examination. British Columbia duplicated the Ontario provision:[84]

> 95. (1) A landlord is responsible for providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy and for complying with health and safety standards, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.
>
> (2) The tenant is responsible for ordinary cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him.
>
> (3) The obligations imposed under this section may be enforced by summary application to

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[84] S.O. 1968-69, c. 58, s. 95; S.B.C. 1970, c. 18, s. 49.

to a judge of the county or district court of the county or district in which the premises are situate and the judge may,

(a) terminate the tenancy subject to such relief against forfeiture as the judge sees fit;

(b) authorize any repair that has been or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off;

(c) make such further or other order as the judge considers appropriate.

(4) This section applies to tenancies under tenancy agreements entered into or renewed after this section comes into force and to periodic tenancies on the first anniversary date of such tenancies after this section comes into force and in all other cases the law applies as it existed immediately before this section comes into force.

The Nova Scotia statute[85] places the landlord under an almost identical obligation with regard to repairs, although some of the phraseology is varied. For example, whereas in Ontario the landlord must keep the premises "in a good state of repair and fit for habitation" as well as meeting legal health and safety standards, regardless of the tenant's knowledge of disrepair at the time of signing the tenancy agreement, in Nova Scotia so long as there is compliance with housing, safety, and health laws, the landlord is under no obligation to repair or improve the premises beyond the condition

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[85]S.N.S. 1970, c. 13, s. 6(1) 1-3.

at the time the tenant first occupies. It appears that the onus might be somewhat heavier on the Ontario landlord, at least if it could be established that meeting minimum standards required by law did not always result in a state of good repair and habitability.

Enforcement of the Nova Scotia statute is by way of complaint under the Summary Convictions Act R.S.N.S. 1967, c. 295 after giving five days notice to the landlord.

The landlord's obligation to repair and the tenant's responsibility for cleanliness and damage are virtually the same in Manitoba as in Ontario; however the enforcement scheme is somewhat more complex. It is designed to relieve the courts of these matters, to encourage the parties to settle their own disputes and to use withholding of rent as a means of bringing pressure to bear on landlords to make reasonable repairs:[86]

> Request by tenant for repairs.
>
> 119 (1) Where a tenant requests his landlord or an agent of the landlord to carry out or make reasonable repairs to the residential premises occupied by the tenant and the landlord refuses or neglects to carry out or make those repairs the tenant may notify the rentalsman for the area of the failure or refusal.
>
> Failure to make repairs.
>
> 119 (2) Upon receipt of a notification under subsection (1), the rentalsman shall

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[86] S.M. 1970, c. 106, s. 119.

endeavour to resolve the problem between the landlord and the tenant and if the rentalsman fails in his attempt to have the landlord carry out or make the repairs that the rentalsman considers to be reasonable, the tenant shall pay the rent as it falls due to the rentalsman to be held in trust by him until the repairs are carried out or made.

Effect of payment to rentalsman.

119 (3) Payment of rent under subsection (2) to the rentalsman and not to the landlord does not constitute a violation or failure by the tenant to pay the rent.

Notification by rentalsman.

119 (4) Where, under subsection (2) a tenant pays rent to a rentalsman, the rentalsman shall in writing notify the landlord that he has received the rent.

Rentention and payment of moneys by rentalsman.

119 (5) Upon receiving rent under subsection (2) the rentalsman shall estimate the cost of repairs in respect of which the matter arose and that the rentalsman considers reasonable, and as the rent is paid shall retain

(a) one month's rent; or

(b) twice the estimated cost of the repairs;

whichever is the greater, until the repairs are completed to his satisfaction and shall forward the amount retained to the landlord when the repairs are completed to the satisfaction of the rentalsman, and shall forward any excess rent received by him to the landlord within thirty days of receipt thereof.

Appeal.

119 (6) Where pursuant to subsection (2) the rentalsman makes a determination and the landlord or tenant, as the case may be, is dissatisfied with the determination, he may within thirty days of

> the date of the determination appeal the determination to a judge of the County Court; and the judge may make such order with respect to the determination as to him seems just and reasonable.

It would be possible for Alberta to implement a plan similar to that of Manitoba either administered by an appointed "Rentalsman" or by the already existing Landord and Tenant Advisory Board. However the writer feels that considerable merit would lie in permitting the tenant to proceed with the repairs himself once the arbitrating board had determined their reasonability and the landlord had failed to act within a specified period of time. The cost could be set off rent payments. In such circumstances it would probably be advisable to give the tenant some protection against retaliatory eviction. The tenant could also be given the power to terminate the tenancy after giving the lessor adequate notice of the defect but no action is taken to correct it.

Before imposing a statutory obligation on landlords to accept the responsibility for repairs, an attempt should be made to understand some of the reasons for their reluctance to do so voluntarily. The Ontario Law Reform Commission included as Appendix D to their Interim Report on Landlord and Tenant Law (1968) an excerpt from an unpublished paper by J. M. Hassett, "The Changing Nature of Landlord-Tenant Relationship: The Medium and the Message". While his study was based on housing conditions in eastern U.S.A. some of his observations are undoubtedly applicable in Canada:[87]

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[87]Hassett, J.M. "The Changing Nature of Landlord-Tenant Relationship: The Medium and a Message" (unpublished) p. 25.

> Suppose, however, that some landlords of slum property can validly object that they cannot make the necessary repairs without increasing rents to a level that their tenants cannot afford. This may occur in a number of different situations and for a variety of reasons. For example: (1) repairs may be so numerous and of such major proportions that the capital outlay appears prohibitive; or (2) even though only relatively moderate amounts must be expended, landlords fail to make the repairs because (a) they lack appropriate sources of financing; or (b) such sources are available but landlords are unaware of them; or (c) landlords feel overburdened by property taxes or fear increased taxes as a result of improvements; or (d) landlords would be willing and able to repair but are not ready to act because of the fear that such improvements would put them at a competitive disadvantage in relation to owners who have not repaired.

One of the recommendations of the Ontario Law Reform Commission was that consideration be given to tax incentives and low interest loans which would make it possible for landlords to comply with the new law and renovate or repair substandard dwellings. The need for such measures would certainly require more extensive investigation.

Under the National Housing Act R.S.C. 1970, C.N-10, Part IV, Home Improvement Loans given by banks or approved installment credit agencies according to the conditions prescribed by the Act for financing repairs, alterations and additions to a home will be guaranteed by C.M.H.C. One of the conditions is that the Governor-General in Council stipulate the interest rate. This should make funds more readily available at a reasonable rate of interest for landlords of rented houses.

Under the Alberta Housing Act R.S.A. 1970, c. 175, s.30, The Alberta Housing Corporation can make available home improve-

ment loans where it feels that other financing is inadequate.

A modification of property tax on improvements made to rental premises might also encourage private owners to improve housing conditions.

Under Part III of the National Housing Act provision is made for cost-sharing between the C.M.H.C. and any province or municipality which wishes to undertake an urban renewal scheme in a substandard municipal area. The Alberta Housing Act contains complementary legislation for implementing urban renewal projects via the Alberta Housing Corporation.

Doctrine of Frustration

Another problem area linked with the responsibility to repair is the application of the doctrine of frustration. Ordinary contractual obligations will be discharged where some unforeseen event independent from the volition of either party prevents the fulfillment of the contract, i.e., the service or object to be supplied is no longer usable or available.

This principle was never incorporated into landlord and tenant law[88] on the reasoning that a lease granted an estate in land which persists despite the destruction of buildings on the premises or the impossibility of performing contractual duties. Therefore the lessee's covenant to pay rent is enforceable unless the lease stipulated that the

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[88] Cricklewood Property etc. Ltd. v. Leighton's Investment Trust Ltd. [1945] A.C. 221; Denman v. Brise [1948] 2 All E.R. 141.

tenancy would terminate or rent would abate in the event of total destruction or destruction sufficient to make the premises unsuitable for the purpose for which they were let.

Covenants to repair would also subsist despite apparent frustration. If the lease is for a term of more than three years, thus falling within the provisions of the Land Titles Act R.S.A. 1970, c. 198, and if no contrary intention is expressed in the lease, the following covenant is implied which would place the onus on the tenant to rebuild the premises (subject to the stipulated exceptions):[89]

> 98. (b) that he will at all times during the continuance of the lease keep and at the termination thereof yield up the demised land in good and tenantable repair, accidents and damage to buildings from fire, storm and tempest or other casualty and reasonable wear and tear excepted.

In other cases, i.e., leases or tenancy agreements of less than three years duration, a tenant's obligation to maintain and deliver up the premises in good and substantial repair will render him responsible for rebuilding even if the premises are destroyed by accidental fire.[90]

A landlord who has expressly covenanted to repair will also be liable to rebuild premises which have been destroyed, but no obligation rests on the landlord to rebuild

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[89] Land Titles Act R.S.A. 1970, c. 198, s. 98(b). See Thistle v. Union Forwarding Co. (1880) 29 C.P. 76.

[90] Matthey v. Curling [1922] 2 A.C. 180.

if the cause of destruction is merely one for which the tenant is not responsible in his general covenant to repair (e.g., accidental fire).[91]

The contractual versus the property approach creates numerous problems in landlord and tenant law,[92] but certainly this is one instance where it is only equitable to grant some relief where the tenancy is no longer viable. In the origins of the law the usual subject matter of the lease was a tract of land upon which the lessee farmed and lived, i.e., there were multiple purposes. The bulk of today's tenancies are shorter-term occupation for one purpose only: residential or business premises. It is little comfort to an apartment dweller that he will retain a legal estate in an air space after the building has been demolished by fire, although this estate does provide him with an insurable interest in the property.

The recommendation of the Ontario Law Reform Commission was that the doctrine of frustration should be applicable to leases, all obligations to pay rent or to repair ceasing when fire or other casualty destroys the premises or damages them beyond use. This recommendation was incorporated into the Landlord and Tenant Act:[93]

> 87. The doctrine of frustration of contract applies to tenancy agreements and the Frustrated Contracts Act applies thereto.

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[91] Weigall v. Waters (1795) 101 E.R. 663.

[92] See Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., supra, p. 1.

[93] S.O. 1968-69, c. 58, s. 87.

Manitoba and B.C. have also brought the doctrine of frustration into the realm of landlord-tenant law, although B.C. does not have a Frustrated Contracts Act.[94]

The Model Residential Landlord-Tenant Code dealt with the matter in greater detail:[95]

> Section 2-208 Tenant's Remedies for Fire or Casualty Damage.
>
> When the dwelling unit or any of the property or appurtenances necessary to the enjoyment thereof are rendered partially or wholly unusable by fire or other casualty which occurs without fault on the part of the tenant, a member of his family, or other person on the premises with his consent, the tenant may:
>
> (1) immediately quit the premises and notify the landlord of his election to quit within [one week] after quitting, in which case the rental agreement shall terminate as of the date of quitting. If the tenant fails to notify the landlord of his election to quit, he shall be liable for rent accruing to the date of the landlord's actual knowledge of the tenant's vacation or impossibility of further occupancy; or
>
> (2) if continued occupancy is otherwise lawful, vacate any part of the premises rendered unusable by the fire or casulaty, in which case the tenant's liability for rent shall be no more than the market value of that part of the premises which he continues to use and occupy.

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[94]Alberta does have a Frustrated Contracts Act R.S.A. 1970, c. 151, adapted from the model presented by the Conference of Commissioners on Uniformity of Legislation in Canada.

[95]Supra, n. 75, s. 2-208, p. 45.

In Posse/In Esse

At a very early date in the development of landlord and tenant law Spencer's Case[96] established that an express covenant concerning subject matter existing at the time of the lease (in esse) runs with the land and binds all successors in title regardless of whether "assignees" are specifically named. However where the covenant relates to something not in existence (in posse, e.g., repair of a fence built subsequent to the lease) the covenant will not bind the assignees of the landlord or tenant unless expressly stipulated in the original lease.

The principle of in posse/in esse would require that all assignees. whether purchasers from the lessor or sub-lessees of the tenant honor covenants regardless of whether the matter was in existence at the time the lease was created.

This principle has been written into the landlord-tenant legislation of several provinces. Again Ontario led the way:[97]

> 89. Covenants concerning things related to the rented premises run with the land whether or not the things are in existence at the time of the demise.

B.C., Manitoba, and New Brunswick have identical provisions.[98]

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[96](1583) 5 Co. Rep. 162. See also the discussion supra, n. 79.

[97]S.O. 1968-69, c. 58, s. 89.

[98]S.B.C. 1970, c. 18, s. 43; S.M. 1970, c. 106, s. 92; R.S.N.B. 1952, c. 126, s. 2.

Covenants Interlocking

At common law the right of one party to demand fulfillment of the obligations of the other is removed when the first party has not fulfilled a material covenant required by the contract. However this principle was not applied to leases since they were conveyances of land rather than ordinary contracts.

The practical result of independent covenants is that the tenant is still liable for rent despite any breaches of a landlord's implied or express covenants (e.g., to provide heat and water; to repair; for quiet enjoyment) and even when the premises are completely destroyed.

A recent illustration of this problem was the case of In the Matter of Vivene Developments Ltd. v. Jack K. Tsuji.[99] As often happens today tenants signed leases and entered into possession of a high-rise apartment before completion of the building, on the promise that all facilities would be available within a given period of time (in this case a month). In fact when few improvements were made over the next six months and numerous breaches of building standards were exposed the tenants formed an association and withheld their rents. After unsuccessful attempts at negotiation, the landlord sued for eviction. When the judge made clear that the law supported the landlord's position the tenants finally agreed to pay their rent.

A suggestion was made by the Ontario Law Reform Commission that provision be made statutorily for termination

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[99] Supra, n. 52.

of a tenancy upon breach of covenant by either landlord or tenant. A summary court proceeding where the court has power to grant relief from forfeiture would probably be the most equitable means of determining when one party is sufficiently in default that the other party should be freed from his obligations. Naturally where the parties enter into a mutual agreement to terminate, such a proceeding would be unnecessary.

The Ontario Act was used as a model for Manitoba[100] and B.C.[101] and reads as follows with regard to interdependent covenants:[102]

> 88. Subject to this Part, the common law rules respecting the effect of the breach of a material covenant[103] by one party to a contract on the obligation to perform by the other party apply to tenancy agreements.

Right to Assign or Sublet

Alberta and Newfoundland are the only Canadian provinces where the Landlord and Tenant Act does not contain a provision regarding assignments and sub-leases. Prima facie a tenant should be able to transfer his interest in the leasehold

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[100] S.M. 1970, c. 106, s. 91.

[101] S.B.C. 1970, c. 18, s. 42.

[102] S.O. 1968-69, c. 58, s. 88.

[103] The interpretation of "material covenant" could create some problems in applying this section.

estate. However most leases contain a provision prohibiting assignments and sub-leases either absolutely or on condition that the landlord's consent first be procured.

The landlord has some valid interests to protect in this area. A person is often accepted as a tenant on the basis of personal qualities and the lessor should be able to retain some control over who occupies his premises, subject of course to the provisions of the Alberta Human Rights Act R.S.A. 1970, c. 178 (see further discussion of this statute, infra).

On the other hand restraints on alienation have always been judicially suppressed, and social factors such as the increased mobility of the general populace, the employee transferring policies of many companies, the greater impersonality of landlord-tenant relationships, all militate against covenants which prohibit assignments or subleases.

Different provinces have devised different schemes for balancing these conflicting interests, at least with regard to residential premises. In Saskatchewan[104], New Brunswick,[105] and P.E.I.[106] if a lease stipulates that the consent of the lessor is required before an assignment or sublease is made

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[104] R.S.S. 1965, c. 348, s. 13.

[105] R.S.N.B. 1952, c. 126, s. 11.

[106] R.S.P.E.I. 1951, c. 82, s. 12.

it will be deemed that this consent cannot be unreasonably withheld. However by inserting the phrase "unless the lease contains an express provision to the contrary," these statutes give the lessee power to contract out of this protection, and the lessor may absolutely restrict alienation without reasonable grounds.

In B.C.[107] a landlord cannot withhold his consent to an assignment or sublease unreasonably and no contracting out is permitted. However the tenancy agreement must be for a term of at least six months and the tenant must give the lessor a month's notice of a request for his consent. In addition the tenancy agreement may expressly state that the landlord is entitled to give a month's notice of the termination of the tenancy rather than his consent to sublet.

The Ontario scheme which has been duplicated in the Manitoba[108] statute reads as follows:[109]

> 90. (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).

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[107] S.B.C. 1970, c. 18, s. 44.

[108] S.M. 1970, c. 106, s. 93.

[109] S.O. 1968-69, c. 58, s. 90.

(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.

It would appear to the writer that the Ontario model is the most equitable. Since no contracting out is allowed every tenant of residential premises may make a reasonable assignment or sublease without fear of receiving notice to quit or of paying rent for premises which he is unable to occupy. The B.C. requirement that the tenant must be under a tenancy agreement of at least six months excludes a large bulk of tenants who rent on a month to month basis.

One possible suggestion to improve the Ontario legislation would be to add a provision whereby the assignee or sublessee automatically becomes bound by the covenants of the original lessee. Similarly of course the lessor must fulfill his obligations under the lease regardless of who is in occupation

Mitigation of Damages

At common law a tenant who abandoned premises during the period of his term would still be liable to pay the rent

reserved in the agreement as only an eviction was operative to abate rent. The landlord was under no obligation to minimize his damages by securing another tenant while the premises remained vacant.

This naturally worked a hardship on a tenant who was forced by circumstances to vacate a particular dwelling and relocate, thus paying rent for two premises. However as was seen in Goldhar v. Universal Sections and Mouldings Ltd. [1963] 1 O.R. 189 (C.A.) a landlord who did attempt to reduce his damages was prejudiced in the sense that he lost his right to recover rent from the original tenant.

The statutory change in Ontario reads as follows:[110]

> 91. 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.

Under the Quebec Civil Code three months damages are awarded to the landlord if the tenant wrongfully abandons his premises. In the event that they are re-let within the three months the tenant may sue to recover a proportion of the damages.

There is little reason for not applying the general rule that a plaintiff suing for breach of contract must

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[110] S.O. 1968-69, c. 58, s. 91. See comparable sections in other jurisdictions: S.M. 1970, c. 106, s. 94; S.B.C. 1970, c. 18, s. 45; S.N.S. 1970, c. 13, s. 6(1)5.

mitigate as far as possible the damages he claims to have suffered. Nothing is lost monetarily to the landlord since he retains his right to demand full rental payments so long as he reasonably cannot rent to a second tenant.

Mitigation of damages should also be applicable to claims for damage done to the premises by the tenant, especially if "damage deposits" continue to be lawful. It is very easy at the present time for a landlord to find that it takes the entire deposit to make the necessary repairs.

Contracting Out

Problems arise in relation to many types of remedial legislation where the parties intended to be protected are not prohibited from contracting out of their rights. Whether waiver agreements should be upheld raises several considerations: was the legislation designed primarily to aid individual persons or was some general public benefit involved; what is the relative bargaining power of the contracting parties?

As a matter of public policy it is submitted that a tenant should not be permitted to contract out of his statutory rights.

Section 16(3) of the Alberta Landlord and Tenant Act is an interesting section with regard to contracting out:[111]

> 16(3) Sections 17 to 22 apply only to tenancies of residential premises and tenancy

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[111] R.S.A. 1970, c. 200, s. 16(3).

> agreements notwithstanding any agreement or waiver to the contrary except as is specifically provided in sections 17 to 22 [emphasis added].

It would appear that two possible interpretations might be open to this section:

(1) parties cannot by waiver or agreement apply these provisions to anything other than a tenancy agreement or tenancy of residential premises, as is implied by use of the word "only";

(2) sections 17 to 22 will apply to all tenancies of residential premises and tenancy agreements regardless of any agreements to the contrary or waivers inter partes and regardless of other statutes.

The latter is hopefully the correct view, in which case any agreement whereby a tenant released his rights with regard to receipt of a copy of the tenancy agreement, security deposits, limiting the landlord's right of entry, notice of increase of rent, or the Landlord-Tenant Advisory Board would be null and void.

It is submitted that any attempt to contract out of statutory provisions should be held invalid, including such protection as is afforded by the Exemptions Act in the case of distress by a landlord.

The Ontario legislature's prohibition of contracting out, the essence of which was duplicated in Manitoba,[112]

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[112] S.M. 1970, c. 106, s. 82.

B.C.,[113] and Nova Scotia[114] reads as follows:[115]

> 81(1) This Part applies to tenancies of residential premises and tenancy agreements notwithstanding any other Act and notwithstanding any agreement or waiver to the contrary except as specifically provided in this Part.

Manitoba followed through with the application of the statute to tenancy contracts by stating that:[116]

> 118(2) Any term or condition in a tenancy agreement
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> (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.

Such a section has value in that it definitively stipulates the result of an attempt to digress from the statutory requirements.

Retaliatory Eviction

Statutory protective measures will be hollow remedies for tenants so long as the landlord can threaten eviction if

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[113] S.B.C. 1970, c. 18, s. 34(3).

[114] S.N.S. 1970, c. 13, s. 3(1).

[115] S.O. 1968-69, c. 58, s. 81(1).

[116] S.M. 1970, c. 106, s. 118.

they try to enforce their rights.[117] If he is a periodic tenant he may be given only a month's notice to find new accommodation, or in the case of a fixed term the opportunity to renew the lease may be lost. In many cases a tenant will not feel that it is worth the risk of eviction to complain about failure to repair, a demand for increased rent without proper notice, insistence on post-dated cheques etc. Retaliatory eviction therefore undermines the object and effect of the Landlord and Tenant Act and inhibits the enforcement of health and safety standards and building codes.

It is exceedingly difficult to legislate against retaliatory eviction since it involves a subjective analysis of the purpose for which a landlord is demanding repossession. One possibility of course is to place the onus on the landlord to show good cause for termination of the tenancy. This would undoubtedly be met with serious opposition as infringing the landlord's right to deal bona fide with his property as he wishes. If a tenant is entitled to vacate premises on giving the notice required by statute, the landlord should be entitled to have the premises vacated on giving the same notice, subject to the exception of retaliatory eviction.

Ontario's legislative attempt to control such eviction reads as follows:[118]

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[117] See Edwards v. Habib (1968) F. 2d 687 where an American court denied a landlord a right to retaliatory eviction in the absence of a prohibitory statute.

[118] S.O. 1968-69, c. 58, s. 106(2).

> (2) In any proceeding by a landlord for possession, if it appears to the judge that,
>
> (a) the notice to quit was given because of the tenant's complaint to any governmental authority of the landlord's violation of any statute or municipal by-law dealing with health or safety standards, including any housing standard law; or
>
> (b) the notice to quit was given because of the tenant's attempt to secure or enforce his legal rights,
>
> the judge may refuse to grant an order or writ for possession and may declare the notice to quit invalid and the notice to quit shall be deemed not to have been given.

In B.C.[119] the judge is also given a discretionary power to refuse to grant an order for possession on the same grounds as appear in (a) and (b) of s. 106(2) of the Ontario Act, although it is stipulated in (a) that the tenant's complaint to any governmental authority must be bona fide. In Ontario it seems likely that if the judge thought that the complaint had not been made bona fide that he would exercise his discretion toward allowing the order.

The Manitoba provision is interesting in that it is not couched in discretionary terms, nor does it stipulate that a complaint must be made bona fide:[120]

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[119] S.B.C. 1970, c. 18, s. 61(2).

[120] S.M. 1970, c. 106, s. 113.

Defences to proceedings for possession.

113(2) In any proceedings by a landlord for possession, if the court finds that

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

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

it shall refuse to grant an order for possession or an order for eviction and shall declare the notice to quit invalid and the notice to quit shall be deemed not to have been given.

Section 113(3) provides modifications of the strict provisions in 113(2):

113(3) Notwithstanding subsection (2), if in any proceedings by a landlord for possession the landlord alleges

(a) that he requires possession of the premises for the purpose of demolishing the premises; or

(b) that repairs of or the rectification of any condition complained of by a tenant or ordered to be carried out by a landlord in respect of the premises are either too costly or of such a nature that they cannot be carried out while the tenant continues to occupy the premises;

> and the court is satisfied from the evidence adduced of the validity of the allegations of the landlord, the court may grant an order for possession or order for eviction as the case may be, subject to such terms and conditions as the court deems fit to impose.

The Model Residential Landlord-Tenant Code[121] attempts to balance the parties' rights and interests by prohibiting evictions within six months of a tenant's bona fide complaint to authorities or to the landlord with regard to the condition of the dwelling unit. However a landlord may recover possession within this time if he falls within any of eight enumerated exceptions (e.g., repossession for purpose of making substantial repairs; tenant's abuse or misuse of dwelling unit; the condition of the dwelling unit at the time of the tenant's complaint conformed with all requirements).

Probably one of the major differences between the present Canadian legislation prohibiting retaliatory eviction and that suggested by the American Bar Foundation lies in the remedy available to the tenant. Under the Model Code a tenant who is wrongfully evicted may claim the greater of three months rent or triple damages plus costs of the action whereas in Canada he is entitled to retain possession of the premises. It is submitted that the former is the more substantial remedy assuming that the tenant has only a moderate amount of difficulty in relocating. Even if the tenant is able to defeat a landlord's claim for possession he may be subjected to small but frequent harrassments until he "voluntarily" vacates.

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[121] Supra, n. 75, Article II-407, p. 68.

Another restriction is placed upon the landlord's right to evict in Manitoba:[122]

No eviction during school year.

113(4) Where a tenant of residential premises has a child of compulsory school age living with him in those premises, the landlord shall not terminate the tenancy or evict the tenant from those premises at any time during any school year in which the child is attending school.

Non-application of subsection (4).

113(5) Subsection (4) does not apply where

(a) a tenant is in arrears of rent; or

(b) a tenant's conduct in the opinion of the rentalsman for the area is such that it interferes with the quiet enjoyment by other tenants residing in the same premises; or

(c) a tenant has violated subsection (2) of section 98.

These provisions would appear to promote public interests by giving security of tenure sufficient that children's educations are not unnecessarily disrupted, yet protecting the landlord's legitimate property interest.

Civil Liberties and Landlord and Tenant Law

One of the most obvious aspects of civil liberties in relation to landlord and tenant law is housing discrimination as touched upon by the Alberta Human Rights Act R.S.A. 1970, c. 178, s. 4:

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[122]S.M. 1970, c. 106, s. 113.

> 4. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall
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> (a) deny to any person or class of persons occupancy of any self-contained dwelling unit in a building which contains 3 or more such units that are available for renting, or
>
> (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any self-contained dwelling unit in a building which contains 3 or more such units that are available for renting,
>
> because of the race, religious beliefs, color, ancestry or place of origin of that person or class of persons or of any other person or class of persons.

However this is only applicable where occupancy is sought in a building where three or more units are available for renting. The writer believes that these fundamental human rights should be extended to include the rental of all types of dwelling units, i.e., houses and duplexes as well as apartments.

An issue raised by the Ontario Law Reform Commission was the policy of many landlords, especially in high-rise apartments, of restricting families with children, at least if the children are under a certain age. While most people would agree that refusal of pets is understandable, should families be penalized in securing the accommodation they desire because of their children?

Difficulties arise here from the developer's and manager's point of view. In general it is more profitable

to exclude children because of lower building and maintenance costs. The municipal tax structure and low density zoning by-laws also play a role--usually as a disincentive against building for families.

Consideration must be given to the social problems involved in mixing families with unmarrieds, couples without children, or old age pensioners. Hostilities may arise over such matters as the level of noise or basic conflicts in life styles. Even with a legislative policy prohibiting restrictions against children, individuals would probably tend naturally to occupy multiple-unit dwellings with other people of comparable age and according to whether they do or do not have children. Of course this proposition together with the actual incidence of enforcement of a restrictive policy against children are purely speculative without a full blown survey of various rental premises.

Another area of contention has been restrictions against trading and canvassing. Many tenants will find that in multiple-unit dwellings they have no choice of companies from whom they may purchase dairy and bakery products or laundry and dry cleaning services within the building, either on a door to door delivery basis or from vending machines.

While the tenant is entitled to know in advance of occupancy what restrictions do exist and to have such included on the written lease or tenancy agreement,[123] landlords have

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[123]The tenant is entitled to an executed copy of the written lease or tenancy agreement within 21 days of executing and delivering it to the landlord: Landlord and Tenant Act R.S.A. 1970, c. 200, s. 17(a).

some convincing arguments against permitting a totally free enterprise system from operating, and in most cases it works to the benefit of the tenant as well.

Unfortunately there are known instances where restrictions are not based on bona fide economic reasons. In some cases the landlord, manager or building superintendent may be securing a commission payment on the sale of goods and services in the building in return for awarding the contract to a particular supplier. Such practices ought to be statutorily outlawed as they have been to some extent in Manitoba:[124]

> 115. No landlord shall demand any payment or advantage from any tradesman or delivery man in exchange for the privilege of exclusive access to any residential premises.

As recommended by the Ontario Law Reform Commission it might be wise to extend this prohibition to superintendents of buildings as well as its owners,[125] or to any agent or employee.[126] In Manitoba the provision is enforceable by the tenant's filing an information against the landlord. He will be liable on summary conviction to a fine not exceeding $1,000.[127]

Restrictions against election canvassers raise other considerations since every effort should be made to remove

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[124] S.M. 1970, c. 106, s. 115.

[125] Supra, n. 50, p. 50.

[126] Id., p. 50, the comment of Mr. Justice McRuer.

[127] S.M. 1970, c. 106, s. 117(1).

impediments from the proper functioning of the democratic process. No landlord should be able to use his position in order to prevent tenants from receiving information regarding prospective electoral candidates at all governmental levels. Three provinces currently have legislation prohibiting such restrictions. The Ontario provision was adopted verbatim in B.C.:[128]

> No landlord, his servant, or agent shall impose any special restrictions on access to the rented premises by candidates, or their authorized representatives, for election to the House of Commons, the Legislative Assembly, any office in a municipal government or a school board for the purpose of canvassing or distributing election material.

Knowingly contravening this section will be an offence punishable on summary conviction with a fine not in excess of $1,000.[129]

Manitoba[130] deviated from this wording only to the extent that "agents" of the landlord were excluded. However the landlord could probably be held responsible if the agent acted with express, implied or usual authority.

A right of privacy against intrusions by the landlord was afforded the tenant of residential premises under section 20 of the 1970 amendments to the Alberta Landlord and Tenant Act:

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[128]S.O. 1968-69, c. 58, s. 93; S.B.C. 1970, c. 18, s. 47.

[129]S.O. 1968-69, c. 58, s. 107(1); S.B.C. 1970, c. 18, s. 62(1).

[130]S.M. 1970, c. 106, s. 96.

> (2) Where premises are occupied or used by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.
>
> (3) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.
>
> (4) For the purposes of this section, any obligation imposed on a landlord by any enactment by reason of the premises being subject to a tenancy shall be treated as if it were an obligation imposed on him by the tenancy, "tenancy" includes a statutory tenancy which does not in law amount to a tenancy and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.
>
> (5) This section shall apply to tenancies created before the commencement of this Act as well as to tenancies created after its commencement.

The essential effect of this legislation has been to place the duty of care towards visitors on the landlord rather than the tenant in cases where it is the landlord's responsibility to effect repairs: the landlord is the constructive occupier. If the suggestion is adopted that landlords should be statutorily obligated to repair residential premises, these tort cases would be simplified considerably, especially if the recommendations of the Alberta Institute of Law Research and Reform were also adopted, eliminating the artificial classification of lawful visitors and distinguishing only trespassers. The recommended scope of the duty which would apply to landlords is as follows:[142]

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[142] Supra, n. 138, p. 47.

> That the occupier owes to all visitors the same duty of care, and that the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier or is permitted by law to be there and this duty applies to the condition of the premises, activities on the premises and the conduct of third parties.

Publicity and Enforcement

The effectiveness of changes in landlord and tenant law will be contingent on the degree to which the general public are made aware of their rights and obligations. Some notoriety was undoubtedly given to the 1970 amendments to the Landlord and Tenant Act of Alberta at the time they were passed; however a method of continuing education is necessary for the benefit of people moving into this jurisdiction and for those who are assuming the role of tenant for the first time.

Perhaps the onus could be shifted in part to landlords themselves by statutorily requiring them to include a copy of the Landlord and Tenant Act in every written lease or tenancy agreement, and in apartment buildings to post a copy in a conspicuous place accessible to all tenants.

One of the amendments to the Alberta statute empowered any municipal government to pass a by-law creating a Landlord and Tenant Advisory Board, the functions of which are:[143]

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[143] R.S.A. 1970, c. 200, s. 22(2).

22(2)(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.

Such a Board was set up in Edmonton[144] in July, 1971, consisting of seven members. Two are lawyers and two have formerly been involved in tenant associations. A signed complaint is procured from the landlord or tenant (usually the tenant) and a form letter is sent out to the other party informing him of the complaint and requesting a reply. Where the Board feels incapable of making a decision on this information, an evening hearing will be held of which both parties have notice. Here they will have an opportunity to present their case and present any witnesses. The Board will then issue a certificate bearing the date of the hearing and the decision reached.

Unfortunately the Board has no further enforcement power. The bulk of the complaints received to date have concerned security deposits, in which case the tenant might have a further right of recourse in Small Claims Court. The Board's mediation is only effective so long as the parties choose to comply.

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[144]The Board was created by Edmonton City by-law. Their office is at 10237 - 98th Street and the phone number is 424-0521.

Although the Board has only been operative for about five months, they have made no attempt at generally publicizing landlord-tenant rights and obligations or even the services that the Board itself has to offer. Persons coming to them are referred to the Queen's Printer for copies of the Landlord and Tenant Act, or to other Social Agencies[145] in the city who will supply further information. This seems a significant abrogation of their function under s. 22(2)(c).

As far as the writer could ascertain, the Edmonton Advisory Board is the only such Board that has been created to date in the province, although it is believed that an abortive attempt to constitute a Board was made in Calgary.

Legal Aid is available to assist individuals without the means to pursue or defend their rights in a landlord-tenant dispute, and Student Legal Services operated by the law students of the University of Alberta has found that landlord and tenant has been "the single most frequent class of problems"[146] referred to their offices.

Manitoba is unique in Canada for its creation of the office of "Rentalsman" to whom a landlord or tenant or both

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[145]The Edmonton Housing Bureau, operating in conjunction with the Social Planning Council has attempted to provide a telephone service for dispensing information with regard to tenancy and available accommodation. Unfortunately they rely almost solely on volunteer help thus their effectiveness is limited.

[146]"Loopholes--Landlord and Tenant", The Gateway Vol. LXII, No. 16 (Tuesday, November 9, 1971) p. 4. Student Legal Services make contributions to the Gateway on a semi-regular basis to inform the student body of areas of the law most relevant to them.

may refer disputes for mediation, or with the written consent of both parties, final and binding arbitration, thus reducing the load on the courts. Alberta of course has an Ombudsman for general purposes, but seldom would landlord-tenant complaints fall within his jurisdiction.[147]

The Rentalsman, who may be designated from among persons in government service to act in this capacity for a certain region, also fulfills the functions of generally educating and advising landlords and tenants concerning rental practices, rights and remedies, and of investigating complaints of contravention of the law.

Particularly important is the Rentalsman's jurisdiction to mediate or arbitrate with regard to the return of security deposits.[148] The Rentalsman holds the deposit in trust during negotiations for a maximum of 30 days, after which time if no settlement has been reached the landlord has ten days in which to commence an action to recover the fund. If he fails to do so the money and interest will be refunded to the tenant.

Provision is also made in the Manitoba legislation for the Lieutenant-Governor in Council to establish a board or designate municipal employees or designate a rentalsman to fulfill a rent review function.[149]

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[147] Ombundsman Act R.S.A. 1970, c. 268.

[148] S.M. 1970, c. 106, s. 87.

[149] S.M. 1970, c. 106, s. 121.

The problem of an enforcement body is one of fundamental concern and importance. It would not be inconceivable to create a separate court entirely to adjudicate landlord-tenant disputes. Such a court could adopt a less formal procedure (similar to Family Court) and possibly could be conducted in the evening when hearings would create less inconvenience for working people.

Conclusion

It is suggested that if landlord and tenant law is undertaken as a major study by the Institute of Law Research and Reform, a good starting point might be to draw upon the research already done respecting the applicability in Alberta of old English statutes, many of which relate to tenancy, to define what provisions are still in force.

In conjunction with the Ontario Law Reform Commission Report on Residential Tenancies a major survey was undertaken involving questionnaires to landlords and tenants. The Manitoba government conducted extensive hearings before starting to draft amendments to their statute. Such techniques could be invaluable in developing a practical insight into the gravity of certain problems and the nature of abuses.

If the purpose of this initial survey was to provide evidence of a need for improvements in landlord-tenant law in Alberta, both by way of clarification of existing law and by way of fundamental changes, hopefully it has established the case beyond a reasonable doubt. While some of the confusion and uncertainty in the law as it appears in this paper is probably attributable to the author, surely anyone who has delved into the area has found patently obvious its complexities and need for reform.

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Act Concerning Grantees of Reversions to Take Advantage of the Conditions to be Performed by the Lessees (1540)	32 Hen. VIII, c. 34

THE LANDLORD AND TENANT ACT

CHAPTER 200

Short title

1. This Act may be cited as *The Landlord and Tenant Act*. [1964, c. 43, s. 1]

Mineral leases exempt

2. This Act does not apply to minerals held separately from the surface of land or any dealings in minerals. [1964, c. 43, s. 2]

Termination of Tenancies

Notice of termination of tenancy

3. (1) A weekly or monthly or year-to-year tenancy may be terminated by either the landlord or the tenant upon notice to the other and, unless otherwise agreed upon, the notice

(*a*) shall meet the requirements of section 4,

(*b*) shall be given in the manner prescribed by section 5, and

(*c*) shall be given in sufficient time to give the period of notice required by section 6, 7 or 8, as the case may be.

(2) Any other kind of tenancy determinable on notice may, unless otherwise agreed upon, be terminated as provided by sections 4 and 5. [1964, c. 43, s. 3]

Form of notice

4. (1) A landlord or a tenant may give notice either orally or in writing, but a notice by a landlord to a tenant is not enforceable under sections 10 to 15 unless it is in writing.

(2) A notice in writing

(*a*) shall be signed by the person giving the notice, or his agent,

(*b*) shall identify the premises in respect of which the notice is given, and

(*c*) shall state the date on which the tenancy is to terminate or that the tenancy is to terminate on the last day of the period of tenancy next following the giving of the notice.

(3) A notice may state both

(*a*) the date on which the tenancy is to terminate, and

(*b*) that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice,

and if it does state both and the date on which the tenancy is to terminate is incorrectly stated, the notice is neverthe-

less effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.

(4) A notice need not be in any particular form, but a notice by a landlord to a tenant may be in Form A of the Schedule and a notice by a tenant to a landlord may be in Form B of the Schedule. [1964, c. 43, s. 4]

Manner of giving notice

5. (1) Notice by a tenant to a landlord may be given personally to the landlord, or his agent, or may be sent to him by ordinary mail at the address where the rent is payable.

(2) Except as provided in this section, a notice by a landlord to a tenant shall be given personally to the tenant.

(3) Where the tenant cannot be given notice by reason of his absence from the premises, or by reason of his evading service, the notice may be given to the tenant,

(*a*) by giving it to any adult person who apparently resides with the tenant, or

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

(*c*) by sending it by registered mail to the tenant at the address where he resides.

(4) Notwithstanding anything in this section, a notice to a corporation may be given in the manner permitted under section 289 of *The Companies Act*. [1964, c. 43, s. 5]

Notice to terminate weekly tenancy

6. (1) A notice to terminate a weekly tenancy shall be given on or before the last day of one week of tenancy to be effective on the last day of the following week of the tenancy.

(2) For the purposes of this section, "week of the tenancy" means the weekly period on which the tenancy is based and not necessarily a calendar week and, unless otherwise specifically agreed upon, the week shall be deemed to begin on the day upon which rent is payable. [1964, c. 43, s. 6]

Notice to terminate monthly tenancy

7. (1) A notice to terminate a monthly tenancy shall be given on or before the last day of one month of the tenancy to be effective on the last day of the following month of the tenancy.

(2) For the purposes of this section, "month of the tenancy" means the monthly period on which the tenancy is based and not necessarily a calendar month and, unless otherwise specifically agreed upon the month shall be deemed to begin on the day upon which rent is payable. [1964, c. 43, s. 7]

Notice to terminate yearly tenancy

8. (1) A notice to terminate a year-to-year tenancy shall be given on or before the 60th day before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy.

(2) For the purposes of this section, "year of the tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and unless otherwise agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession. [1964, c. 43, s. 8]

Compensation when premises not vacated

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

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

(3) A landlord's claim for arrears of rent or compensation for use and occupation by a tenant after the expiration or termination of the tenancy may be enforced by action or as provided in section 11. [1964, c. 43, s. 9]

Application for order for possession

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

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

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

(*a*) setting forth the terms of the tenancy,

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

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

(*d*) stating any other relevant facts. [1964, c. 43, s. 10]

Claim for arrears in rent and compensation

11. (1) The originating notice of motion of the landlord may also include a claim for arrears of rent and for compensation for use and occupation of the premises by the tenant after the expiration or termination of the tenancy.

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

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

(b) where a claim is made for compensation, particulars of the use made of the premises after the expiration or termination of the tenancy, so far as is known. [1964, c. 43, s. 11]

Hearing of application

12. (1) Upon hearing the motion, or, where it is opposed, upon hearing and considering, in a summary way, the oral and affidavit evidence of the parties and their witnesses, the Court may

(a) if he is satisfied that the tenancy has expired or has been terminated, give an order for possession,

(b) where a claim for rent is made, give judgment for the amount of rent proven to him to be in arrear,

(c) where a claim for compensation is made, give judgment in such amount as the Court may determine as compensation for the use and occupation of the premises after the expiration or termination of the tenancy, having regard to the nature of the use and occupation and the rent payable during the tenancy, and

(d) make such order as to costs as he thinks just.

(2) The Court may grant or dismiss the application in whole or in part and may direct the trial of an issue to determine any matter in dispute.

[1964, c. 43, s. 12; 1968, c. 60, s. 2]

Terms of order for possession

13. (1) An order under section 12 granting possession

(a) shall direct the tenant to deliver up possession of the premises to the landlord by a specified date or within a specified time after service of the order on the tenant, and

(b) shall state that if the order is not obeyed by the specified date or within the specified time a writ of possession will issue without any further order.

(2) The order may be served in the same manner as a notice may be served on a tenant pursuant to section 5.

[1964, c. 43, s. 13]

Writ of possession

14. Where the order is not obeyed by the specified date or within the specified time, the landlord is entitled, without any further order, to be issued a writ of possession on filing an affidavit showing service of the order and that it has not been obeyed. [1964, c. 43, s. 13]

Proceedings after tenant vacates

15. Proceedings in respect of a claim for arrears of rent or compensation may continue to judgment notwithstanding

that the tenant delivers up possession of or vacates the premises after service upon him of the originating notice of motion. [1964, c. 43, s. 14]

Tenancies of Residential Premises

Tenancies of residential premises

16. (1) In this section and sections 17 to 22,

(*a*) "residential premises" means premises used for residential purposes, and does not include premises occupied for business purposes with living accommodation attached under a single lease;

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

(*c*) "tenancy agreement" means an agreement between a landlord and a tenant for possession of residential premises, whether written, oral or implied.

(2) The provisions of sections 3 to 15 in so far as they apply to tenancies of residential premises are subject to this section and sections 17 to 22.

(3) Sections 17 to 22 apply only to tenancies of residential premises and tenancy agreements notwithstanding any other Act and notwithstanding any agreement or waiver to the contrary except as is specifically provided in sections 17 to 22. [1970, c. 64, s. 3]

Tenancy agreements

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

(2) Where the copy of the tenancy agreement is not delivered in accordance with subsection (1), the obligations of the tenant thereunder cease until such copy is delivered to him. [1970, c. 64, s. 3]

Security deposit

18. (1) A landlord holds each security deposit paid or given to him or his agent, or to anyone on his behalf, as trustee for the tenant but subject to the provisions of this Act and the tenancy agreement and any other agreement pertaining to it.

(2) Where the security deposit consists of money, the landlord may invest the money in investments authorized by *The Trustee Act* for the investment of trust funds.

(3) Subject to subsection (4), a landlord shall pay annually to the tenant interest on a security deposit consisting of money held by him or his agent or anyone on his behalf at the rate of 6 per cent per year.

(4) Where the security deposit consists of money, a tenant may notify his landlord in writing that he elects not to have the interest on the security deposit paid annually as provided in subsection (3) and in that case the interest shall be payable on the termination or expiration of the tenancy, unless otherwise agreed between the landlord and the tenant.

(5) The landlord is entitled to retain any interest and profit resulting from the investment of a security deposit in excess of the amount of interest payable under subsection (3) or (4).

(6) Where the landlord and the tenant agree that interest shall be payable under this section at a rate of interest higher than 6 per cent per year, subsections (3), (4) and (5) shall be deemed to refer to the higher rate.

(7) This section applies to security deposits paid or given before, on or after July 1, 1970. [1970, c. 64, s. 3]

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19. (1) Where a landlord holds a security deposit, then, upon the expiry or termination of the tenancy,

(*a*) the landlord shall return the security deposit to the tenant within 10 days after the tenant delivered up possession of the premises, or

(*b*) if all or part of the security deposit may be deducted in accordance with the conditions agreed to by the tenant, the landlord shall

(i) deliver a statement of account therefor, and

(ii) return the balance of the deposit, if any, to the tenant within 10 days after the tenant delivered up possession of the premises,

or

(*c*) if the landlord is entitled to make a deduction from the security deposit for repairs to the premises but is unable to determine the correct amount thereof within 10 days after the tenant delivers up possession of the premises, the landlord may make an estimate thereof, and in that case the landlord

(i) shall

(A) deliver an estimated statement of account, and

(B) return the estimated balance of the deposit, if any,

to the tenant within 10 days after the tenant delivered up possession of the premises, and

(ii) shall

(A) deliver a final statement of account, and

(B) return the final balance, if any,

to the tenant within 30 days after the tenant delivered up possession of the premises.

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

(3) Where a landlord fails to return all or part of a security deposit to a tenant in accordance with subsection (1), then, whether or not a statement of account was delivered to the tenant, the tenant may take proceedings under *The Small Claims Act* to recover the whole of the deposit or that part of the deposit to which the tenant claims to be entitled, if the amount claimed is within the monetary jurisdiction of the court.

(4) In proceedings taken under subsection (3) the magistrate or judge

(*a*) shall determine the amounts, if any, which the landlord is entitled to deduct from the security deposit in accordance with the conditions agreed to by the tenant, and

(*b*) where the deductions so determined are less than the amount of the deposit, shall give judgment in favour of the tenant for the balance.

(5) In this section, "security deposit" includes any amounts owing to the tenant as interest by virtue of section 18 at the time of termination or expiration of the tenancy.

[1970, c. 64, s. 3]

Entry to premises

20. Except in cases of emergency and except where the landlord has a right to show the premises to prospective tenants at reasonable hours after notice of termination of the tenancy has been given, the landlord shall not exercise a right to enter the rented premises unless he has first given written notice to the tenant at least 24 hours before the time of entry, and the time of entry shall be during daylight hours and specified in the notice, except that nothing in this section shall be construed to prohibit entry with the consent of the tenant given at the time of entry.

[1970, c. 64, s. 3]

Notice of increase in rent

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

(2) Subsection (1) does not apply where the tenancy agreement provides for a period of notice longer than 90 days before the increase in rent is effective.

[1970, c. 64, s. 3]

Landlord and Tenant Advisory Board

22. (1) The council of a city, town, village, municipal district or county, or the board of administrators of a new town, may by by-law establish a Landlord and Tenant Advisory Board and provide for the remuneration of its members and any other matters pertaining to its procedures or incidental to the exercise of its functions.

(2) The functions of a Landlord and Tenant Advisory Board are

(*a*) to advise landlords and tenants in tenancy matters,

(*b*) to receive complaints and seek to mediate disputes between landlords and tenants,

(*c*) to disseminate information for the purpose of educating and advising landlords and tenants concerning rental practices, rights and remedies, and

(*d*) to receive and investigate complaints of conduct in contravention of legislation governing tenancies.

[1970, c. 64, s. 3]

Regulations

Regulations

23. The Lieutenant Governor in Council may make regulations for the purpose of carrying out the intent of this Act and, without restricting the generality of the foregoing, may

(*a*) prescribe forms to be used in proceedings under this Act, and

(*b*) prescribe a tariff of court fees and solicitors' costs in connection with proceedings under this Act.

[1964, c. 43, s. 15]

SCHEDULE

FORM A

NOTICE TO TENANT

TO (Name of Tenant)

I hereby give you notice to deliver up possession of the premises ..... which you hold
(*identify the premises*)
of me as tenant, on the ..... day of ..... next, or on the last day of the period of your tenancy next following the giving of this notice.

Dated this ..... day of ..... 19....

.....
(*Landlord*)

[1964, c. 43, Sched. Form A]

FORM B

NOTICE TO LANDLORD

TO (Name of Landlord)

I hereby give you notice that I am giving up possession of the premises ..... which I hold
(*identify the premises*)
of you as tenant, on the ..... day of ..... next, or on the last day of the period of my tenancy next following the giving of this notice.

Dated this ..... day of ..... 19....

.....
(*Tenant*)

[1964, c. 43, Sched. Form B]