

**LAW REFORM COMMISSION OF BRITISH COLUMBIA**

**REPORT ON LANDLORD AND TENANT RELATIONSHIPS**

**(PROJECT NO. 12)**

**RESIDENTIAL TENANCIES**

**LRC 13**

**1973**

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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## TABLE OF CONTENTS

|  | <b>Page</b> |
|--|-------------|
| INTRODUCTION   | 7           |
| I. THE LANDLORD AND TENANT ACT                                 | 9           |
| A. Introduction  | 9           |
| B. Residential Tenancies                                       | 10          |
| C. The Form of the Act   | 11          |
| II. SCOPE OF THE PROPOSED ACT                                  | 17          |
| A. Tenants and Licenses  | 17          |
| B. Its Application to the Crown                                | 20          |
| C. The Caretaker's Suite                                       | 23          |
| D. Mobile Homes  | 24          |
| E. Monetary Limitation   | 25          |
| III. RESOLUTION OF DISPUTES - THE RENTALSMAN AND THE<br>COURTS | 26          |
| A. Introduction  | 26          |
| 1. Functions of the Manitoba Rentalsman                        | 30          |
| (a) General  | 30          |
| (b) Security Deposits  | 30          |
| (c) Abandoned Goods  | 31          |
| (d) Failure to Supply Services                                 | 31          |
| (e) Repairs  | 32          |
| (f) Mediation and Arbitration                                  | 33          |
| 2. Powers of the Manitoba Rentalsman                           | 33          |
| B. The Division of Jurisdiction                                | 35          |
| 1. Functions of the Rentalsman                                 | 36          |
| (a) The Disposition of Rent Deposits                           | 36          |
| (b) The Disposition of Damage Deposits                         | 36          |
| (c) The Landlord's Failure to Provide<br>Essential Services    | 37          |
| (d) The Landlord's Failure to Effect Repairs                   | 37          |
| (e) Discriminatory Rent Increase                               | 38          |
| (f) Hidden Rent Increase                                       | 38          |
| (g) Abandoned Goods  | 39          |
| (h) Possession   | 39          |
| (i) General  | 41          |
| 2. The Courts  | 42          |
| C. Powers of the Rentalsman                                    | 43          |
| D. Administration  | 44          |
| Memorandum of Dissent of Mr. Peter Fraser                      | 47          |
| Memorandum of Dissent of Mr. Paul D.K. Fraser                  | 48          |

|    |   |     |
|----|---|-----|
| IV | TENANT SECURITY AND RENT CONTROL                        |     |
|    | PART I: TENANT SECURITY                                 | 50  |
|    | A. Introduction   | 50  |
|    | B. The Present Position                                 | 50  |
|    | 1. General  | 50  |
|    | 2. Retaliatory Evictions                                | 51  |
|    | C. Comparative Study                                    | 53  |
|    | 1. Security of Tenure Schemes Dependent on Rent Control | 53  |
|    | (a) The British Scheme                                  | 53  |
|    | (b) Victoria and New South Wales                        | 57  |
|    | (c) New York City and Massachusetts                     | 61  |
|    | (d) Newfoundland and Quebec                             | 61  |
|    | (i) Newfoundland  | 61  |
|    | (ii) Quebec   | 62  |
|    | 2. Security of Tenure Independent of Rent Control       | 63  |
|    | (a) West Germany  | 63  |
|    | (b) Switzerland   | 64  |
|    | (c) United States                                       | 64  |
|    | (d) Canada  | 65  |
|    | (i) Manitoba  | 66  |
|    | (ii) Surrey, British Columbia                           | 69  |
|    | D. An Evaluation of Tenant Security                     | 71  |
|    | E. Recommendations                                      | 75  |
|    | PART II - RENT CONTROL                                  | 85  |
| V  | SECURITY DEPOSITS                                       | 89  |
|    | A. Introduction   | 89  |
|    | B. British Columbia: The Present Position               | 89  |
|    | C. Shortcomings of the Present Legislative Scheme       | 91  |
|    | D. Comparative Study                                    | 92  |
|    | 1. General  | 92  |
|    | 2. Canada   | 93  |
|    | 3. United States  | 94  |
|    | 4. Other Jurisdictions                                  | 95  |
|    | E. Policy Considerations                                | 95  |
|    | F. Recommendations                                      | 97  |
|    | G. Rentalsman's Handling of Statutory Deposits          | 102 |
|    | H. Summary of Recommendations                           | 103 |
| VI | CONTRACTUAL NATURE OF THE TENANCY AGREEMENT             | 106 |
|    | A. General  | 106 |
|    | B. The Interdependence of Material Covenants            | 107 |
|    | C. Freedom of Contract                                  | 111 |
|    | D. The Lord's Day Act                                   | 115 |
|    | E. Privity and Rights on Assignment                     | 116 |
|    | F. Formalities and Land Registration                    | 117 |
|    | G. Implied Terms  | 120 |
|    | H. Interesse Termini                                    | 121 |
|    | I. Frustration of Contract                              | 123 |

|      |   |     |
|------|---|-----|
| VII  | STATUTORY DUTIES AND PROHIBITIONS               | 125 |
|      | A. Introduction                                 | 125 |
|      | B. Landlord's Responsibility to Repair          | 126 |
|      | C. Tenant's Responsibility for Cleanliness      | 128 |
|      | D. The Tenant's Right to Privacy                | 128 |
|      | 1. During the Tenancy Agreement                 | 129 |
|      | 2. On Notice of Termination                     | 130 |
|      | E. Locks  | 131 |
|      | F. Entry by Canvassers                          | 132 |
|      | G. Penalties                                    | 133 |
|      | H. Breach of Statutory Duty                     | 135 |
| VIII | RENTAL RATES                                    | 137 |
|      | A. Frequency of Rental Increases                | 137 |
|      | B. Definition of Rental Increases               | 140 |
|      | C. Increased Occupancy                          | 143 |
|      | D. Acceleration of Rent                         | 143 |
| IX   | ABANDONMENT                                     | 145 |
|      | A. Definition                                   | 145 |
|      | B. Abandonment of Goods                         | 149 |
|      | C. Landlord's Duty to Re-rent After Abandonment | 153 |
| X    | DISCRIMINATION IN LANDLORD AND TENANT RELATION  | 158 |
| XI   | COLLECTIVE ACTION BY TENANTS                    | 164 |
| XII  | OTHER PROBLEMS                                  | 170 |
|      | A. The Rent-Control Act                         | 170 |
|      | B. Municipal Options                            | 177 |
|      | C. Mobile Homes                                 | 179 |
|      | D. The Overholding Tenant                       | 181 |
| XIII | CONCLUSION                                      | 185 |
|      | A. Summary of Recommendations                   | 185 |
|      | B. Acknowledgments                              | 197 |

TO THE HONOURABLE ALEX B. MACDONALD, Q.C.,  
ATTORNEY-GENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON LANDLORD AND TENANT RELATIONSHIPS  
(Project No. 12)  
RESIDENTIAL TENANCIES

This Report has been prepared following your request for advice with respect to the present Provincial legislation regarding the subject of landlord and tenant.

The post-war years have seen a dramatic increase in the percentage of British Columbia residents who live in rented accommodation. This trend has made the substantive and procedural law governing landlord and tenant relationships more important than ever before. The enactment of Part II of the *Landlord and Tenant Act* was a significant response to changing conditions. We have, however, concluded that further reform is in order, particularly with regard to tribunals, procedures and security of tenure. Numerous recommendations of a technical nature are also made.

## INTRODUCTION

In a letter to the Commission, dated July 6, 1973 the Attorney-General indicated that there would occur, before the end of that year, an urgent need for guidance with respect to the present Provincial legislation regarding the subject of landlord and tenant and asked that this be taken on as an immediate and urgent task and that a report be made not later than the end of December, 1973. This Report has been prepared in response to that request.<sup>1</sup>

The law of landlord and tenant did not form part of the Commission's existing Programme and it was necessary to add this study as a separate Project. It was initially decided to restrict its scope to residential tenancies, leaving open the question of undertaking a study on commercial tenancies at some later date. This Report is therefore entitled *Report on Landlord and Tenant Relationships: Residential Tenancies*.

The time limits within which we were operating did not permit us to follow our usual practice of preparing a working paper containing tentative conclusions and proposals for reform and circulating it for comment. We were, however, loath to proceed to our final Report without any form of consultation with the public and interested parties. It was felt that this consultation could be best carried out by soliciting and considering written submissions and by holding public hearings.

During the first week in August advertisements were placed in all the daily newspapers in British Columbia inviting members of the public, groups and organizations to make written submissions to the Commission.<sup>2</sup> Municipal bodies were specifically invited to express their opinions. The advertisement also stated:

The Commission is prepared to consider requests by those submitting briefs, to be heard in person at Vancouver . . .

The Commission's initial research identified a number of aspects of the landlord and tenant relationship which were the subject of special controversy. We thought it desirable to solicit particular comment on these and so our advertisement invited views on, *inter alia*,

1. what courts or bodies should have jurisdiction over disputes between landlord and tenant, and what their procedures should be.

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1. The Law Reform Commission Act, S.B.C. 1969, c. 14, s. 3 (c) provides:

It is the function of the Commission to take and keep under review all the law of the Province, including statute law, common law, and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments, and generally the simplification and modernization of the law, and for the purpose

© to undertake, at the request of the Attorney-General or pursuant to recommendation of the commission approved by the Attorney-General, the examination of particular branches of the law, and the formulation, by means of draft bills of otherwise, of proposals for reform therein;

2. Copy of the advertisement is included as an Appendix to this Report.





2. the availability of other facilities to assist in resolving such disputes and distributing information.
3. how far a landlord should be required to justify an eviction or the termination of tenancy.
4. how far the collective bargaining process is appropriate to landlord and tenant matters.
5. security and damage deposits.

In response to that advertisement we received over 200 written submissions. Of those submissions, approximately 80 per cent were from landlords and landlords' groups, ten per cent from tenants and tenants' groups and ten percent from other persons and organizations.

Our public hearings were held on October 17, 18 and 19 at the Vancouver Public Library. Time was allocated to all persons who had, within the time limit set out in the advertisement, asked to participate in the hearings and presentations were made by representatives of eleven different groups and by two individuals on their own behalf.<sup>3</sup> Again, the voices of the landlords predominated, with nine presentations. Only one submission was made on behalf of tenants *per se* and four were made by other groups. Most of those making presentations at the hearings were questioned by the members of the Commission, other participants and members of the public in attendance.

Following the hearings, all submissions were considered further, along with the results of research by the Commission. These deliberations led to the conclusions and recommendations which form the basis of this Report.

One aspect of the submissions made to us deserves special comment at this point. It was almost unanimously represented to us, by those speaking on behalf of landlords, that what they conceive to be an unduly restrictive *Landlord and Tenant Act* has contributed to the current shortage of rental accommodation in this Province. It has been urged that any measures which would further restrict "landlords' rights" would further discourage construction of, and investment in, new rental accommodation and would hasten the conversion of existing rental accommodation to condominium housing. Conversely, it was suggested that a legal regime more favourable to the landlord would stimulate construction and would ultimately benefit the tenant through the operation of competition and the free market.

These submissions pose a difficult problem for us, particularly because they were not supported by any facts or studies which would assist us to assess economic consequences in any reliable way. Thus, while we have been mindful throughout the study of the fact that our recommendations may have economic effects, and in some cases have rejected submissions made to us where the economic effects were predictable and thought to be undesirable, in the final analysis we concluded that it would be wrong in principle to allow economic speculation to deter us from recommendations which would bring about an equitable legal balance between the legitimate rights, interests, and expectations of landlords and tenants.

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3. A list of those who made presentations at the hearings is included as an Appendix to this Report.

## CHAPTER I THE LANDLORD AND TENANT ACT

### A. Introduction

That body of law which regulates the relationship between a landlord and his tenant is firmly rooted in the common law of England which we inherited upon the founding of the colony of British Columbia in 1858. A number of the characteristics of the common law relationship are succinctly set out in Williams' *Notes on the Canadian Law of Landlord and Tenant*.<sup>1</sup>

At common law the relation of landlord and tenant is a contractual one, arising when one party, retaining in himself a reversion, permits another to have the exclusive possession, of a corporeal hereditament, for some definite period or for a period which can be made definite by either party. The contract may be express or it may be implied by law. It is not a contract and nothing more, as it vests in the tenant taking possession an estate or interest in the land or premises demised. The doctrine of frustration of contract does not apply to a lease. Tenancies are sometimes created by statute. There may also be tenancies by estoppel. Rent need not be, but usually is reserved, and payment of rent is often evidence of the existence of a tenancy.

The growth of the law relating to landlord and tenant was not, however, the exclusive property of the courts. Legislative intervention was frequent. An early edition of Woodfall<sup>2</sup> lists no less than 88 English statutes affecting the landlord and tenant relationship which were apparently in force in 1858. The earliest of those statutes dates back to 1266.<sup>3</sup>

In 1897 the more relevant provisions of the English statutes were consolidated and included in the Revised Statutes of British Columbia for that year as the *Landlord and Tenant Act*.<sup>4</sup> Subject to minor amendments which were introduced with respect to bankruptcy,<sup>5</sup> the Act of 1897 is still in force as Part I of the existing *Landlord and Tenant Act*.<sup>6</sup>

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1. (3<sup>rd</sup> ed., 1957). Some of the common law characteristics set out have been altered by statute.

2. Woodfall, *Law of Landlord and Tenant* (10<sup>th</sup> ed., 1871).

3. 51 Henry 3, c. 4 (distress on beasts of the plow and sheep).

4. R.S.B.C. 1897, c. 110.

5. See, S.B.C. 1924, c. 27; S.B.C. 1963, C. 21.

6. R.S.B.C. 1960 c. 207 as amended. S.B.C. 1970, c. 18; S.B.C. 1971, c. 58, 2. 9; S.B.C. 1973 c. 47. [Hereafter referred to as the Act]. A consolidated copy of the Act is included as an Appendix to this Report.



## B. Residential Tenancies

At common law, and under Part I of the Act, no distinction was drawn between the law applicable to residential tenancies and that applicable to industrial and commercial tenancies. In the 1960's it became clear that the common law was not functioning efficiently in resolving problems between landlords of residential premises and their tenants. The fact that the legal relationship was very much allied with the concept of the leasehold estate, and the fact that freedom of contract had, in practical terms, come to operate entirely to the benefit of landlords, meant that the law was producing unreasonable and unfair results. The call for reform was virtually unanimous.<sup>7</sup>

The first Canadian jurisdiction to take steps in the direction of reform was Ontario. In 1968 the Ontario Law Reform Commission produced its Interim Report on *Landlord and Tenant Law Applicable to Residential Tenancies*.<sup>8</sup> That Report reviewed a number of the anachronistic consequences which the common law produced and identified a number of matters on which immediate legislative action was thought to be required. The Ontario Commission summarized the reasons for the common law falling behind the needs of both landlords and tenants with respect to residential tenancies in the following fashion:<sup>9</sup>

The common law of landlord and tenant, over the centuries, has not developed any legal philosophy based on a theory of vital interests. The single most important feature of landlord and tenant law is the existence of the leasehold "estate" of the tenant. The vesting of the estate in the tenant underlies the rather fixed nature of the law and has caused courts to determine the rights of tenants according to rigid land law principles rather than in accordance with the more realistic development of contract and tort law which would likely apply in the absence of the estate theory ... Landlord and tenant law is not in a consistently logical sense concerned with the interests of landlords and tenants and it has not even attempted to define them. In a sense the common law of landlord and tenant is mechanical in that its conclusions as to the rights of the parties are based on the fact of the "estate", not on any realistic standard of vital interests which the law will endeavour to protect.

Following the Ontario Interim Report, the Ontario Legislature enacted *The Landlord and Tenant Amendment Act*.<sup>10</sup> The Ontario changes had been in effect for just over a year before our Legislature enacted Part II of the *British Columbia Act*. This legislation to a large extent mirrors the Ontario amendments although there are a number of minor variations between the two which will be referred to later.<sup>11</sup> Most of the

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7. See, M.R. Gorsky, *The Landlord and Tenant Amendment Act, 1968-69 - Some Problems of Statutory Interpretation* 439, 441 (1970 Law Society of Upper Canada Lectures).

8. Hereafter referred to as the *Ontario Interim Report*.

9. *Ontario Interim Report* 10.

10. S.O. 1968-69, c. 58 which added to the existing Ontario legislation Part IV relating to residential tenancies and embodying most of the reforms recommended by the Ontario Commission.

11. Generally the cases decided in the Ontario Courts can be relied on for guidance in interpreting the British Columbia legislation. Reference will also be made to recently enacted remedial landlord and tenant legislation in other provinces; e.g., Manitoba: *The Landlord and Tenant Act*, S.M. 1971, c. 35, amending C.C.S.M. c. L70.

substantive provisions of Part II will be considered severally, in the proper context, elsewhere in this Report.

While it might be thought desirable to elaborate on the anachronistic consequences which Part II was designed to remedy, in our opinion there is little to be gained from such an exercise. The only result would be pointless repetition and a rewriting of portions of the Ontario Interim Report for our purposes. Rather, we suggest that the Ontario Interim Report be read in conjunction with this Report.

### C. The Form of the Act

The *Landlord and Tenant Act* is now divided into two distinct parts. Part II of the Act has almost completely occupied the legislative field with respect to residential tenancies. The provisions of Part I, which still govern commercial tenancies, have a limited effect on residential tenancies.<sup>12</sup>

A statute which contains two different parts which are essentially unrelated creates a situation which is likely to cause confusion in the mind of the layman. Perhaps no other Act of the Legislature is as widely read and interpreted by non-lawyers for guidance in their own affairs. It seems undesirable that the layman wishing to ascertain his rights, and consulting a copy of the *Landlord and Tenant Act* to that end, should immediately be confronted by the anachronistic provisions and archaic language of Part I. We are of the opinion that the contents of the *Landlord and Tenant Act* should logically be contained in two separate Acts and, in particular, that Part II should form the basis of a new *Landlord and Tenant Act* governing residential tenancies.

This cannot, however, be achieved by simply separating Part II from Part I into distinct Acts and retitling Part I. Section 34(3) of the Act provides:

Part I of this Act applies to tenancies of residential premises and tenancy agreements, except in so far as Part I conflicts with Part II, in which case Part II applies.

It is therefore necessary to examine Part I and attempt to identify those provisions which might be applicable to residential premises and do not conflict with any provisions of Part II. Once those provisions have been identified consideration can then be given to the desirability of carrying them forward into a new Act, either in their existing form or with modifications.

Sections 6, 7 and 18 to 32 of Part I are entirely procedural in content. At common law, if a tenant allowed arrears of rent to accumulate or was in default of some other condition of his tenancy which would entitle the landlord to terminate it, or continued in occupation after the tenancy expired, the landlord was obliged to bring an action in the High Court for ejectment. Such proceedings were often slow and expensive. Sections 18 to 32 were designed to overcome this difficulty by providing that a summary application to a County Court might be made.

Sections 6 and 7 are also aimed at avoiding the necessity of an ejectment action in Supreme Court, but are limited to situations where the tenant has

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12. Arguments can be made that some provisions of Part I apply and the courts have not given affirmative answers in all cases. The clear policy of the Legislature, however, appears to be that Part I should have little or no application to residential tenancies.

abandoned the premises. Section 6, which seems to be directed particularly at agricultural tenancies, provides for an application to two Justices of the Peace who may, upon observing certain procedures, put the landlord into legal possession and in effect clear his title of the lease. In most cases when the circumstances of abandonment contemplated by section 6 arise, the landlord would also have a remedy in a County Court under sections 18 to 32.

Part II, however, contains its own procedural provisions which place jurisdiction over residential tenancies in the Provincial Court.<sup>13</sup>

These procedural provisions are to be found in sections 60 to 65. Is there a conflict between the procedural provisions of Part I and Part II? Section 61(1) clearly states:

Unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds he is entitled to possession, except under the authority of an order obtained under section 60.

The wording of that section coupled with the contents of section 34(3) quoted above suggests that the procedures provided by sections 18 to 32 have no application to residential tenancies. That was the result arrived at by the Vancouver County Court in *Oxford Industries Ltd. v. L. F. Conn and M. Conn*.<sup>14</sup>

The exception to section 61(1), however, is where the tenant has abandoned the premises. That is precisely the situation contemplated by sections 6 and 7 which may, therefore, be applicable to residential tenancies. The apparent policy of section 61(1) is that where a tenant abandons the premises the landlord is free to retake possession without the necessity of a court order and, to the extent that section 6 and 7 remain applicable, it might be argued that they impede this policy. Moreover, to the extent that section 6 might assist the landlord in clearing his title of a registered lease, a better remedy exists in the form of an application to the Registrar under section 185 of the *Land Registry Act*.<sup>15</sup> We see little virtue in preserving sections 6 and 7 or sections 18 to 32 in a new Act dealing with residential tenancies.

Sections 2, 4, 5 and 8 relate to distress. The latter three sections are designed to give the landlord a statutory right to distrain where no such right existed at common law. Section 2 regulates priorities with respect to a right to the tenant's goods in a case of a competition between a distraining landlord and an execution creditor. It favours the landlord and provides that before the creditor can levy execution against the goods he is obliged to secure the landlord's interest.

Section 39(1) in Part II provides:

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13. See, e.g., definition of judge s. 34 (1)(a).

14. Per Judge McLellan (Unreported - Vancouver County Court, no. 912/71).

15. R.S.B.C. 1960, c. 208.

16. See, Chapter IX.

Except where a tenant abandons the premises, no landlord shall distress for default in the payment of rent whether a right of distress has heretofore existed by statute, the common law, or contract.

Thus, the remedy of distress has been abolished with respect to residential premises except in the relatively narrow circumstances where the tenant has abandoned. It is recommended elsewhere in this Report<sup>16</sup> that the remedy of distress be completely abolished. Therefore, sections 2, 4, 5 and would have no application to an Act which reflects those recommendations.<sup>17</sup>

Sections 9, 11, 12 and 15 are concerned with establishing, or preserving, a continuity of relationship between landlord, tenant and under-tenant where there has been a change of party, through death or assignment, or some slight alteration of legal relationship through the renewal of a head lease. Essentially, those provisions regard the tenancy as an interest in land and their applicability is sharply called into question by the wording of section 35 which provides:

For the purposes of this Part, the relationship of landlord and tenant is one of contract only, and a tenancy agreement does not confer on the tenant an interest in land.

Moreover, sections 9, 11 and 12 are designed to correct certain common law deficiencies which manifest themselves only in very narrow circumstances which are not likely to occur in the context of modern residential tenancies in this Province. It should also be noted that elsewhere in this Report<sup>18</sup> recommendations are made which clarify the rights and remedies which should be available in the circumstances contemplated by sections 9, 11, 12 and 15. Those provisions should not be preserved in any new Act dealing with residential tenancies.

Section 10 of Part I provides:

- (1) It is lawful for the landlord, where the agreement is not by deed, to recover by action in any Court of competent jurisdiction a reasonable satisfaction for the lands, tenements, or hereditaments held, used, or occupied by the defendant for the use and occupation thereof.
- (2) If at the trial of the action it appears that any rent has been reserved by a parol, demise, or any agreement (not being by deed), such rent may be the measure of the damages to be recovered by the plaintiff.

This provision also reflects the common law position that a tenant's interest was an interest in land. At common law the landlord could not recover rent unless the

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17. It should also be noted that the policy content of s. 2 is questionable. In the past century the tendency of the law has been to promote equality between creditors. Moreover, the inapplicability of s. 2 would not deprive the residential landlord of a claim if an execution creditor seized the goods first. The landlord would still have a remedy under the provisions of the *Creditor's Relief Act*, R.S.B.C. 1960, C. 85.

18. See Chapter VI.

19. See s. 35 and discussion above.

tenant's interest was granted by deed. Section 10 was designed to remedy that deficiency.

For the purposes of recovery of rent, the residential tenancy is now a matter of contract,<sup>19</sup> and section 10 seems obsolete. Moreover, matters of form are regulated by Part II. Section 34(1)(d) defines the term "tenancy agreement" as follows:

"tenancy agreement" means an agreement between a tenant and a landlord for possession of residential premises, whether written or oral, express or implied, where the rent payable under the agreement does not exceed five hundred dollars per month.

Both section 10 and 34(1)(d) have the effect of obliterating the old distinctions between tenancies created by deed and those created by less formal means. As section 34(1)(d) is contained in Part II and is the later provision it seems that, for the purposes of residential tenancies, section 10 has been completely superseded and need not be preserved.

Sections 16 and 17 of Part I give the landlord certain substantive rights against the overholding tenant. They provide that where the tenant overholds after the expiration of his lease, or after having given to the landlord notice of his intention to quit, he is obliged to pay to the landlord, or person otherwise entitled to possession, double rent. These provisions do not appear to provide any relief to the landlord who has given the tenant notice to quit on a periodic tenancy in cases of overholding.

Section 59(1) of Part II provides:

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

Is there any conflict between section 59(1) and section 16 and 17? It might be argued that those sections are complementary. Section 59(1) is silent on the landlord's entitlement to compensation after a lease has automatically expired, as it is restricted to situations where the tenancy has been terminated by notice. Section 17, on the other hand, gives no remedy where the tenancy has been terminated by the landlord. Sections 17 and 59(1) do overlap where the overholding tenant has given notice; but it cannot be said that they conflict merely because one provision provides for double rent and the other is silent on the amount of compensation. Sections 16 and 17 would therefore appear to be applicable to residential tenancies.

Elsewhere in this Report the policy aspects of the "double rent" remedy are considered and that remedy is rejected. In our opinion sections 16 and 17 should not be preserved. The hiatus created by the loss of section 16 should be closed by a specific amendment to section 59(1) expanding compensation for use and occupation to the situation where a tenant overholds after a lease for a specified term has expired.<sup>20</sup>

Sections 13, 14 and 12 (in part) concern, *inter alia*, the situation where rent is to be apportioned among a number of persons entitled thereto. When one such

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20. See Chapter XII.



person dies and his interest is thereby terminated, the rights of his personal representatives are preserved with respect to the proportion which may have accrued to the date of death, but deferred until the entire rent is due. The provision will only be applicable in very limited circumstances which are quite unlikely to arise when the land in question is used for residential purposes and falls within Part II. Nonetheless, it is conceivable that such circumstances could arise, and because Part II is silent on apportionment, it might be useful to preserve the effect of sections 12, 13 and 14 for this purpose. This could be done by including them in a new Act; but because the use of archaic language in such a statute is to be discouraged, we suggest they be incorporated by reference.

Section 33 of Part I sets out certain rights of landlord and trustee in cases where the tenant becomes bankrupt. This section contains the following features:

- (a) upon an assignment, the trustee is entitled to retain the leased premises for up to three months notwithstanding that the lease provides for its automatic termination on bankruptcy.
- (b) If the lease does not terminate automatically, the trustee may surrender possession of the premises or assign the bankruptcy interest in the lease.
- (c) The landlord is given a preferred claim against the estate of the bankrupt for up to three months arrears of rent and may prove as a general creditor for any excess, and may claim up to three months accelerated rent.

Part II is silent on the effect of the tenant's bankruptcy and section 33, to the extent that it does not conflict with Part II, ought to be preserved. Again, we suggest that it be incorporated by reference into a new Act.<sup>21</sup>

Section 3 is the final provision of Part I to be considered in this analysis. It reads:

Any person having rent in arrears or due upon any lease or demise for life or lives may recover such arrears of rent by action as if such rent were due and reserved upon a lease for years.

The preamble to that provision in the original English statute<sup>22</sup> was as follows:

And whereas no action of debt lies against a tenant for life or lives for any arrears of rent during the continuance of the estate for life or lives ...

That summarizes the common law position. Where a lease terminates upon the death of some person no arrears of rent can be recovered. Section 3 was enacted to remedy that deficiency. While almost all tenancies in British Columbia are either periodic tenancies or for a specified term, a lease for life might still arise and in our opinion the effect of section 3 should be directly preserved in any new

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21. We make no comment on the constitutional implications of s. 33. The power of the Province to enact such a provision does not appear to have been tested in the Courts, although s. 50 (6) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, provides some basis for an argument that the provision is *infra vires*. See Williams, *Law of Landlord and Tenant* 659 (3<sup>rd</sup> ed.).

22. *Anne*, c. 14, s. 4.

legislation.

In summary, most provisions of Part I have, or should have, no application to residential tenancies. In some cases the provisions of Part I relate to leasehold estate concepts which are incompatible with the policy of Part II that residential tenancy agreements be a matter of contract. In other cases procedural and substantive provisions are totally superseded by existing provisions of Part II. Other provisions of Part I are rendered obsolete by recommendations contained elsewhere in this Report. The provisions dealing with apportionment and bankruptcy should be preserved, but in some place other than a new Act concerned with residential tenancies. Only the effect of section 3 should be specifically preserved in a new Act of the kind proposed.

The Commission has concluded that a statute governing residential tenancies should be accessible to, and easily understood by, a knowledgeable layman. The elimination of Part I and its archaic and confusing language is the first step toward this goal.

The Commission recommends that:

1. *Part II of the existing Landlord and Tenant Act be repealed and replaced by a new Landlord and Tenant Act relating only to residential tenancies (hereafter "The proposed Act").*
2. *The proposed Act contain the provisions of Part II of the Landlord and Tenant Act, as modified by the recommendations made in this Report.*
3. *The proposed Act contain a provision comparable to section 3 of Part I.*
4. *The proposed Act incorporate by reference sections 12, 13, 14 and 33.*
5. *Part I of the Landlord and Tenant Act be preserved as a separate Act to be known as the "Commercial Tenancies Act."*

## CHAPTER II

## SCOPE OF THE PROPOSED ACT

### A. Tenants and Licences

The common law recognizes two distinct species of relationship by which one person can occupy, or have the use and enjoyment of, the premises of another. Those relationships are that of landlord and tenant, and licensor and licensee. The essential difference is said to be that while a tenancy passes an interest in land, a licence will not. While an occupant may enjoy much the same benefits whether he be a tenant or a licensee, his rights and obligations are somewhat different.<sup>1</sup> One aspect of this difference may lie in the applicability of Part II of the *Landlord and Tenant Act*.

It seems clear that Part II applies only to situations where a landlord and tenant relationship exists. While the term "residential premises" is defined broadly,<sup>2</sup> Part II does not purport to govern all occupancies of residential premises, but applies only to "tenancies of residential premises."<sup>3</sup> Licensees such as boarders and lodgers are, therefore, excluded from the ambit of the Act.

Some controversy has arisen over the scope of Part IV of the *Ontario Act*. There, "tenant" is defined as including an "occupant,"<sup>4</sup> which might conceivably include a residential licensee. Lamont argues that, notwithstanding the definition of "tenant", licence arrangements fall outside the scope of Part IV,<sup>5</sup> and that contention is fortified by the recent decision in *R. v. Poulin*.<sup>6</sup>

Is the present scope of Part II satisfactory? This can only be answered

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1. See, Woodfall, *Landlord and Tenant* 7 et. seq. (27<sup>th</sup> ed.).

2. S. 34(1)(b).

3. S. 34(2) provides:

This Part applies to tenancies of residential premises and tenancy agreements, notwithstanding any other Act or Part, I of this Act and notwithstanding any agreement or waiver to the contrary, except as specifically provided in this Part.

4. A similar definition is found in s. 18 of the *British Columbia Act* but only for the purposes of ss. 19 - 32 and it does not, therefore, apply to Part II.

5. Lamont, *Residential Tenancies* 5 (2<sup>nd</sup> ed. 1973).

6. [1973] 2 O.R. 875 (Ont. Prov. Ct.). Swabey Prov. Ct. J. in dismissing charges under *The Landlord and Tenant Act* added "I wish to make it plain that I am not deciding that all rooming houses do not come within the definition [of occupant]. I am merely deciding on the facts of this case that the relationship of landlord and tenant ... did not exist."

through a more specific examination of the law and practice surrounding the manner in which tenancies and licenses are distinguished. The distinction, at common law, between the interest of a tenant and that of a licensee such as a lodger seems to rest on the answers to two questions: does the occupant have exclusive possession, and did the parties intend to create a tenancy? If the answer to both is yes, a tenancy is created. If the answer to one or both is no, then the interest of the occupant is that of licensee. As to the first, Woodfall states:<sup>7</sup>

Rooms may be let in the same manner as lands and tenements, but a mere lodger who does not have exclusive possession of his room is given nothing more than a licence to reside in the house. The occupier of apartments is not a tenant unless the premises are exclusively let to him, which distinguishes such a person from a lodger ... The question whether a man is a lodger merely, or whether premises have been let to him so that he is a tenant, must depend on the circumstances of each case. There is involved in the term "lodger" that the man must lodge in the house of another man and with him; if a householder retains to himself the general control of a house, with the right of interference, a person who occupies part of that house would seem to be a lodger. If the landlord resides in the house allowing someone to occupy a room or rooms furnished it is a question of fact whether the landlord had an intention to abandon control of these rooms; *prima facie* "the inmate" is a lodger unless there is further evidence of the nature of the relationship ...

As to the second, Williams states:<sup>8</sup>

The English Courts have, since 1942, held that the test of exclusive possession is no longer decisive in determining whether a tenancy has been created or only a licence given. The question is one of intention of the parties and the law does not impute the intention to enter into legal relationships where the circumstances and conduct of the parties negative any such intention.

The test of exclusive possession has never been so severe as to require the would-be landlord to divest himself of all rights to the property except a reversionary interest. An interest which would otherwise be a lease is not a licence merely because it may be subject to certain reservations or restrictions on use.<sup>9</sup> In the context of modern residential tenancies, the tenant may bargain for a whole bundle of rights, some of which may entail the right to exclusive possession of some portion of a building and others the right to use other portions or facilities in common. It could not be argued tenably that an apartment dweller is licensee simply because he does not have exclusive possession of the corridor or laundry room, or because the landlord reserves the right to show the premises to a prospective tenant or buyer.

It follows that there is some degree of elasticity in the notion of "exclusive possession" which permits the courts to look at all aspects of the occupancy to arrive at a common sense decision as to its nature. That seems to be the approach taken by courts in British Columbia and elsewhere. It is well illustrated by the English case of *Appab v. Parncliffe Investments, Ltd.*<sup>10</sup> There, the premises in question consisted of a furnished room in a "residential hotel." The trial judge approached the

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7. N. 1 *supra*, 13.

8. Williams, *Canadian Law of Landlord and Tenant* 8 (3<sup>rd</sup> ed.). See also, Woodfall, n. 1 *supra*, 10.

9. See, Williams *ibid.*

10. [1964] 1 All E.R. 838 (C.A.).

question in the following fashion:<sup>11</sup>

Now I will try to construct some kind of balance sheet. In favour of the view that this was a lodging house the plaintiff was offered a room daily at 15s. She was allowed to leave with virtually no notice. Notices were put up "All visitors to leave by 10:30 p.m." and there was a written instruction by the front door "Keep the door shut." Finally the name "Emperor's Gate Hotel" appears on the outside of the building. On the other side, the accommodation appeared to be self-contained. Keys to both doors were provided together with a separate cooker and no meals were provided. Certain facts can safely be ignored in this kind of arrangement. One may dismiss the fact of service, hot water, and cleaning of staircase and common parts. It is a feature regularly met with in the letting of many blocks of flats in London. The occupants would be very surprised to learn that because these amenities are provided they rank as lodgers. The practice of this court is to treat such people as tenants ... The offer of weekly or daily payment is also thrown into the scale but it is not to my mind conclusive. The sum is no less rent because it is payable *de die in diem*. The notices on the wall in an oral tenancy with no rent book are referable, in my view, to these being some of the terms of a tenancy.

The trial judge concluded that the occupant's interest was that of a tenant. On appeal, it was noted that the "cooker" was no more than a gas ring, the bathroom and water closet were shared in common with others, the owner's services covered not only cleaning the areas in common but daily cleaning of the room, making of beds, and a weekly supply of fresh linen, and that the owner had a right of access to the coin box of the gas meter located in the room. The Court of Appeal, in effect, drew its own balance sheet and concluded that the occupant did not have exclusive possession and was a licensee.

In the opinion of the Commission, such an approach leads to desirable results. In a study such as this, it is always a temptation to attempt to define, with some precision, limitations on the scope of the legislation. Having regard, however, to the multiplicity of situations and combinations of circumstances which can arise, any move in this direction is more likely to result in confusion rather than reform. In the absence of any evidence that those whose interests ought reasonably to be protected by legislation governing residential accommodation, are not being protected, we are of the view that the scope of the Act ought to remain unchanged.

It follows that we reject the suggestion that boarders and lodgers should be dealt with in Part II. In this context one provision of *The Landlord and Tenant Act*<sup>12</sup> of Manitoba calls for special comment. Section 123 provides:

Where a person in any residential premises owned or operated by him for the purpose, provides both room and board in those premises for five or more tenants, the provisions of Part IV, to the extent that they may be reasonably applicable, apply to the room accommodation provided by the landlord.

We see the relationship between a boarder and his "hosts" and other boarders as being a personal one, and regulation by legislation which is essentially aimed at apartment accommodation is inappropriate. It is rendered even more

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11. Per Judge Howard, *ibid.* at 838, 841.

12. S.M. 1970, c. 106, s. 123.

13. A tenancy could exist in such cases, depending on the particular facts, but in most situations it would not.

inappropriate by recommendations contained elsewhere in this Report. Security of tenure in an apartment is one thing but security of tenure at the dinner table is quite another.

Even if such a provision were introduced, much more specific limitations on its operation would be necessary. Section 123, as it stands, could conceivably extend to such diverse situations as nursing homes and nunneries.<sup>13</sup> It is suggested that in those situations the parties are best left to their own terms.

The Commission recommends that:

*The scope of the proposed Act be the same as the scope of Part II and its provisions should not extend to occupancies which, at common law, are treated as licences.*

## **B. Its Application to the Crown**

The Crown, by its very nature, cannot be the tenant of residential premises.<sup>14</sup> The Crown, however, can be, and frequently is, the landlord of residential premises. Public housing seems to be increasing in British Columbia and is a phenomenon which must be reckoned with. Most of this public housing falls, for administrative purposes, under the jurisdiction of the British Columbia Housing Management Commission. There appear to be at least 13 public housing developments in the greater Vancouver area for which that Commission is responsible.

As far as we are able to ascertain, the activities and practices of that Commission conform to the provisions of the *Landlord and Tenant Act*. Compliance with the Act would, however, seem to be more a matter of policy than strict legal requirement.

One of the basic prerogatives of the Crown at common law is the rule that the Crown is not bound by a statute unless named therein or by necessary implication. There seems to be little in Part II of the *Landlord and Tenant Act* which would form the foundation of such a necessary implication. In England the Crown is not presumed bound by the duty imposed upon landlords in the English *Housing Act, 1936* to see that premises are reasonably fit for habitation.<sup>15</sup>

In British Columbia the common law rule regarding Crown liability under statutes has been modified by section 35 of the Interpretation Act which provides:<sup>16</sup>

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14. *Quaere*, the status of the official residence of the Lieutenant-Governor.

15. See, Glanville Williams, *Crown Proceedings Act, 1947* 49 (1948).

16. R.S.B.C. 1960, 199, s. 35.

No provision or any enactment in any act shall affect in any manner or way whatsoever the rights of her Majesty, her heirs or successors, unless it is expressly stated therein that her Majesty shall be bound thereby.

The Crown, therefore, is not bound by a statute unless there is an express statement to the contrary, a position much more restrictive than the common law prerogative.

This Commission has adopted the philosophical position that, as a general rule, those laws which are applicable to any relationship between subject and subject should also be applicable to any relationship between the Crown and a subject. This philosophy is reflected in our *Reports on the Legal Position of the Crown*<sup>17</sup> and *Prejudgment Interest*.<sup>18</sup> In particular we have recommended that:

The British Columbia *Interpretation Act* be amended to provide that the Crown is bound by every statute in the absence of express words to the contrary.

It was our view that the reversal of the presumption contained in the *Interpretation Act* would require those from legislation to turn their minds toward Crown immunity and make a deliberate policy choice as to whether it would be preserved. Any decision that the Crown would not be bound by any particular piece of legislation would then be obvious on the face of that legislation.

If that recommendation were implemented, Part II would be binding on the Crown. While there may be some facets of public housing in which the Crown should have a greater freedom of action than the ordinary landlord, no evidence of these have been brought to our attention in the course of this study. We have, therefore, no basis for any recommendation that the proposed Act contain a provision that it is not binding on the Crown.

The Commission recommends that:

*Assuming the presumption contained in section 35 of the Interpretation Act were reversed in accordance with earlier recommendations of this Commission, the proposed Act contain no provision that the Act is not binding on the Crown.*

At this point it also seems appropriate to comment on two other exemptions from the operation of Part II. Section 44(1) provides that where a tenancy agreement is for a term of six months or longer the tenant, subject to certain restrictions, has the right to assign or sublet the premises. Section 44(2) provides:

Subsection (1) does not apply to a tenant of premises administered by or for the Government of Canada, or of the Province, or a municipality, or any agency thereof, developed and financed under the *National Housing Act*.

That exception is aimed at subsidized housing for low-income tenants. It would prevent a tenant, who meets the income requirements, from assigning or subletting the premises to a tenant who does not meet those requirements. The need for that exception is questionable since section 44(6) provides:

A tenancy agreement that provides that the consent of the landlord is required as authorized by subsection (3) may also provide that instead of

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17. Law Reform Commission of British Columbia, *Report on Civil Rights, Part I - Legal Position of the Crown* (L.R.C. 9, 1972).

18. Law Reform Commission of British Columbia, *Report on Debtor-Creditor Relationships Part IV, Prejudgment Interest* 27, (L.R.C. 12, 1973).

consenting to the assignment, subletting, or other parting with possession, the landlord may, at his option, serve one month's notice of termination of the tenancy agreement on the tenant in the manner provided in this Part.

It is, therefore, open to a housing authority to require its consent to an assignment and preserve the right to terminate if the new tenant is unacceptable. On the other hand, the exception does not appear to have lead to any great mischief and we are not prepared to recommend its repeal.

Section 51(1) places certain restrictions on the frequency of rent increases. Section 51(6) provides:

This section does not apply to

- (a) a tenancy agreement respecting residential premises administered by or for the Government of Canada or of the Province or any agency thereof, or of a municipality, developed and financed under the *National Housing Act, 1954* (Canada), and where the tenancy agreement contains a provision for the adjustment of rent in accordance with a formula contained in any joint agreement between the Government of Canada and the Province, or a municipality, as the case may be; or
- (b) a tenancy agreement respecting residential premises made under the *Housing Act*; or
- (c) a tenancy agreement respecting residential premises made under the *Elderly Citizen's Housing Aid Act*.

That exception also seems aimed at subsidized housing for low income groups and is an expression of the policy that in some cases the rent payable may vary with the tenant's income level. That policy is often crystallized in a specific provision of tenancy agreements with respect to subsidized housing: the so-called "income escalator" clause. If the general provision limiting the frequency of rent raises were applicable to subsidized housing, that policy would be defeated.

It has, however, been argued that the exception is too wide. One brief which we received stated:

While we can see the reason for excepting agreements with a rent adjustment clause contained in an agreement with the Government of Canada, we see no reason for the blanket exception for all housing built under the other two acts. The exception is understandable if applied to agreements which contain a built-in income-escalator clause included in pursuance of some valid law or regulation. But, if the rental agreements for housing built under the latter two acts do not contain such clauses, we see no reason for the exception. Rent in subsidized housing should not be allowed to increase more frequently and with less notice than rent in unsubsidized housing. Such a condition is virtually outrageous since the tenants of housing financed under either the *Housing Act* or the *Elderly Citizen's Housing Aid Act* undoubtedly need more protection than any other class of tenant because of their age and/or economic status. Therefore, WE RECOMMEND that Sections 51(6)(b) and (c) be repealed and the following section be substituted for them:

[This section does not apply to]

- (b) a tenancy agreement respecting residential premises administered by or for the government of the province or any agency thereof, or a municipality or any agency thereof, or a private party, developed and financed under the *Housing Act* or the *Elderly Citizen's Housing Aid Act*, but only where such agreement contains a formula for the adjustment of rent



according to the income of the tenant made in pursuance of any law or regulation of the Government of Canada or of the Province.

That argument has considerable appeal, but it seems to us that it is directed more at a potential problem than an existing abuse. At our public hearings those who submitted the brief were asked if they were aware of any cases where unduly frequent rental increases were vested upon tenants of subsidized housing where an income escalator clause was not in force. They were aware of no such cases. While, in some cases, we are prepared to make recommendations aimed at potential rather than actual abuses, in this case we have some reservations.

Both the *Housing Act*<sup>19</sup> and the *Elderly Citizen's Housing Aid Act*<sup>20</sup> contemplate agreements between the Provincial Government and municipalities with respect to low-rental housing. The latter Act also contemplates agreements with non-profit corporations and the *Housing Act* provides for the borrowing of money secured by debentures. The Commission has no knowledge concerning the provisions of existing agreements between the Provincial Government and municipalities and non-profit corporations pursuant to those Acts. Nor are we aware of the extent to which securities have been issued under the *Housing Act* or the substantive provisions of such securities as may have been issued. We therefore have some fear that any narrowing of the exemption set out in section 51(6)(b) and (c) of the *Landlord and Tenant Act* might interfere with, or amount to a violation of, the rights of municipalities, corporations, and bond holders who have contracted with the Provincial Government with respect to low-cost housing. That fear, coupled with the lack of evidence that the exemptions are being abused, lead us to the conclusion that a recommendation to narrow the exemption would be inappropriate at this time.

### C. The Caretaker's Suite

Section 34(1)(b) excepts from the definition of residential premises those "premises occupied for business purposes with living accommodation attached under a business lease." In most cases the application of that exception is quite clear. A rented grocery store or laundromat, with living accommodation attached, would quite clearly be excepted. Less clear is the applicability of Part II to residential premises occupied by a caretaker or resident manager in a larger apartment building: the so-called "caretaker's guide."

The specific arrangements with respect to the caretaker's suite may vary from building to building, but the caretaker normally pays rent, although it may be somewhat less than the suite would command on the open market. The purpose of this reduced rent may be a "fringe benefit" to make the position of caretaker more attractive to a prospective employee; or it may be a device to ensure that the caretaker stays on the premises. In discussing the application of the *Ontario Act* to the caretaker's suite, and after having drawn a distinction between tenancy and licence

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19. R.S.B.C. 1960, C. 183.

20. R.S.B.C. 1960, C. 125.

21. N. 5 *supra*, 7.

and discussing the role of the intention of the parties, Lamont states:<sup>21</sup>

The above distinction would indicate that the accommodation provided for janitors or superintendents of apartment buildings is almost always on the basis of a licensor and licensee basis, and therefore not under Part IV. [sic]

In *Lesperance v. Montague*, [1947] O.W.N. 257, [1947] 3 D.L.R. 174 (C.A.), dealing with the occupation of a janitor, the judgment stated "when it was necessary, for the due performance of his duties, that a person should occupy certain premises, or he was required to occupy ... for the more satisfactory performance of his duties, such person occupied in the capacity of a servant rather than a tenant.

Furthermore, as above stated, the definition of "residential" in Section 1(c) exempts premises occupied for business purposes with living accommodation attached under a single lease.

This exception would therefore exclude the accommodation provided for a janitor or superintendent of an apartment building, as such accommodation comes within the definition of premises used "for business purposes with living accommodation attached."

Notwithstanding that interpretation, it would be advisable for the owner of an apartment, employing a superintendent who lives on the premises, to expressly provide in the contract of employment that a landlord and tenant relationship shall not be deemed to be created. The agreement providing for the accommodation should state that the janitor or superintendent has only a license to occupy while so employed, with the right of occupancy to terminate with the termination of employment.

On the other hand it can be argued that Part II is applicable because the caretaker occupies the suite solely for residential reasons and not for "business purposes."

It is desirable that the status of the caretaker's suite be clarified. What should that status be? Many of the existing provisions of Part II are for the protection of tenants and there is no apparent reason why these should benefit the caretaker with respect to the premises he occupies. Should a landlord be free to exercise a right of distress, alter locks, and avoid a responsibility to repair with respect to the caretaker's suite when he is not free to do so with respect to any other apartment in a building? We think not. On the other hand, the landlord has a legitimate need to require that a caretaker's occupation of his suite be coextensive with his continued employment. As matters now stand the caretaker *qua* employee may be entitled to only two weeks' notice, whereas *qua* tenant he might be entitled to continue occupancy for up to two months. If Part II were applicable, the landlord would be unable to contract out of the notice provisions and avoid this problem.

We have concluded that the proposed Act should be applicable to the caretaker's suite and extend to the caretaker the protection of the Act while recognizing the realities of the landlord's situation.

The Commission recommends that:

*The proposed Act contain a statutory definition of the term "caretaker's suite" and provide that it is included in the definition of "residential premises;" but the recommendations relating to tenant security should not apply to the caretaker's suite.*

#### D. Mobile Homes

Until 1973, Part II was not specifically applicable to mobile homes or to the so-called "pads" which are rented to the owners of mobile homes by operators of mobile homes parks. The issue had, however, been raised in the courts where it was held that mobile homes and pads were included within the definition of "residential premises."<sup>22</sup> This has now been confirmed by amendments to Part II. Section 34(l)(b) sets out the following definition:

"mobile home" means a dwelling unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.

The definition of "residential premises" was extended to include "a mobile home" and "land that is rented as a space for an upon which the tenant, pursuant to a tenancy agreement, may bring a mobile home."

Elsewhere in this Report we consider the specific problems raised by mobile homes and mobile home parks. Our conclusion is that, while many of the features of the proposed *Landlord and Tenant Act* should be applicable to tenancies involving mobile homes a number of the problems raised are sufficiently different that a separate Act regulating mobile home parks is desirable. The development of such an Act is beyond the scope of this study. We therefore favour the deletion of mobile homes and "pads" from the definition of residential premises, but not until more specific legislation dealing with mobile homes is introduced.

The Commission recommends that:

*The definition of "residential premises" in the proposed Act continue to include mobile homes and "pads" until specific legislation is enacted with respect to tenancies in mobile home parks.*

#### E. Monetary Limitation

In section 34(1) of the Act the definition of "residential premises" specifically excludes premises where the rent payable exceeds \$500 per month. The reason for that exclusion is not clear. It may have been based on a desire to conform to the, then, monetary jurisdiction of Small Claims Court. On the other hand, it may represent a desire to permit a greater freedom of contract with respect to more expensive premises, on the theory that the tenant who can afford rent of \$500 per month is likely to have little need for the protective provisions of the Act.

Whatever the reasoning may have been, the \$500 limitation introduces an anomaly into the law of landlord and tenant applicable to residential tenancies. It places outside the scope of Part II situations to which it should properly apply. For example, it is not unusual for a group of persons to combine their resources and rent a large, old house for residential purposes. In such cases the rent frequently exceeds \$500. Why should the provisions of Part II not extend to such occupancies? We can see no logical reason for the existence of the monetary limitation and to the extent that it is discriminatory we find it undesirable.

The Commission recommends that:

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22. See *Smith Trailer Park Ltd. v. Phillip McBride* (No. 730/70) and *Smith Trailer Park Ltd. v. Eric Erickson* (No. 839/70). Both unreported cases were heard in the New Westminster County Court. These decisions were followed on this issue in *Hrynychuk v. Steel* (unreported - Provincial Court, Kamloops Registry No. 1450/70).

*The definition of "residential premises" in the proposed Act not contain any exemption based on the amount of rent payable.*

## CHAPTER III

## RESOLUTION OF DISPUTES - THE RENTALSMAN AND THE COURTS

### A. Introduction

With the introduction of Part II of the *Landlord and Tenant Act* in 1970, when the relationship between landlord and tenant in respect of residential premises was stated in the legislation to be one of contract only,<sup>1</sup> jurisdiction over disputes arising out of Part II was assigned to Judges of the Provincial Court of British Columbia (hereafter referred to as the "Small Claims Division").<sup>2</sup>

Certain matters were specifically stated to be the subjects of summary applications - the disposition of security deposits;<sup>3</sup> the enforcement of the landlord's obligation to maintain habitable premises and to repair; the enforcement of the tenant's obligation to maintain cleanliness and to repair damage caused by him and his guests;<sup>4</sup> a landlord's claim for arrears of rent and compensation from an overholding tenant;<sup>5</sup> and a landlord's claim for possession.<sup>6</sup> In the case of a summary application under section 49 of the Act a judge had the power to terminate a tenancy agreement or to authorize any repair and order the cost to be paid by the person responsible.<sup>7</sup>

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1. *Landlord and Tenant Amendment Act*, S.B.C. 1970, c. 18, s. 2, enacting Part II of the *Landlord and Tenant Act*, R.S.B.C. 1960 c. 207. See s. 35.

2. *Ibid.* s. 34.

3. *Ibid.* s. 38.

4. *Ibid.*, s. 49 (3).

5. *Ibid.*, s. 59 (4).

6. *Ibid.*, s. 61.

7. *Ibid.*, s. 29 (3).

8. *Ibid.*, s. 65.

It was provided that appeals from the orders of Small Claims Division Judges would lie to a Judge of the County Court.<sup>8</sup>

In 1973 there were some amendments to the jurisdictional provisions of the Act.<sup>9</sup> In the matter of the enforcement of the landlord's and tenant's obligations under section 49, a judge was further empowered to order the landlord or the tenant to remedy any breach.<sup>10</sup> In addition, a new *ex parte* procedure was added to the Act.<sup>11</sup> This procedure is set out in section 60B, which provides that:

- (1) The judge may, in respect of any application under sections 60 and 60A, or any proceeding under this Part, at any time, whether before or during the hearing, upon *ex parte* application, or upon such notice as he may direct,
  - (a) prohibit a landlord or a tenant from contravening the provisions of the Act, or the terms of the tenancy agreement;
  - (b) order a landlord or a tenant to perform and carry out the provisions of the Act, or the terms of a tenancy agreement; and
  - (c) order a landlord or a tenant to keep the peace and be of good behaviour respecting his relations with the other, or other persons involved, until the conclusion of the hearing, or until further order.
- (2) Following the hearing, the judge may make such order as he may consider appropriate in the circumstances, including a further order under subsection (1).

In 1970 municipalities were empowered<sup>12</sup> to establish, by by-law, Landlord and Tenant Advisory Bureaux with the following functions:

- (a) to advise landlords and tenants in tenancy matters;
- (b) to receive complaints and seek to mediate disputes between landlords and tenants;

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9. *Landlord and Tenant Amendment Act*, S.B.C. 1973, c. 47.

10. *Ibid.*, s. 5

11. *Ibid.*, s. 12. The evidence before the Commission shows that this procedure is not being used.

12. *Landlord and Tenant Amendment Act*, S.B.C. 1970, c. 18, s. 2.



- © 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.

In 1973 the establishment of Landlord and Tenant Advisory Bureaux in municipalities was made mandatory.<sup>13</sup> It is to be noted, however, that these bureaux do not have dispute resolving powers beyond those of advice and mediation.

The Province contains two other bodies concerned with solving disputes in landlord and tenant matters. These are the Vancouver Rental Accommodation Grievance Board and the Surrey Landlord-Tenant Grievance Board. Both were constituted by by-law under the authority of the *Rent Control Act*,<sup>14</sup> and their position at law is explored more thoroughly elsewhere in this Report.<sup>15</sup> To the extent, however, that both have provided working examples of alternatives to the Small Claims Division in assisting landlords and tenants to resolve their differences, we have drawn on their experience in formulating our proposals for change.

One of the issues on which the Commission invited specific comment from those submitting briefs was: What courts or bodies should have jurisdiction over disputes between landlord and tenant, and what their procedures should be.

A majority of those who addressed themselves to this question favoured a reduction in (or elimination of) the role of the Small Claims Division and the constitution of municipal boards or special landlord and tenant courts. This view was supported both by those representing landlords' interests and those representing tenants' interests. Landlords in particular emphasized their feelings of frustration over the delay experienced in the Small Claims Division; both landlords and tenants expressed the view that the Small Claims Division lacked expertise in, and understanding of, the practicalities of day-to-day landlord and tenant relations; and a number of respondents called for a dispute resolving body with facilities to inspect residential premises for the purpose of assessing damage. Many of those who favoured the setting up of a special tribunal cited their satisfaction with the Vancouver Rental Accommodation Grievance Board.

A common submission was that the special tribunal should consist of a landlords' representative, a tenants' representative and a neutral third party. Implicit in these submissions is the argument that desirable expertise in landlord and tenant relations is best obtained in this way.

A general impression gained by the Commission from both the written briefs and oral presentations at the public hearings was that there are certain specific

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13. *Landlord and Tenant Amendment Act*, S.B.C. 1973, c. 47, s. 14.

14. R.S.B.C. 1960, C. 338.

15. Chapter XI.



aspects of landlord and tenant relations which are the subject of recurring and frequent disputes, and that it is a commonly held view that the Small Claims Division is not the most appropriate forum for their resolution.

The opinion that the areas of common dispute are comparatively limited and well-defined is supported by the statistical studies which were available to us. Table I in Appendix "D" to this Report shows the breakdown by subject-matter of the landlord and tenant claims lodged in the Vancouver and Victoria Small Claims Divisions in 1972, while Table II shows the same breakdown for the same period for the Vancouver Rental Accommodation Grievance Board. Table III shows the value of landlord and tenant claims made in the Vancouver and Victoria small Claims Divisions during 1972.

A number of the recommendations which we make later in this Report are conditional on the availability of an institution which can act quickly and which has a thorough understanding of the realities of everyday landlord and tenant relations. We cannot go so far as to say that the Small Claims Division could not, given the time, money, personnel and evidentiary and procedural dispensations necessary, develop the ability to act quickly and with the understanding which we regard as being vital to the success of our major substantive recommendations. We do, however, believe that it would be easier, and give rise to less distortion, if a new body, with specific and well-defined functions, were set up to take jurisdiction over certain established aspects of landlord and tenant relations and the new aspects which we propose later in this Report.

In the simplest terms, we are persuaded that the idea of establishing an alternative to the Small Claims Division in solving some landlord and tenant disputes is not inimical to the wishes of a majority of landlords and tenants, and that in setting up a new body a better guarantee of speed and expertise will be offered.

Having come to this conclusion, the question then arises as to the kind of institution which is best suited to the task.

The Vancouver Rental Accommodation Grievance Board and the Surrey Landlord-Tenant Grievance Board, as we have said, provide us with examples of alternatives to the Small Claims Division which appear to have worked and given general satisfaction. On the other hand, however, these are municipal bodies, and from a Province-wide perspective the concept of a municipal body has two distinct disadvantages. First, as we state elsewhere, we believe that landlord and tenant law should be uniform across the Province, and a corollary of this view is that landlord and tenant disputes should be resolved according to consistent principle. If we were to recommend the establishment of municipal bodies to discharge the functions which we believe should be performed outside the Small Claims Division (or the transferring of these functions to existing municipal bodies set up under section 66 of the Act), it is highly probable that the same dispute would be solved in as many different ways as there would be municipal bodies. Secondly, the expense and resources involved in setting up a speedy and expert body in each municipality would be considerable, even assuming that these resources were uniformly available across the Province.

In the light of this, and with the precedent of another Province, Manitoba, to reinforce our thinking, we settled in favour of a centralized body with the facilities to cope with disputes on a Province-wide basis.

We considered the desirability of constituting the new body in such a way as to encompass representation of landlords and of tenants. This did not appeal to us. Its advantage is to ensure that the decision-making body is made aware of the realities of landlord and tenant relations, but representation is not the only way of achieving this. Its disadvantage is that a landlords' representative might have a predisposition to decide in favour of a landlord, and a tenants' representative in favour of a tenant. Leaving aside the question whether, given the wide variety of interests among landlords and tenants as groups, a true representative of either could be found, we concluded that the new body should acquire its expert knowledge of landlord and tenant relations by experience.

In the course of our research on possible alternatives to the Small Claims Division as a vehicle for solving some landlord and tenant disputes we have examined a system established in Manitoba in 1970. Under The *Landlord and Tenant Act*<sup>16</sup> jurisdiction is, broadly speaking, apportioned between the County Court and an official known as the rentalsman. The Manitoba Legislature, in dividing the jurisdiction, appears to have separated from general landlord and tenant law, enforceable in the County Court, areas of common dispute between landlords and tenants which are disposed of by the rentalsman in an informal manner.

#### 1. Functions of the Manitoba Rentalsman

##### (a) *General*

Section 85(3) of the Manitoba statute, describing the general functions of the rentalsman, provides that:

The functions of the office of rentalsman are

- (a) to advise landlords and tenants in tenancy matters;
- (b) to receive complaints and 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.

##### (b) *Security Deposits*

Section 87 of the *Manitoba Act* describes the jurisdiction of the rentalsman in the case of disputes over security deposits.

- 87 (1) Where a dispute arises between a landlord and a tenant as to the return of the security deposit or any part thereof on the allegation of the landlord
  - (a) that the tenant has caused damage to the residential premises concerned; or
  - (b) that the tenant is in arrears in payment of his rent;

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16. R.S.M. 1970, c. L70.

the landlord shall forthwith

- (c) in writing notify the rentalsman and the tenant of his reasons for objecting to the return of the security deposit or any part thereof to the tenant; and
- (d) at the same time, forward the amount of the security deposit with interest thereon of at least four per cent per annum compounded and calculated as required under section 86, to the rentalsman;

and with respect to the alleged damage, the landlord shall furnish the rentalsman with a detailed description thereof together with an estimate of the cost of repairing the damage.

87 (2) Where under subsection (1) the rentalsman receives a notification from a landlord, he shall as soon as is reasonably possible, endeavour to obtain an agreement between the landlord and tenant as to the manner in which the security deposit should be dealt with; and if the landlord and tenant fail to reach an agreement, then the rentalsman shall continue to hold the deposit to be disposed of in accordance with subsection (3) or (5).

87 (3) Notwithstanding subsection (2), where there is disagreement between a landlord and a tenant as to the manner in which a security deposit is to be dealt with, the landlord and tenant may in writing agree to have the rentalsman act as an arbitrator; and in such a case, the finding of the rentalsman is final and binding on the landlord and tenant and is not subject to appeal or review by any court of law.

87 (4) The *Arbitration Act* does not apply to an arbitration under subsection (3).

87 (5) Where under this section a rentalsman mediates or arbitrates a dispute respecting the disposition of a security deposit, and fails within thirty days to complete the mediation or arbitration, as the case may be, he shall in writing forthwith notify the parties concerned of his inability to complete the mediation or arbitration together with his reasons for failing to complete the mediation or arbitration; and if within ten days from the date of receipt of the notification the landlord does not commence an action for the security deposit and interest held by the rentalsman, the rentalsman shall return the security deposit and interest to the tenant.

(c) *Abandoned Goods*

Section 94 of the *Manitoba Act* gives the rentalsman powers in the case of a tenant's abandoning goods on rented premises. The text of section 94 is reproduced in Chapter IX of this Report.

(d) *Failure to Supply Services*

Section 68 of the relates in part to the rentalsman's power where a landlord does not supply certain services to a tenant.

98 (7) Where under the terms of a tenancy agreement, the landlord is responsible for the provision of heat, water and electric power services, or any one or more of them, and the landlord fails or neglects to fulfil his obligation to provide these services; or it appears that a tenant may be deprived of any of those services due to the

failure of the landlord to meet his obligation to the vendor of any of those services, the tenant shall, upon the instruction of the rentalsman, pay the rent as it falls due to the rentalsman;

98 (8) Where the rent is paid to the rentalsman under subsection (7), the tenant shall not be held to be in arrears of his rent and the rentalsman may

(a) hold and continue to receive rents until the landlord provides for the use of the tenant heat, water or electric power services as the case may be; and

(b) where necessary, pay to the vendor of heat, water or electric power services from the rent received, an amount sufficient to ensure the supply of those services to the landlord by the vendors.

98 (9) Where the rentalsman has collected rents in excess of any amount required to be paid under clause (b) of subsection (8), he shall refund the excess to the landlord.

(e) Repairs

Section 119 of the *Manitoba Act* concerns the rentalsman's functions when a landlord's duty to repair premises is in question.

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.

119 (2) Upon receipt of a notification under subsection (1), the rentalsman shall 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.

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 his rent.

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.

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.

- 119 (7) Where under this section a landlord is requested to make reasonable repairs to residential premises occupied by a tenant and the time for appeal under subsection (6) has expired or an appeal taken by the landlord is unsuccessful and the landlord fails or refuses or neglects or continues to fail, refuse or neglect to make the repairs, the rentalsman shall make or cause the repairs to be made and pay the costs thereof from the moneys retained by him under subsection (5) and forward any surplus moneys to the landlord.

(f) Mediation and Arbitration

Section 120 of the *Manitoba Act* concerns the rentalsman's mediation and arbitration powers.

- 120 (1) In the event of any dispute between a landlord and a tenant, either the landlord or the tenant or both may refer the dispute to the rentalsman for the area who shall

- (a) endeavour by mediation to settle the dispute; or
- (b) with the written consent of the landlord and the tenant arbitrate the dispute.

- 120 (2) Where under subsection (1), the rentalsman acts as an arbitrator, his findings are final and binding on both the landlord and the tenant; and *The Arbitration Act* does not apply to the arbitration.

2. Powers of the Manitoba Rentalsman

The Manitoba legislation assigns the following powers to the rentalsman to enable him to carry out his duties.

- 85 (4) For the purpose of investigating a specific complaint under this Act, the rentalsman or any person authorized by him for the purpose, shall, pursuant to an order under subsections (7) and (8), have access to residential premises to which this Act applies, during reasonable hours and to specific documents, correspondence and records relevant to the complaint and may make copies thereof or take extracts therefrom.

- 85 (5) Except for the purposes of a prosecution under this Act, or in any court proceedings, or for the purpose of the administration and enforcement of this Act, neither the rentalsman nor any authorized person shall

- (a) knowingly communicate, or allow to be communicated, to any person any information obtained by or on behalf of the rentalsman under this section; or
- (b) knowingly allow any person to inspect, or to have access to, any copy of any book, record, document, file, correspondence, or other record obtained by, or on behalf of, the rentalsman under this section.

- 85 (6) Subsection (5) does not prohibit

- (a) the communication of information by the rentalsman to persons charged with the administration of any statutes of

Canada or of any other province that relate to the subject matter of this Act; or

- (b) the communication by the rentalsman of any information with the consent of the person to whom that information relates; or
- © the release or publication by the rentalsman, with the consent of the owner of any book, record, document, file, correspondence or other record, or a copy thereof.

85 (7) In carrying out the powers conferred and the duties imposed on the rentalsman under this Act, the rentalsman or any person authorized by him for the purpose may apply to a judge of the County Court for an order granting him access to residential premises, documents, files, correspondence, records and accounts of a person carrying on business to which this Act relates and authorizing him to make copies thereof or to take extracts therefrom.

85 (8) A judge of the County Court may, on an *ex parte* application, issue the order applied for if he is satisfied that the authority for access is reasonable and necessary.

The Commission found the concept of assigning certain landlord and tenant disputes to a rentalsman initially appealing, and asked one of its consultants in the Project, Professor Peter D. Leaski to go to Manitoba to investigate the operation of the system there. He provided us with the following report.

*Report on the Manitoba Rentalsman*

The Office of Rentalsman is to some degree integrated with the Manitoba Consumers Bureau. The Rentalsman is also a director of the Consumers Bureau and Associate Deputy Minister in the Department of Consumers, Corporate and Internal Services. The Rentalsman himself exercises a policy supervision over the activities of the staff in the Office of Rentalsman but his primary operating duties are in the area of Consumer Affairs. The Deputy Rentalsman is in day-to-day charge of the operations of the office of Rentalsman. The Office of Rentalsman is located in Winnipeg and all Rentalsman staff are located there. Rentalsman functions for the whole of the province of Manitoba are carried out by six civil servants. Three junior officers are primarily responsible for answering telephone inquiries. They also deal with certain investigations arising out of telephone calls which they have dealt with and simpler inquiries originating through correspondence referred to them by the Deputy Rentalsman. The senior staff deal with more complex investigation files, arbitration, etc. None of the members of the staff has any legal training. The junior officers include two university graduates and one ex-policewoman. The senior staff include an ex-police detective, an ex-school teacher and an ex-sales manager of a hardware store. Recruitment emphasis has been on suitability for the work in the view of the senior officials rather than any particular set of formal qualifications.

The most impressive feature of the Manitoba Rentalsman's office is the ability to deal with such large volume of work with a relatively small number of officers. The secret of their success is good administration. Without sacrificing flexibility, careful effort has been made to develop standardized forms for dealing with repetitive situations. In addition, there is a very carefully planned usage of personnel to achieve the maximum effectiveness with the minimum expenditure of effort. A telephone call is always used in preference to a letter; a letter in preference to a personal inspection; and the burden of producing information is placed squarely on the parties with whom the Rentalsman's staff are dealing. By focusing sharply on the issues in dispute, the Rentalsman's staff avoid timeconsuming examination of matters which will not contribute to a resolution of the particular dispute with which they are

dealing. The problem of providing Rentalsman facilities to areas of the province outside greater Winnipeg is managed in a number of interesting ways. First of all, great stress in public advertising of the Rentalsman's office is placed on a telephone availability. Calls from outside the greater Winnipeg area are encouraged by the Rentalsman's willingness to pay the toll charges. Furthermore, senior members of the Rentalsman's staff make periodic tours of the outlying areas of the province. During these tours time is devoted to giving information to the public about landlord and tenant matters. In addition the availability of these touring officers is advertised in advance so that people with problems requiring the Rentalsman's office can anticipate the arrival in their area of a Rentalsman officer. In addition, where inspections of rented premises are necessary in areas outside metropolitan Winnipeg the Rentalsman's office calls on R.C.M.P. officers and public health inspectors stationed in the area where the inspection has to be carried out. An additional factor, the importance of which should not be overlooked is that the outlying areas of the province do not produce the proportionate share of landlord/tenant disputes which might be expected on a per capita basis generalizing from the greater Winnipeg experience.

As an indication of the volume of telephone inquiries that can be dealt with without opening a complaint file it should be noted that in 1972 when the office received just slightly fewer than 50,000 phone calls fewer than 2,000 new complaints were registered. It is also interesting to observe that the figures for complaints in Winnipeg were 1,585 and complaints outside Winnipeg 269 despite the fact that roughly half the population of Manitoba live within greater Winnipeg and the other half live outside Winnipeg. By far the largest category of disputes handled by the Rentalsman are disputes involving security deposits; the second largest group involved complaints about landlords' fulfilment of their obligations to repair.

The Manitoba officials interviewed laid great stress on the importance of achieving a reputation for impartiality. They also stressed prompt and inexpensive handling of citizen's disputes. Another principle on which great stress was laid was the principle of uniformity of interpretation. This was in part achieved through training of the junior officers by the more senior ones. It was also accomplished by setting aside a regular part of each week during which all decisionmaking staff of the Rentalsman's office would gather together to discuss caseload and any interesting questions or files.

Included as Table IV in Appendix "D" to this Report is a breakdown by category of the complaints actually registered by the rentalsman's office during 1971 and 1972.

## **B. The Division of Jurisdiction**

The Commission has concluded that the setting up of a rentalsman system in British Columbia, along the lines of the system operating in Manitoba, to share jurisdiction with the courts in landlord and tenant disputes, would go some way towards the goal of achieving speedy and expert settlement of those disputes.

It should be stated at the outset that the conceptual approach to the division of jurisdiction which we favour is that adopted in Manitoba. General jurisdiction in landlord and tenant matters should remain in the courts, and the rentalsman should undertake only those functions which are specifically allocated to him. For example, the rentalsman should have the power to direct repairs to damaged premises, but any action for damages arising out of a failure to repair, whether framed in contract or in tort, should continue to be pursued in the courts.

We should also state at the outset our belief that the rentalsman, in discharging his functions, ought to observe to the best of his ability the rules of natural justice, but ought not to be handicapped to any significant extent by formal

rules of procedure or evidence. The essence of his operation should be a speedy resolution of disputes, based on a knowledge of what is generally acceptable practice between landlords and tenants. His approach should encompass, like that of the Manitoba rentalsman, mediation between landlords and tenants, so that formal confrontation between the two can be avoided as much as possible. He should, however, make himself available to parties for the arbitration of their disputes where both consent and where the rentalsman does not otherwise have exclusive jurisdiction.

Many of the functions which we recommend for the rentalsman are outlined in detail elsewhere in this Report, but for the purpose of clarifying the general role which we propose for him, we list them here.



## 1. Functions of the Rentalsman

### (a) *The Disposition of Rent Deposits*

We recommend in Chapter V of this Report that landlords be permitted to take rent deposits (not greater than an amount equal to one month's rent), to be held by the rentalsman. We also recommend that where there is a dispute over whether the landlord or the tenant is entitled to the rent deposit, the rentalsman should make a final disposition. This is discussed in detail in Chapter V, but we point out here that the following principles should apply to the jurisdiction to be exercised by the rentalsman and the courts.

- (1) Where the amount of a landlord's claim for arrears of rent does not exceed the amount of the rent deposit held by the rentalsman, the landlord should be obliged to pursue his claim with the rentalsman;
- (2) Where the landlord's claim for arrears of rent exceeds the amount of the rent deposit and the landlord wishes to recover the entire amount, he should proceed in the courts. In that situation the landlord should deliver to the rentalsman a copy of the writ or summons and the rentalsman should hold the deposit, pending the determination of the court;
- (3) Where the landlord's claim for arrears of rent exceeds the amount of the rent deposit the landlord should, of course, be free to proceed before the rentalsman against the rent deposit but, having done so, he should be precluded from filing a claim in the courts for the remainder of the arrears.

While we believe that existing rights of appeal from the courts should not be disturbed, we are of the view that in the interest of a speedy disposition of claims, there should be no right of appeal from a determination of the rentalsman in relation to a rent deposit.

### (b) *The Disposition of Damage Deposits*

We also recommend in Chapter V that landlords should be permitted to take damage deposits (not greater than an amount equal to one-half of one month's rent), also to be held by the rentalsman. These damage deposits are to be available in total or partial satisfaction of any legitimate claim which the landlord may have against the tenant for breach of the tenant's obligation to repair damage to the premises caused by him or his visitors.

Once again we emphasize that the availability of this procedure should not preclude a landlord from pursuing an ordinary claim in the courts for breach of the statutory covenant to repair damage where the amount claimed is more than the amount of the damage deposit.

Principles similar to those we have outlined for claims for arrears of rent should apply to the landlord's choice of forum.

- (1) Where the amount of a landlord's claim for damage does not exceed the amount of the damage deposit held by the rentalsman, the landlord should be obliged to pursue his claim with the rentalsman;

- (2) Where the landlord's claim for damage exceeds the amount of the damage deposit and the landlord wishes to recover to the full extent, he should proceed in the courts. In that situation the landlord should deliver to the rentalsman a copy of the writ or summons and the rentalsman should hold the deposit, pending the determination of the court;
- (3) Where the landlord's claim for damage exceeds the amount of the damage deposit the landlord should be free to proceed before the rentalsman against the deposit but, having done so, should be precluded from pursuing the remainder of the claim in the courts.

As we point out in Chapter V, if the rentalsman cannot get agreement between a landlord and a tenant as to the state of the premises, he might in the last resort conduct an inspection.

Where the landlord chooses to sue in the courts, we again do not propose that existing appeal rights should be disturbed. We do, however, adhere to the view that there should be no right of appeal from a rentalsman's determination.

(c) *The Landlord's Failure to Provide Essential Services*

One of the more common areas of dispute and causes for hostility between landlords and tenants is the landlord's failure to provide services to the premises. Under the present law the tenant's most obvious recourse in such circumstances is to the Small Claims Division under either section 49(3) or section 60B of the *Landlord and Tenant Act*. Under these sections the court may either terminate the tenancy or order the landlord to provide the service.

We are of the view, however, that the scheme now operating in Manitoba with respect to the provision of essential services is likely to result in more immediate and effective relief for the tenant. We have already quoted the relevant sections of the Manitoba legislation.<sup>17</sup> In essence the scheme consists of a statutory rent withholding, through the agency of the rentalsman, until essential services of heat, water and electric power are provided (if the landlord is obliged to provide them). Where necessary the rentalsman is empowered to pay the vendor of the services out of the rent withheld, in order to ensure the supply of the services.

We propose the same scheme for this Province, but would extend its scope to encompass the landlord's failure to provide, where he is under an obligation to do so, gas, garbage collection, sewage services and elevator service (if elevator service is considered vital for the tenant's continued occupation of the premises).

We do not think it appropriate for there to be a right of appeal from the rentalsman where he exercises jurisdiction in this area.

We emphasize, however, that where the tenant has suffered loss through the landlord's failure to provide services (whether essential or otherwise), and wishes to make a claim for damages (whether in contract or tort) he should continue to pursue this claim in the courts. The rentalsman's function in this area is purely one of ensuring the actual provision of services.

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17. *The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 98 *supra*.

(d) *The Landlord's Failure to Effect Repairs*

The landlord's failure to effect repairs to the premises which he is obliged by statute or by the tenancy agreement to do, is also a common cause for dispute and hostility between landlords and tenants. Here again, the tenant's most obvious recourse is to the Small Claims Division under section 49(3) or section 60B of the *Landlord and Tenant Act*, and the remedies available consist of a termination of the tenancy by court order or an order that the landlord perform his obligation.

The Manitoba solution has already been outlined<sup>18</sup> and we are impressed with its practicality. As in the case of a landlord's failure to provide essential services, the rentalsman, where the landlord fails to effect repairs and the rentalsman determines that the repairs are the landlord's responsibility, may receive the tenant's rent. On doing so he may either hold the rent until the repairs have been carried out, or himself cause the repairs to be made.

We propose the same scheme for this Province. Our proposal differs, however, from the Manitoba scheme in one respect. In Manitoba the landlord may appeal the rentalsman's determination that he is responsible for repairs to the County Court, and the rentalsman may not cause repairs to be made unless the time for appeal has expired or, where an appeal has been lodged, it has been disposed of. While we agree that the rentalsman's determination is one of law to the limited extent that he must decide whether or not the landlord is actually responsible for repairs by statute or under the tenancy agreement, we view the determination as being substantially, and most commonly, one of fact. We do not, therefore, believe that the delay which might be caused by the lodging of an appeal is justified by the limited purpose which an appeal would serve.

We point out again that while the rentalsman ought to assume jurisdiction in the matter of the landlord's obligation to effect repairs for the purpose of having the repairs made, the tenant who has a claim for damages for any loss occasioned by the landlord's failure should continue to pursue that claim in the courts.

(e) *Discriminatory Rent Increases*

In Part I of Chapter IV of this Report we recommend that a scheme of tenant security be introduced in the Province. We are not, however, in a position to recommend that a scheme of rent control be introduced to reinforce it. Therefore we have made provision for the situation where the landlord may wish to dispossess a tenant and does so by increasing the rent over and above the amount which he charges other tenants in similar circumstances. We discuss this situation in detail in Part II of Chapter IV, and it suffices to say here that we propose that the rentalsman be given power to make a determination, on the motion of a tenant, that a rent increase is discriminatory.

This is not a situation where, in our view, the Small Claims Division has any role to play, and neither do we recommend that there should be an appeal from the rentalsman's determination.

(f) *Hidden Rent Increases*

In Chapter VIII of this Report we point out that there is some ambiguity surrounding the definition of a rent increase. This assumes some importance in

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18. *Ibid.* s. 119 *supra*.

view of the fact that rent increases may not be imposed more than once a year. We propose in Chapter VIII that where a landlord wishes to impose surcharges or withdraw services (each of which may in certain circumstances be a rent increase), the consent of the rentalsman be obtained to adjust the interests involved in an appropriate manner.

In the same chapter we propose that the rentalsman, for the purpose of determining whether a landlord is justified in increasing the rent, also be given power to decide in certain circumstances whether a person residing in rented premises is a permanent resident or a transient.

(g) Abandoned Goods

In Chapter IX we propose a scheme under which the rentalsman would supervise the disposition of abandoned goods on rented premises. The scheme is outlined in detail in Chapter IX, and we mention it here only for the sake of completeness.

(h) Possession

In Chapter IV of this Report we propose that a concept of tenant security be introduced in the Province. Under this scheme, a tenant who wishes to remain in possession of premises after the expiry of the term of his tenancy should have the right to do so unless certain enumerated circumstances exist which make it proper for the landlord to regain possession. The essence of the scheme is that a tenant given notice is entitled to ask for reasons for the notice if he does not wish to move, and is entitled to have the landlord justify his action to the rentalsman, who should then have the power to determine whether one (or more) of the enumerated circumstances exists. If no circumstance exists which would justify the landlord terminating the tenancy, the rentalsman should have the power to hold the termination ineffective. Details of the scheme appear in Chapter IV.

We considered at some length the question whether determinations under this scheme should be made by the courts or by the rentalsman. From one standpoint the decision to be made by the rentalsman is clearly more "judicial" than the other decisions which we propose for him. To a much greater extent the exercise will involve the presentation and rebuttal of evidence, the landlord bringing evidence in support of his decision to terminate the tenancy, and the tenant endeavouring to rebut that evidence by evidence of his own. From another standpoint, however, the qualities which we believe to be most desirable in a rentalsman - the ability to make quick decisions, without evidentiary restriction, based on a knowledge of what is generally acceptable behaviour between landlords and tenants, and among tenants themselves - are of the greatest significance in this context. Landlords have told us, albeit reluctantly, that they could support a scheme of tenant security only if they have access to a tribunal which will accept for what it is worth any evidence which a landlord may have to justify the termination of a tenancy. Similarly we have been told that in the interest of satisfying the majority of tenants in any particular building, that tribunal must be able to act quickly to dislodge a tenant whose behaviour is unacceptable.

We were ultimately persuaded that the advantage of speed and informality which the rentalsman would have over the courts justified our sacrificing the advantage of being able to act more judicially which the courts might have over the rentalsman. In the final analysis the rentalsman's task will be substantially one of finding facts, and we would regard him as well-equipped to perform this task.

We then asked ourselves the very difficult question whether in this instance we should depart from our view that in the interests of avoiding delay, decisions of the rentalsman should not be subject to appeal. We were very much aware that landlords viewed the obligation to retain a tenant whom they regarded as undesirable as potentially disastrous, and would almost certainly view the fact of there being no right of appeal from the rentalsman as heightening the danger.

This notwithstanding, we believe that the dangers of the delay which according a right appeal might bring in the context of tenant security, override the interest of having review of the rentalsman's decision. The same landlord who on one occasion might feel aggrieved by a decision that he must retain a tenant, might feel more aggrieved on another occasion if, having received the rentalsman's blessing for the eviction of a tenant, he were to find himself confronted with an appeal by the tenant. In final defence of the position we have taken on the question of appeals from the decision of the rentalsman on possession orders, we point out that a landlord, having been unsuccessful in dislodging a tenant in one instance, is not prevented from giving notice again if the tenant's conduct deteriorates or if the circumstances otherwise change. We would expect the rentalsman to discourage frivolous or harrassing terminations by landlords, but we cannot support any principle which would estop a landlord from attempting to terminate a tenancy again for any set period after the previous termination attempt.

On balance we have concluded that one of the most important features of tenant security is that the parties should know where they stand, once and for all, for good or ill.

Having decided that the rentalsman should be charged with the responsibility of deciding whether a landlord is justified, within the framework of tenant security, in terminating a tenancy, we then considered whether the Small Claims Division should retain jurisdiction to make possession orders where tenant security is not an issue. Such situations ought to be comparatively rare if our recommendations on tenant security are accepted, but might nonetheless arise in the case of the tenant who does not contest the validity of a notice to terminate but stays on through inertia or for some other reason.<sup>19</sup> Because the situation ought to be rare where possession is sought but tenant security is not in issue, we think that it would be convenient for the rentalsman to be given jurisdiction to make possession orders in all cases.

In making this recommendation we do not wish to ignore the fact that the question of a tenant's entitlement to possession of rented premises may arise as part of, and collateral to, an action in the Supreme Court or a County Court.<sup>20</sup> We do not think that the courts ought to be impeded in disposing of such actions by the assigning of jurisdiction over the matter of possession of residential tenancies to the rentalsman, and the authority of the courts ought to be preserved to that extent.

We do not think it necessary for the rentalsman to have his own staff for the purpose of executing the orders for possession which he may issue. The landlord

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19. See Chapter XII *infra* where the case of the overholding tenant is discussed.

20. See *Supreme Court Rules 1961*, 0.3, r. 6(2) and 0.12, rr. 25, 26, 27, 28. For example, the question of a tenant's entitlement to possession may arise in the context of an action against a landlord by his mortgagee.

21. The landlord's obligation to maintain habitable premises and to effect repairs; the tenant's obligation of cleanliness and to repair damage caused by him or his visitors.

should be able to register the order in the Small Claims Division and have it executed by the Sheriff in the ordinary way. The landlord should not, however, be in a position to use a possession order in *terrorem* against a tenant. To avoid this situation the landlord should be compelled to act on the order within seven days of the date upon which the landlord is first entitled to possession, or seven days of the date the order was issued (whichever is the later), failing which the order should expire. We note, however, that in section 60A of the present *Landlord and Tenant Act* the Sheriff is required to act on a warrant for possession within seven days. While we believe that the Sheriff ought to act as quickly as possible. We envisage circumstances where practically he may not be able to act within seven days. We would therefore recommend that the Sheriff have fourteen days within which to execute warrants for possession.

One final point should be made in the context of orders for possession. Section 49(3)(a) of the present *Landlord and Tenant Act* empowers the Small Claims Division to terminate a tenancy "upon such terms and conditions as the judge sees fit" when the obligations contained in section 49(1) and (2) are not met by either landlords or tenants.<sup>21</sup>

If our recommendations on tenant security are accepted, the only situation in which the power in section 49(3)(a) would be relevant would be where the tenant for a lengthy term, confronted with the landlord's failure to maintain habitable premises or to repair, wishes to go out of possession with judicial blessing before the expiry of the term. We do not believe that it is necessary to preserve this remedy. The tenant should make his own determination whether a material covenant has been breached<sup>22</sup> and should plead the breach as a defence if he is later sued for arrears of rent.

(i) General

One of the most vital functions of the rentalsman ought to be to try as much as possible to engender an amicable atmosphere between landlords and tenants. Although he should have the power in the last resort to make binding determinations in areas where he has jurisdiction, the rentalsman should make all reasonable attempts to refine the issues before him, and should, in appropriate circumstances, endeavour to mediate between the parties before imposing a decision on them.

We are encouraged by the Manitoba experience to believe that these expressions go beyond mere pious hopes. The report made to us on the operation of the rentalsman's office there gives us some confidence that in the ordinary course of events relations between landlords and tenants are not so hostile that the rentalsman cannot in many instances avoid imposing a settlement on the parties.

We were told at our public hearings that a number of the disputes which now arise between landlords and tenants do so because one or the other or both of the parties are in ignorance of the law or are under some misapprehension as to the law. In Manitoba the rentalsman is charged with the function of disseminating information "for the purpose of educating and advising landlords and tenants"<sup>23</sup> concerning rental practices, rights and remedies. Similarly it is his duty "to advise

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22. See Chapter VI *infra*.

23. *The Landlord and Tenant Act*, R.S.M. 1970, c. L70, i. 85(3).

24. *Ibid.*

landlords and tenants in tenancy matters."<sup>24</sup> We propose the same functions for the rentalsman in this Province, in the expectation that by imparting information and advice the rentalsman may assist in preventing disputes between landlords and tenants from arising.

The Manitoba rentalsman is also bound "to receive complaints and mediate disputes between landlords and tenants" and "to receive and investigate complaints of conduct in contravention of legislation governing tenancies."<sup>25</sup> The rentalsman in British Columbia should also have these functions. Indeed, as we have said before, the rentalsman should always attempt mediation, if it is appropriate, before making strict adversaries of the parties.

The functions of the rentalsman and his role in prosecutions under the proposed Act deserve further comment. Under the present system it appears that prosecutions under the *Landlord and Tenant Act* may be less than vigorous. It seems to us that the existence of the rentalsman may assist in the collection of information which will allow the prosecutions to be brought more effectively in situations where they will be most salutary. In other words, we would hope that as the rentalsman develops a clearer picture of rental practices across the Province he will be in a position to encourage appropriate prosecutions.

The rentalsman himself, however, should not prosecute, and it is vital that any information which is imparted to him by any person in the course of any mediation which he may attempt should not be later used against that person in a prosecution. This is not the situation in Manitoba,<sup>26</sup> but we have serious doubts that a rentalsman can function effectively as a mediator when the parties know that information which they may otherwise be disposed to give may work to their disadvantage in a criminal context.

Lastly, we endorse the position taken by the Manitoba Legislature in specifically empowering the rentalsman to act as an arbitrator in any landlord and tenant dispute where the landlord and the tenant both give written consent.<sup>27</sup> We also agree that the *Arbitration Act*<sup>28</sup> should not apply to such arbitrations.

## 2. The Courts

In our attempt to apportion jurisdiction between the rentalsman and the courts we have been engaged in a rough exercise of characterization of functions. Those functions which tend to have an administrative character<sup>29</sup> we have assigned to the rentalsman, while those which tend to be more judicial we have suggested

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25. *Ibid.*

26. *Ibid.* s. 85(5).

27. *Ibid.* s. 120 (1) .

28. R.S.B.C. 1960, c. 14.

29. With the possible exception of the rentalsman's proposed jurisdiction over the rules relating to tenant security.

should remain in the courts.

We have earlier set out the situations in which we propose that the courts should not have jurisdiction, but where landlords and tenants are free to pursue claims in the courts, jurisdiction should go according to the ordinary monetary limits. For example, a landlord should be free to pursue in a County Court a \$2,000 claim against a tenant for breach of the statutory obligation to repair rented premises. Similarly, a tenant suffering personal injury by reason of the landlord's failure to repair, and claiming ten thousand dollars in damages, should continue to be free to proceed in the supreme Court.



### C. Powers of the Rentalsman

We have discussed at some length the functions of the rentalsman, and have made occasional broad references to the procedures which he ought to adopt. We have also set out at some length the powers, such as the power to inspect premises and documents, which the Manitoba rentalsman has been assigned. We have not so far, however, addressed ourselves to the powers which the rentalsman in this Province, given the wide range of functions which we propose for him, ought to have.

We have said that the rentalsman ought not, in discharging his functions under the proposed Act, be bound by the rules of evidence. We recognize that this, on its face, may appear to be drastic proposal, but we are conscious of the fact that to impose the rules of evidence would delay the rentalsman in many cases, when we have said that the ability to act quickly is one of his most desirable attributes. The case of a landlord's application for quick possession<sup>30</sup> may serve to illustrate the point. A tenant may be causing extreme inconvenience to his neighbours by, say, continuous drunken and insulting behaviour. The landlord may, in these circumstances, wish to act quickly on the complaints of the neighbours. He should not be prevented from approaching the rentalsman immediately with a request that the tenancy be terminated as soon as possible, even though he may not himself have been subject to the behaviour over an extended period of time. He ought to be able to tell the rentalsman what the neighbours told him, and the rentalsman ought to be able to receive that statement for what he believes it to be worth. We would, of course, expect the rentalsman to conduct some form of investigation, perhaps by a telephone call to the neighbours, and certainly we would expect the rentalsman to approach the offending tenant. But we do not believe that the rentalsman ought in every case to be obliged to hold a hearing according to the rules of evidence. He should observe the rules of natural justice as far as possible, but should be permitted to receive all evidence submitted to him and act on any evidence which he, in his discretion, believes to be convincing.

Because we view the rentalsman as having an investigatory function as well as acting as a referee between a landlord and a tenant, we would also grant him the power to obtain access to records and to premises which the Manitoba rentalsman has been granted.<sup>31</sup> Although in the ordinary course of events the rentalsman ought, in order to operate efficiently, place the burden of producing evidence on the party or parties before him, he may reach a point where he believes he can come to a fair decision only where he has himself seen records (for example, where it is alleged that rent has not been paid) or premises (where it is alleged that damage has been caused). As these are sweeping powers we would also adopt the Manitoba position of having the rentalsman apply to a Judge of a County Court before being granted these orders of access, and of imposing a duty of confidentiality on the rentalsman.

We have considered whether the rentalsman ought to be granted the power to compel the attendance of witbut have concluded that this is unnecessary. As the rentalsman, according to our proposals, will not be bound by the rules of evidence, he will be able to act, if he thinks fit, in the absence of evidence which might be required by a court. Therefore we would stop short of granting him

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30. See Chapter IV *infra*.

31. *The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 85, *supra*.

power to issue subpoenas to persons.

Two of the matters which we were specifically asked to consider were whether facilities should be available at night for the resolution of landlord and tenant disputes, and what attitude should be adopted with respect to the inclusion or exclusion of members of the legal profession in routine proceedings having to do with tenancy matters.

In relation to the first question we see the flexibility of the rentalsman's operation permitting him to discharge his functions according to the convenience of the parties involved. If there is a demand in any particular case for the availability of his services in the evenings or at weekends, We believe that these demands could and should be reasonably accommodated.

As to the question relating to the legal profession it appears that this is scarcely an important issue. Table V in Appendix "D" shows that under the present system of dispute solving, legal representation is not a significant factor. We see no reason why members of the legal profession should not represent clients before the rentalsman.

One final matter ought to be mentioned. We have so far pointed out that there should be no appeal from decisions of the rentalsman in areas where we have proposed jurisdiction for him. We are therefore led to consider whether his decisions should be subject to judicial review. On balance we have concluded that they should not be. Once again we emphasize that to be quick, efficient and effective the rentalsman should have freedom of action to proceed as he thinks fit, and we are fearful that the process of judicial review would circumscribe his actions to the point where he would not be able to dispose of a statutory deposit or make a quick order of possession without a cumbersome hearing procedure which would destroy his effectiveness.

Lest it be thought that we are totally insensitive to the claims of the rules of natural justice, we point out that although we propose a variety of functions for the rentalsman they tend, with one exception,<sup>32</sup> to be administrative rather than judicial, and we have some confidence that a rentalsman unchoked by the threat of judicial review of his actions, will not be in a position to make unreasonable inroads into the rights of the citizens of this Province.

#### **D. Administration**

One of our more important concerns in recommending the setting up of a rentalsman with Province-wide jurisdiction was the way in which his serviced could be extended to the whole Province.

Our research into the incidence of landlord and tenant disputes in the Province revealed that outside some major urban centres there are very few. Table VI in Appendix "D" shows that the percentage of landlord and tenant disputes in Small Claims Division is generally low, and it is interesting to note that only in Nanaimo, New Westminster, Surrey and Vancouver does the percentage rise above four per cent. In Victoria only one and one half per cent of the Small Claims Division actions concerned landlord and tenant disputes. In the remaining centres investigated the percentage was negligible or nil.

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32. The jurisdiction to make possession orders.

We cannot begin to speculate as to the reason for the disparities in the incidence of disputes shown by these figures but for us the most significant factor was that the same disparities are evident in Manitoba. There, where half the population lives outside Greater Winnipeg, the rentalsman in 1972 registered 1,585 complaints arising in the Greater Winnipeg area, and only 269 outside. The similarities between the population configurations of Manitoba and British Columbia are obvious, and while perhaps they are not conclusive, we have some confidence that if a centralized rentalsman system can work in Manitoba, it can also work here.

Earlier in this Chapter we outlined a report which we received on the Manitoba experience, and it is to be noted that the rentalsman in Winnipeg is able to discharge his responsibilities outside the metropolitan area by making toll-free telephone lines available, by use of correspondence, by occasional tours to outlying areas, and by asking local officials to make investigations where necessary.

We should point out, however, that there are two significant differences between the rentalsman scheme in operation in Manitoba and the scheme which we propose here. First, we propose that the number of functions to be discharged by the British Columbia rentalsman be greater than those discharged by the Manitoba counterpart. Secondly, we propose that the rentalsman here take jurisdiction over the making of possession orders. It is in this situation that speed and actual presence may be most important. We suggest that the significance of both differences between the Manitoba scheme and the scheme which we propose here may be overcome by a larger staff and an emphasis on mobility. Given the fact that landlord and tenant disputes do not appear to be all that common outside the lower mainland area, we would not expect that the rentalsman would have to go to outlying areas at short notice with any frequency, but if a dispute reaches a stage where the presence of the rentalsman or one of his staff is required quickly, we believe that that service should be made available. It would, of course, be for the rentalsman to determine whether a dispute was of that category, or whether it could properly be solved during one of the rentalsman's regular visits to outlying areas.

The rentalsman in Manitoba is at pains to advertise widely the availability of his services, the fact that toll-free lines are available to his office, and the dates of his visits to various areas of the Province, and we go so far as to hope that even with a decentralized operation the rentalsman in British Columbia could offer more assistance to landlords and tenants in outlying areas than is now available.

The *Manitoba Act* does, however, provide in section 85 that:

- (1) ... the Lieutenant Governor in Council may designate one or more persons as rentalsman who shall, in addition to carrying out such duties as are required by this Act, carry out such other duties and perform such functions as may be prescribed by the Lieutenant Governor in Council.
- (2) A rentalsman designated under subsection (1) may be designated from among persons employed in the government service and may be required to serve within a specified area of the province.

We would recommend the inclusion of a provision similar to section 85(2) of the *Manitoba Act*, to meet the possibility of a situation in which it would be desirable to decentralize the operation of the rentalsman's office. Events may prove it convenient or necessary to appoint a rentalsman for, say, Vancouver Island or for sections of the interior of the Province, and the power to follow this course of

action should be contained in the proposed Act.

One of the criticisms which may potentially be levelled at the rentalsman system as we have outlined it is that the rentalsman and his staff may become overburdened with work at the beginning of each month, because of the numbers of people vacating premises at the end of the previous month. It may be said that this press of work will prevent the rentalsman from discharging his functions efficiently. In answer to this we point to the fact that this situation does not appear to have caused difficulty in Manitoba, where the rentalsman has been able to devise administrative techniques for avoiding unworkable situations. In the normal case of a monthly tenancy, a landlord will have an opportunity, early in the month of termination, to inspect the premises for damage, and will ordinarily be in a position to decide whether he has a claim against the statutory damage deposit well before the end of the month. The rentalsman will thus be in a position to put his processes into operation without waiting for the beginning of the next month. Such inspections as he feels required to conduct need not all take place on the day the tenant is vacating the premises.

We acknowledge that if our recommendations are accepted the rentalsman in British Columbia would be charged with the additional responsibility of reviewing notices of termination. We draw attention to the fact, however, that substantial numbers of tenancies are terminated by tenants. Where notices are given by landlords we expect that only a small percentage will be the subject of detailed review before the rentalsman. Of that percentage, the vast majority will involve monthly tenancy situations where the request for review is made at least 15 days before the tenancy is due to expire. Once again, the rentalsman's processes can begin in the middle of the month, and his inspections, if necessary, need not take place all at once on one or two days in a month. It is worth mentioning that in Surrey, where a security of tenure scheme has been operating for some time, there does not appear to be any evidence that the scheme is failing because of administrative inconvenience.

We do not, therefore, believe that the criticism of impracticality which may be made of the rentalsman system ought to be persuasive.

Finally, we think it important that the rentalsman have legal qualifications. We have already said that the rentalsman should observe as far as possible the rules of natural justice, and where, in particular, he is deciding matters relating to possession, a knowledge of the law and legal procedure will, we believe, be crucial. It does not follow that all the rentalsman's staff ought to be legally qualified. In most of the routine situations which, if the Manitoba experience is any guide, will arise in the rentalsman's office, legal qualifications would be irrelevant. We emphasize however that the exercise of the more important functions will call for an appreciation of the law which only a lawyer would have.

The Commission recommends that:

1. *In the proposed Act an official known as the rentalsman be given exclusive jurisdiction over, and functions related to, the following matters involving the landlord and tenant relationship:*
  - (a) *the disposition of rent deposits;*
  - (b) *the disposition of damage deposits;*
  - (c) *a landlord's failure to provide essential services;*

- (d) *a landlord's failure to effect repairs;*
  - (e) *the imposition of discriminatory rent increases;*
  - (f) *the determination of the nature of "hidden" rent increases;*
  - (g) *the supervision of the disposition of abandoned goods;*
  - (h) *the making of al possession orders;*
  - and*
  - (i) *certain advisory, investigatory, mediatory, arbitral and educative functions.*
2. *There should be no right of appeal from a decision of the rentalsman, and his decisions should not be reviewed in any court.*
  3. *Matters arising out of:*
    - (a) *the proposed Act; and.*
    - (b) *the general law of landlord and tenant;**over which the rentalsman is not allocated specific jurisdiction, should continue to be decided in the courts.*
  4. *The courts should continue to have the power to decide on questions of possession of residential premises which may arise collaterally in any other action.*
  5. *It should be made clear that the Provincial Court of British Columbia does not have exclusive jurisdiction over those matters arising out of the landlord and tenant relationship which would be reserved for the courts if our recommendations are accepted.*
  6. *The rentalsman, in exercising his jurisdiction, should attempt to observe the rules of natural justice as far as possible, but should not be bound to act in accordance with the rules of evidence.*
  7. *The rentalsman, acting on the authority of an order of a Judge of a County Court, should have the powers of access to documents and to premises, subject to the same limitations as to confidentiality; set out in section 85(4) to (8) of The Landlord and Tenant Act of Manitoba.*
  8. *The rentalsman should have legal qualifications.*

#### Memorandum of Dissent of Mr. Peter Fraser

##### Prosecutions

If the recommendations of this Report are accepted and become law, certain kinds of conduct will become offences punishable on summary conviction. Based upon the experience under the present Act, I believe that the penal provisions will be ineffective unless the rentalsman is authorized to initiate and conduct prosecutions; that it is not enough to permit him merely to "encourage" prosecutions.

Despite apparently widespread disobedience of the present Act, there does not seem to have been a significant number of prosecutions. The reasons are not clear. It may be that knowledge of violations is not reaching the authorities; or it may be that they are given low priority.

The rentalsman, with his direct involvement in landlord-tenant matters and his access to information, seems to me the logical person to be given the conduct of prosecutions, if we wish to avoid having legislation which is not enforced.

The fear expressed is that this would detract from his appearance of impartiality and therefore undermine his mediation role. The slight evidence from Manitoba (where the rentalsman has been involved in a few prosecutions) suggests - and I believe - that the fear is unfounded.

#### Memorandum of Dissent of Mr. Paul D.K. Fraser

##### \_\_\_\_\_Appeals from the Rentalsman

I am unable to agree with the Commission's recommendation that the decisions of the rentalsman on possession orders should not be subject to appeal or judicial review.

The single reason for the majority recommendation is the avoidance of the delay that would accompany an appeal. The majority seek to comfort an unsuccessful landlord by pointing out that he is not estopped from taking new possession proceedings if the situation with the tenant gets discernably worse. No comfort is offered to the tenant against whom the rentalsman has made an order for possession and who, if he lives in the Greater Vancouver area at the date of the writing of this Report, finds himself looking for accommodation in a market that displays a critical shortage and a vacancy factor of less than one per cent.

There can be no doubt that the rights of either a landlord or a tenant are affected by the rentalsman's decision with respect to possession. In this area he will be exercising a "judicial" function as opposed to an administrative function. He will be the master of the procedures before him and in making his decision he will be entitled to rely on all of the information he can accumulate without regard to any legal test of admissibility. No one disputes that the rentalsman can be wrong in his decision just as no one disputes that a wrong decision may have a profound effect on the losing party. Nevertheless, the majority Report denies access to the courts by way of an appeal of the rentalsman's decision.

In my respectful opinion, access to the courts should only be cut off where it is immediately apparent that legal proceedings are entirely inappropriate in the circumstances. I cannot be so convinced in matters of landlord and tenant. Although the time limited for our research has been brief, the Commission was not aware of any Act in North America relating to landlord and tenant that denied the parties access to the courts. That is, of course, no reason for the Commission to be timid where it believes its recommendations to be sound; but it is a measure of the importance that other jurisdictions have attached to access to their courts.

I am convinced that appeal provisions will assist the quality of the rentalsman's decisions on possession orders.

In my view an appeal from the rentalsman's decision should be by way of trial *de novo* before the Small Claims Division of the Provincial Court of British Columbia. It seems to me, with respect, that that court is well-equipped to handle the appeals and its priorities can be accommodated to their urgency. In my view, an appeal should be filed within 48 hours of the rentalsman making a decision and I have no doubt that administrative arrangements could be made to have the appeal actually heard within five days of the filing of the notice of appeal. Two or three Provincial Court Judges could be made available where and when

necessary to hear appeals.

In making the recommendation I do, I am not unmindful of the fact that some of the information that the rentalsman had before him will not be admissible in court. It occurs to me that the presence of appeal provisions will oblige the rentalsman to base his decision at least in part on such information as he knows would be both admissible and persuasive to a court in the event an appeal is launched.

I recommend that:

*There should be a right of appeal from a decision of the rentalsman with respect to an order for possession; the appeal should be by way of trial de novo to the Small Claims Division of the Provincial Court of British Columbia with no right of subsequent appeal.*

## CHAPTER IV                    TENANT SECURITY AND RENT CONTROL

### PART I - TENANT SECURITY

#### A.     Introduction

It has been urged on us by tenants' organizations and others that the month-to-month tenant of residential premises should receive a greater measure of security of tenure than the present law provides. Tenant security was one aspect of landlord and tenant relationships upon which we specifically invited comment, and almost every submission which we received dealt with this question in one way or another. Not surprisingly, increased tenant security was almost unanimously opposed by landlords and their spokesmen. Their position was that the existing "one month's notice" position should remain unchanged and that "short notice" provisions should be added to deal with extreme cases of tenant misbehaviour.

The briefs which we received from municipal bodies, local grievance boards, and advisory bureaux dealing with landlord and tenant matters were divided on this issue, although the majority seemed to favour increased tenant security. A submission was also made to us, at our hearings, by a representative of an organization of apartment resident managers and caretakers. They too favoured the proposition that a notice given by a landlord terminating a tenancy should be justified.

This Chapter will be devoted to the description of the existing law in British Columbia with respect to tenant security, an examination of the law in other jurisdictions where forms of tenant security exist, an exploration of the arguments for and against a change in the law, and our conclusions and recommendations.

#### B.     The Present Position

##### 1. \_\_\_\_ General

The substantive provisions relating to the termination of tenancy agreements are set out in sections 52, 55, 56, and 57 of the Act. The procedural aspects are contained in sections 53, 54, and 63. The substantive provisions read as follows:

52. A weekly, monthly, year-to-year, or any other kind of tenancy determinable on notice may be terminated by either the landlord or the tenant upon notice to the other and, unless otherwise agreed upon at the time the notice is given, the notice
- (a) shall meet the requirements of section 53;
  - (b) shall be given in the manner prescribed by sections 54 and 63; and
  - © shall be given in sufficient time to give the period of notice required by section 55, 56, or 57, as the case may be.
55. (1) A notice to terminate a weekly tenancy shall be given on or before the last day of one week of the tenancy to be effective on the last day of the following week 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.

56. (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.

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

(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.

It should be noted that the Act does not draw any distinction between a notice given by a landlord and the notice given by the tenant. No reasons are required by either party and the time within which notice must be given is the same for each party.

It should also be noted that the Act uses the words "notice to terminate." Terminology presents special problems. Notice to terminate given by a landlord has been referred to as: "eviction," "eviction notice," "notice to quit," and "notice to vacate" in various submissions which we have received. The language of the Act seems preferable and we propose to use it throughout this Chapter.

As most rental accommodation in British Columbia is occupied on a month-to-month basis by the tenant, the most significant provision is section 56, which requires that the landlord who wishes to terminate a month-to-month tenancy give no less than one month's notice. The landlord is free to give a longer notice if he chooses. Before 1973 the parties were free to contract out of the requirements of section 56 and it was not uncommon for landlords using standard form tenancy agreements to provide that the month-to-month tenant must give 45 days' notice to terminate the tenancy while the landlord was free to terminate the tenancy on 72 hours' notice. The Legislature, in 1973, amended section 52 to provide that the parties could only contract out of the statutory notice requirements "at the time notice is given." This substantially improved the tenant's position.

The notice provisions with respect to weekly and yearly tenancies are similar to the ones governing monthly tenancies.

## 2. Retaliatory Evictions

In 1968 the Ontario Law Reform Commission pointed out that:<sup>1</sup>

One serious difficulty with any law to provide for the protection of tenants is that the tenant who takes advantage of it may receive a one month's notice

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1. *Ontario Interim Report 73.*

to quit, if he is a periodic tenant, or may fail to have his lease renewed in the event that he has a tenancy for a fixed term. This is known as retaliatory eviction. Unless some measure of protection from retaliatory eviction is enacted the purpose of remedial legislation may be frustrated.

The Ontario Commission made a recommendation couched in terms similar to those contained in section 61(2) of the British Columbia *Landlord and Tenant Act*. That provision reads:

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 bona fide 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.

That provision sets out two defences which may be available to the tenant in proceedings by a landlord for possession. Rather than providing for "no eviction without just cause" the section seems to say "no eviction for unjust cause" with "unjust cause" being defined quite narrowly. The expression "secure or enforce his legal rights" used in that provision has been interpreted in a number of decisions<sup>2</sup> and has not caused any serious difficulty.

It is clear, however, that the power of the judge under section 61(2) is discretionary, and that there is no obligation to refuse to grant an order for possession even if the tenant is found to have made a complaint to a government authority.<sup>3</sup> In this context it is interesting to note the remarks of Professor Sinclair in his *Working Report on Landlord and Tenant Law* prepared for the Law Reform Division of the New Brunswick Department of Justice:<sup>4</sup>

It is tempting to provide in this type of section that there is a time limit beyond which the landlord may move so that if the tenant has complained to an authority of actions by the landlord, then the landlord may not make a move to dispossess the tenant within, say, a period of 60 or 90 days. It has been made clear to some legislatures that beyond, say, a 90-day period the landlord should be free to do as he pleases, and a number of states in the United States have, in fact, chosen this route. New Jersey, for example, has a 90-day provision so that the tenant only has a defence that he is being dispossessed because of complaint, if a complaint was made within the last 90 days. The situation has so

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2. *Rosenthal Holdings Ltd. v. Lewis Williams* (No. 3266/70, Vancouver Provincial Court, unreported); and *William Hynchuk v. Chester Steele* (No. 1450/70, Kamloops Provincial Court, unreported). For a discussion of these decisions see S. Rush, *B.C. Landlord/Tenant Relations* 58 (2<sup>nd</sup> ed. 1972).

3. *Cf. Icelandic Old Folks Society v. Robert Gee* (No. 3239/70, Vancouver Provincial Court, unreported) where the discretion was not exercised.

4. Allan M. Sinclair, *Survey of Landlord and Tenant Law: A Working Report* 183 (1973).

worked out in New Jersey that a complaint has to be made now every 90 days, say, to the Department of Health, or some other municipal agency, in order to keep the tenant's rights alive, and the landlord cannot proceed to remove him.

Increased tenant security, depending upon the specific scheme chosen would seem to render provisions such as section 61(2) obsolete and unnecessary.

### C. Comparative Study

In this section a number of existing schemes of tenant security are examined. For present purposes they are divided as follows:

- (a) Schemes operating in conjunction with a system of rent control:
- (b) Schemes which are independent of rent control.

#### 1. \_\_\_\_ Security of Tenure Schemes Dependent on Rent Control

Most of the security of tenure schemes in the common law world have formed part of a larger scheme of rent control.<sup>5</sup> Rent control was first introduced in Great Britain in 1915 as a response to the housing shortage of World War I. It both froze rents and granted security from eviction. This scheme has provided a model for others in Britain and other common law jurisdictions. The British scheme will be briefly examined as well as a number of other schemes which followed it.

##### (a) \_\_\_\_ *The British Scheme*

Britain has had one form of rent control or another since 1915, although various attempts have been made over the years to free large numbers of dwellings from its application. In the 1950's there was a noticeable trend toward relaxing control, but in the 1960's it again became more stringent. Today, most rented premises are subject to some sort of government regulation or control.<sup>6</sup> The system is complex, with various kinds of dwellings coming under different

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5. In "Rental Control in Canada," an article contained in the first volume of the Refresher Course Lectures arranged by the Law Society of Upper Canada in 1945, Wishart Spence, now Mr. Justice Wishart Spence of the Supreme Court of Canada, said at 295 " ... security of tenure is absolutely necessary for the enforcement of control of the price; experience has shown that so soon as security of tenure is let go; control of price disappears." In 1968 the Ontario Law Reform Commission, in its *Interim Report* said at 64 "Peacetime rent control cannot overlook tenure control. These two concepts are opposite sides of the same coin. Almost every rent control system maintained in

6. Premises in the top range of rateable value are free from government regulation or control. The *Rent Act 1965* extended protection to tenancies where the rateable value of property did not exceed 400 in Greater London or 200 elsewhere. The scheme of protection was continued by the *Rent Act 1968*. It should be noted that the rateable value of property is determined according to principles set out in the *Rating and Valuation Act 1925*, c. 90. The number of tenancies excluded by the high rateable value provision is not great; as one writer put it: "The exception is not quantitatively important because almost all such houses are owner-occupied." See *Cheshire's Modern Law of Real Property* 461 (11<sup>th</sup> ed. 1972 E. H. Burn).

7. "Controlled" dwellings are those to which earlier legislation, established the level of rent for different dwellings, applies. These are being phased out in favour of "regulated" dwellings, i.e., those mentioned in n. 6. The system provides that, where there is disagreement between landlord and tenant as to the level of rent, the matter may be referred to a Rent Officer, who, taking into account all the circumstances which would determine the rental level of the dwelling, except scarcity, determines a "fair rent," which is binding on both parties. For a discussion of the scope of the 1968 Rent Act, see *Lewis and Holland, Landlord and Tenant* 239-241 (1968). The same text contains a discussion of the system of rent control operating under the Act (at 247-251).

schemes.<sup>7</sup> What is important, however, for the purposes of this study is that all regulated or controlled dwellings are subject to a scheme of security of tenure. The *Report of the Committee on the Rent Acts, 1971* stated that the present legislation has a dual purpose: protection against excessive rents and the provision of security of tenure.<sup>8</sup>

The letting of a regulated or controlled dwellings in Britain, for whatever term, gives tenants rights of occupation which may continue for the rest of their lives and for two further lives within the family.<sup>9</sup> The tenancy cannot be terminated against the wishes of the tenant unless one of the specified grounds for possession is proved to the satisfaction of the court. Even then, the court need not make an order unless it regards it as "reasonable" to do so.<sup>10</sup>

The system provides that where landlords wish to regain possession of regulated or controlled tenancies, they must apply to the court for a possession order. The court may grant such an order where it thinks it "reasonable" to do so and where the court is satisfied that suitable alternative accommodation is available for the tenant or will be when the order in question takes effect, or where one of the following grounds is established:<sup>11</sup>

- (a) there has been nonpayment of rent lawfully due, or any other breach of an obligation of the tenancy;
- (b) any of the following acts has occurred on the part of the tenant, any person residing or lodging with the tenant, or a sub-tenant;
  - (i) conduct which is a nuisance or annoyance to adjoining occupiers,
  - (ii) conviction for using or allowing the premises to be used for an immoral or illegal purpose,
  - (iii) acts or waste, neglect, or default, causing the conditions of the premises to deteriorate (and the tenant has not taken such steps to remove the offender if he or she is a lodger or sub-tenant);
- © in consequence of the tenant having given notice to quit, the landlord has contracted to let or sell the premises or taken some other step whereby he or she would be seriously prejudiced if

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8. In the Report of the Committee on the *Rent Acts, 1971* (the report of a committee appointed in October 1969 by the Minister of Housing and Local Government and the Secretaries of State for Scotland and Wales to review and report on the operation of rent regulation under the *Rent Act 1965* (consolidated, 1968, c. 23)). The Committee indicated in the opening paragraph that the legislation, like earlier legislation dealing with control, has two objectives - to give protection against excessive rents and to afford security of tenure (at 3).

9. That is for the lives of the spouse and/or another family member bona fide residing with the tenant at the time of his or her death. See *Rent Act 1968*, c. 73, Schedule 1.

10. *Rent Act 1968*, C. 23, s. 11.

11. These are set out in Schedule 3, Part I of the 1968 Act; they refer to provisions in section 10.

possession were not obtained;

- (d) the tenant has assigned or sublet the whole, or a part, of the premises without the landlord's consent;

- (e) the landlord reasonably requires the premises for the residence of a whole-time employee of the landlord, or a tenant of his or hers where the tenant was formerly in his or her employ, or the dwelling was let in consequence of that employment;
- (f) the landlord reasonably requires the premises as a residence for himself or herself, any son or daughter over eighteen years, his or her mother or father, or the mother or father of his or her spouse. A qualification exists to this ground that an order will not be made where the court considers that greater hardship would be caused by making it than by refusing it;
- (g) A sub-tenant has been charged more than the recoverable rate for the sublet premises.<sup>12</sup>

Where an order is granted on the basis of one of these nonmandatory grounds, section 11 of the 1968 Act gives the court discretion to stay or suspend execution of the order, or postpone the date of possession for such period or periods as the court thinks fit. The court may also attach to the order any other conditions it thinks fit.<sup>13</sup>

The court *must* grant an order for possession where the landlord establishes one of the following grounds:

- (a) The landlord formerly lived in the premises and requires them for himself or herself or any member of the family residing there with the landlord when he or she was last living there. This is subject to the qualification that written notice that possession might be required was given before the start of the tenancy;
- (b) The premises have been held for the purpose of being available for occupation by a minister of religion as a residence from which to perform his or her duties and are now required for such occupation. Again, written notice must have been given of this possibility before the start of the tenancy;
- (c) The landlord requires the premises which were at one time occupied by a person employed in agriculture under the terms of his or her employment for the occupation of a person whom the landlord employs or will employ in agriculture.
- (d) The premises are overcrowded in such circumstances as to render the occupier guilty of an offence;
- (e) The premises are unsanitary;

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12. The grounds have been summarized in this way by T.M. Aldridge, in *Rent Control and Leasehold Enfranchisement* 29-32 (3<sup>rd</sup> ed. 1970). For a further discussion of some of the important grounds on which an order for possession will be given, see *Cheshire, op. cit. supra* n. 6, at 466-469.

13. *Rent Act 1968, C. 23, s. 11.*

14. The grounds are enumerated in Schedule 3, Part II of the 1968 Act; they are given here as summarized by Aldridge, *op. cit. supra* n. 2, at 32-34.

- (f) The premises are required by a development corporation or a local highway authority for new town purposes;
- (g) The premises are a part of a house in which an undertaking has been given that it will not be used for human habitation because of inadequate means of escape from fire.<sup>14</sup>

When one of these grounds has been established, the judge has no discretion of any kind.<sup>15</sup>

It should be noted that a possession order can only be obtained by landlords by court order. Section 30 of the *Rent Act, 1965*<sup>16</sup> makes it a criminal offence to "unlawfully deprive" a tenant of occupation; that is, to take possession without first obtaining a court order. The same section also makes it an offence to harass a tenant or unreasonably to withdraw services for the purpose of causing the tenant to leave the premises.

In conclusion it must be emphasized that security of tenure applies only to those dwellings which are controlled or regulated. Thus, it does not apply to more expensive rented accommodation;<sup>17</sup> neither does it apply to furnished premises which for a variety of reasons<sup>18</sup> are exempted by the legislation.<sup>19</sup>

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15. *Rent Act 1968*, c. 23, s. 11(5).

16. Section 30 is in Part III of the 1965 Act, which was not consolidated by the 1968 Act.

17. N. 6 *supra*.

18. See *Cheshire*, *op. cit. supra* n. 6 at 459-460.

19. *Rent Act 1968*, s. 2(l)(b). "The Act does not apply to those furnished dwellings where the amount of the rent which is fairly due to attendance or to the use of the furniture (having regard to its value to the tenant) is not a substantial part of the whole rent ... Thus, most furnished dwellings are not 'regulated' ones. However, an application can be made to a Rent Tribunal to fix a reasonable rent for furnished dwellings not offered full protection of the Act, and where such an application has been made after a notice to quit has been served, the Tribunal can grant up to a six month extension of the notice to quit. This is reviewable, but, as a matter of practice, will not be reviewed more than once." *Report of the Rent Committee*, 1971, n. 8 *supra*, at 121-126. (These provisions do not apply in England and Wales to tenancies for a fixed term, as no notice to quit need be given. They do apply to such tenancies in Scotland where a notice to quit is required.) Thus, security for such tenancies is rather limited.

20. The tenancy of tenants living in controlled dwellings cannot be terminated by a landlord, unless a decree for possession is granted. This will not be granted unless the court thinks it "reasonable" to do so, and unless a ground set out in s. 29 of the *Rent Restrictions Act 1960*, c. 42, is provided. For a detailed discussion of the Irish legislation, see K.E.L. Deale, *The Law of Landlord and Tenant in Ireland* (1968).

21. In Ghana, only the Courts can eject a tenant, and then only where circumstances warranting ejectment exist. Such circumstances include rent in arrears and complaints by a landlord, tenant, or other person interested in the premises; also, such grounds as the landlord genuinely needing the premises for his or her own use (and swearing that they will not be let for at least two years) are included. S. 17 (1) of the *Rent Act 1963* (Act 220) governs ejectment. For a critical examination of these provisions, see Ofori-Boateng, "Ejectment Orders and Procedure Under the *Rent Act 1963* (Act 220)" (1969) 1 *Review of Ghana Law* 87.





The British scheme has been followed in a number of jurisdictions including Ireland<sup>20</sup> and Ghana.<sup>21</sup> Furthermore, in Australia, the United States and Canada, attempts have been made to implement security of tenure schemes in conjunction with a program of rent control. It is appropriate at this point to examine briefly the security of tenure schemes in force in the Australian States of Victoria and New South Wales, in the State of Massachusetts, in New York City, and in the Provinces of Quebec and Newfoundland.

(b) Victoria and New South Wales

The Australian States have tended to carry on the national rent control scheme which was introduced by the federal government in 1938, and abandoned by it in 1948. In 1948, the State of Victoria pegged all rents at their 1940 level and enacted that possession might be recovered only on the limited number of grounds set out in the Act, and then, only by court order. At the present time, control applies only to "prescribed premises." This category encompasses

- (a) those premises which were leased at some time between 1940 and 1954, and have not become vacant and been relet since, or, have not been excluded by Order of the Governor in Council (a limited number of tenancies today);
- (b) those premises which have come under the authority of the Act by Order of the Governor in Council (an increasing number).<sup>22</sup>

The Act contains no provision governing the exercise of the power of the Governor in Council to order a dwelling to be placed under control. The Victorian scheme is by no means one involving complete control. It has been postulated that: "The present legislation provides the better system. It allows scope for landlords to get a reasonable return whilst enabling individual cases of oppression to be dealt with as they arise."<sup>23</sup>

The Victorian legislation contains provisions which regulate the level of rents.<sup>24</sup> For present purposes it is not necessary to describe this system in detail.

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22. The relevant sections governing "prescribed premises" are ss. 43, 44 (1), and 45 (1) of the *Landlord and Tenant Act, 1958*. For a review of the legislation, see P. Nedovic and R. J. Stewart "The Fitness and Control of Leased Premises in Victoria" (1979) 7 *Melbourne University Law Review* 258, at 269-70.

23. See Nedovic and Stewart, *op. cit. Supra*, n. 27, at 268.

24. *Ibid* 271-273. See also Robert Brooking and Alex Chernoff, *Tenancy Law and Practice: Victoria* 323-327 (1972).

25. See ss. 82, 92, and 93 of the *Landlord and Tenant Act, 1958*.

26. S. 89 provides that a landlord must take proceedings for this special notice before the Court of Petty Sessions, which consists of a Stipendiary Magistrate sitting alone. An appeal to the Supreme Court is allowed on matters of law only. (S. 98.)

Where premises have become "prescribed premises," there are restrictions on the ability of the landlord to recover possession.<sup>25</sup> A landlord must obtain a special notice to quit from a court of competent jurisdiction.<sup>26</sup> The grounds which a landlord must prove before a court order will be granted may be summarized as follows:

- (a) the rent is in arrears for at least 56 days;
- (b) the lessee has failed to perform some other term or condition of the lease, for which failure has not been excused. Notice in writing specifying the breach must be served on the lessee at least fourteen days before the action is heard, and no remedy has been made;
- (c) the lessee has failed to take reasonable care of the premises or goods leased, or has committed waste;
- (d) the lessee or a resident or visitor has been guilty of conduct which is a nuisance or annoyance to neighbours;
- (e) the lessee or any other person has been convicted of an offence arising out of the illegal use of the premises or the premises has been found or declared to have been used for such purpose;
- (f) the lessee has given notice of intention to vacate, or has signified in writing his or her willingness to vacate, following which the lessor has taken steps as a result of which he or she would be seriously prejudiced if possession was not obtained;
- (g) the premises, if a dwelling-house, are, or within twelve months will be, reasonably required by the lessor for occupation by him or herself, or by a son, daughter, mother, father, brother, sister, or someone who ordinarily resides with, and is wholly or partly dependent on, him;
- (h) the premises are used as, or have been acquired as, a parsonage, presbytery, or other like premises;
- (i) the premises are required by a beneficiary under a trust, or a member of the immediate family;
- (j) the lessor is carrying on a hospital, school, or the like, and requires the premises for such use (including the accommodation of staff);
- (k) the premises are, or have been, occupied by some person in consequence of employment with the lessor, and are reasonably required for occupation by some person in a similar capacity;
- (l) the premises have been sold - and one-quarter of the purchase price is due in twelve months - and vacant possession has been a condition of sale;

- (m) the premises are reasonably required for reconstruction, demolition, or removal;
- (n) the present lessee became the lessee by virtue of an assignment or transfer to which the lessor did not consent;
- (o) the lessee has sublet the premises, or some part of them, and approval has not been granted;
- (p) the premises have been shared with the lessor for at least the last twelve months and the lessor desires possession;
- (q) the lessee has not been living in the premises for three months before notice to quit has been given where the lessor has not granted permission for such an arrangement;
- (r) the lessee is receiving more than 100 per cent of the rent paid to the lessor by a sublessee;
- (s) the premises are a garage, and the lessor requires possession of it for his or her occupation or for the purpose of leasing or selling the whole premises;
- (t) the premises are owned by the lessor, being a man of over 65 or a woman of over 60, whose income, if living alone, does not exceed \$910, or if living with his or her spouse, does not exceed \$1820 per annum, who owns no other dwelling in Victoria (or whose spouse does not), exclusive of their residence, and who requires the premises for sale with vacant possession;
- (u) the lessee could without undue financial hardship purchase or lease another adequate and suitable dwelling; or the lessee has other adequate and suitable premises available for his or her occupation for residential purposes.<sup>27</sup>

On hearing an action for recovery of possession, the court is directed to take into account the question of hardship to the lessee, the lessor, or any other person, in making, or in refusing to make, any order. In considering the hardship of a lessor or lessee, special regard is to be had to those suffering from disabilities resulting from war service. Where an order is based on grounds (g), (h), (i), (j), (k), (l), (m), or (p), the court shall consider whether reasonably suitable alternative accommodation is, or has been, since the date on which notice to quit was given, available to the person in occupation or to the lessor or other person who would occupy the premises if an order were made. Where the lessee is receiving a total permanent incapacity pension or a blinded pension, an order shall not be made unless reasonable alternative accommodation is available on a written lease for not less than five years. Where an application is based on grounds (e), (f), or (t), the court shall not refuse to make an order for recovery by reason only of hardship which would be caused by the making of an order, or because there is a lack of

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27. For a similar summary of the grounds set out in s. 82, see *Brooking and Chernoff, op. cit. supra*, n. 24, at 328-330.

available alternative accommodation.<sup>28</sup>

The scheme operating in New South Wales has been described as one primarily concerned with "eviction control," with the control of rents being a subsidiary matter.<sup>29</sup> The New South Wales scheme is not dissimilar to those in force in Britain and Victoria, with security of tenure being afforded only to tenants whose dwellings are controlled. "Controlled premises" include only those premises built before 1954 and not relet since 1956. A notable feature of the scheme is the movement towards decontrol. This movement was increased by amendments to the legislation in 1968, which were aimed at hastening decontrol. The grounds for possession are essentially the same as those in Victoria,<sup>30</sup> with one important exception being that the rent need only be in arrears for 28 days as opposed to 56 in Victoria.<sup>31</sup> In 1968 the fact of "wealth" was introduced as a ground for possession. It was provided that where the means of the lessee, together with the means of all other persons in the dwelling-house (not including boarders or children under 16) are such that it is reasonable that the lessee, or the lessee and any such persons should acquire or lease other premises, the court can grant an order for possession.<sup>32</sup>

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28. S. 92.

29. See Peter Clyne, *Practical Fide to Tenancy Law* 10 (1970). The writer added that: "Naturally it would be useless of control evictions in any fashion if landlords could simply put up the rent to whatever figure they please, and then evict the tenant because he fails to pay it."

30. The appropriate provisions are contained in Part III of the *Landlord and Tenant (Amendment) Act 1948* - Recovery of Possession of Prescribed Premises.

31. There are some other minor differences, such as the fact that the profit being made by a sub-lessee must be 120 per cent of the landlord's return, as opposed to 100 per cent in Victoria. These are not significant for present purposes.

32. It is pointed out by Clyne, *op. cit. supra*, n. 34, at 251, that this ground is being widely used in the state to end controlled tenancies, and is not restricted in application to the "wealthy." On second reading of the Bill which introduced this ground, the Minister of Justice, J. C. Maddison, said: "This Act should no longer continue to offer protection to a tenant by way of rental subsidy at the expense of the owner where the tenant can be shown to have the means to fend for himself ... The purpose of the Government is to reach a situation where only those persons who can justifiably claim they would suffer genuine hardship should be entitled to enjoy the protection of the Act ... The philosophy that the Bill seeks to espouse in an initial way is that every tenant in controlled premises cannot for ever expect to live under subsidized rent conditions unless he can show that his case is one of genuine hardship." (Hansard, "Parliamentary Debates," Nov. 26, 27/68, Vols. 45 and 46, pp. 2833, 2843, 2952, 2958, 2991.)

33. According to Clyne, the discretion of the Courts has been greatly increased by the 1968 legislation.

34. See *Is There a Case for Rent Control? Background Papers and Proceedings of a Canadian Council on Social Development Seminar on Rent Policy* (1973), at 19 *et seq.* It should be noted that Massachusetts introduced an optional scheme in 1970, see *infra*, n. 36; also, under Phases I and II of President Nixon's Economic Stabilization Program, 1971, the whole country was placed under a limited form of rent regulation. (Phase II exempted industrial, farm nonresident commercial property; new construction offered for rent for the first time after Aug. 15/71; rehabilitated dwellings ... rented for the first time after Aug. 15/71; single-family dwellings rented on a greater than month-to-month lease where the owner owns no more than four such dwellings; owner-occupied rented dwellings of four units or less rented on longer than month-to-month lease; and units renting for \$500 a month or more.) For present purposes, however, it is important to note that the national scheme was not accompanied by security of tenure.

The court is directed to take into consideration when hearing an application for possession any hardship which might result to the lessor or lessee or any other person by the granting or refusal to grant an order; and is directed also to consider "all other relevant matters." The court is described as having virtually complete discretion whether to grant or not grant an order, and whether to postpone or suspend the operation of one granted, whatever the circumstances.<sup>33</sup>

(c) *New York City and Massachusetts*

New York City has the only comprehensive system of rent control in the United States today.<sup>34</sup> There is no need to examine the somewhat complicated formulas which are used to determine which premises are included in the rent control scheme and which are exempted. This has been done elsewhere.<sup>35</sup> It is sufficient for the purposes of this study to point out that a security of tenure system co-exists with rent control in relation to those dwellings which are controlled. As one commentator has put it:<sup>36</sup> "The new law prohibits landlords from refusing to renew leases of tenants in occupancy, with a limited number of exceptions." These exceptions are contained in New York City Local Law, No. 16-1969.<sup>37</sup>

In 1970, the Massachusetts State Legislature passed legislation enabling municipalities to establish rent control. The law also states that a landlord may evict a tenant from controlled accommodation for "just cause, provided that his purpose is not in conflict with the provisions and purposes of this act." Eviction, however, must be approved by the municipal rent control commissioner. The Massachusetts law exempts from the system those premises used by transients, those owned by a public institution, those used for educational or nonprofit purposes, those that are part of a two or three unit building in which the owner also resides, and cooperatives.<sup>38</sup>

(d) *Newfoundland and Quebec*

(i)        *Newfoundland*

From 1943 until 1972 there was legislation in Newfoundland which provided

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35. See M. Audain, "Rent Regulation: Sketches of Various Schemes," in *Is There a Case for Rent Control?* *op. cit. supra*, n. 34, at 19-22; and the comment 6n recent statutes: "The New York Rent Stabilization Law of 1969," (1970) 70 Columbia Law Review 156.

36. When commenting on recent New York City Laws, *op. cit. supra*, n. 35, at 169.

37. NY 51 - 5.9(c)(9). This section was not available at the time of writing.

38. See Audain, *op. cit. supra*, n. 34, at 22-24. By mid 1972 the Massachusetts rent control and security of tenure scheme had been adopted in Boston, Brookline, Cambridge, and Somerville.

39. *The Rent Restrictions Act, S.N.* 1943, 6. 45.

40. *Ibid.* s. 12 and Schedule. These provisions are contained in an Appendix to this Report.

for security of tenure together with a system of rent control.<sup>39</sup> The Act provided that the court would not provide an order for possession or for ejectment of a tenant in a dwelling to which the Act applied unless one of the grounds set out in the Act had been established,<sup>40</sup> and unless alternative accommodation existed.<sup>41</sup> Recently a new Act, *The Landlord and Tenant (Residential Tenancies) Act*,<sup>42</sup> was enacted to regulate residential premises in the Province. Under the legislation possession orders must be obtained from a Magistrate, and where it appears that a notice to quit was given because of an application to the Board to review rent, or because of a tenant attempting to enforce or secure any rights, the Magistrate may refuse to grant the order.<sup>43</sup> Notice to terminate a weekly tenancy must be given by a landlord at least four weeks in advance (a tenant need only give one week's notice); notice to terminate a month-to-month tenancy must be given by the landlord at least three months in advance (the tenant must give one month's notice); and notice to terminate a year-to-year tenancy must be given by both landlord and tenant at least three months in advance.<sup>44</sup> However, a most significant feature of the new Act is that no comprehensive system of security of tenure is incorporated in the legislation. The scheme set up by the 1943 Act has been abandoned.

(ii) *Quebec*

In Quebec a security of tenure scheme accompanies a rent control scheme,<sup>45</sup> and provides that eviction can only occur:

- (a) when a tenant does not pay the rent when ordered to do so;
- (b) when the landlord legitimately requires the premises for him or herself, or a close relative, or for a party that is financially dependent upon the landlord;
- (c) when the tenant has engaged in or allowed immoral or illegal activities on the premises;
- (d) when the dwelling has become overcrowded to a serious extent;
- (e) when the tenant has converted the premises to a rooming house without the owner's permission;

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41. See s. 12(2).

42. S.N. 1973, c. 54. The legislation was proclaimed and became effective on May 31/73.

43. See s. 15 (7). Under s. 19 provision is made for proceedings under the Act where the tenant has refused or failed to go out of possession.

44. S. 51 (1).

45. An Act to Promote Conciliation Between Lessees and Property Owners, 1951. For a detailed discussion of the legislation, see Audain, *op. cit. supra* n. 35, at 31-33; and Ontario Interim Report 66-68.

(f) when the house is acquired for public purposes.<sup>46</sup>

The Quebec scheme does not, subject to certain local options which are permitted, apply to dwellings for which the rent on December 1, 1962 exceeded \$125 per month in Montreal and \$100 per month elsewhere and appears to be aimed principally at protecting low-income tenants. It should also be noted that the security of tenure scheme, being tied to the rent control provisions, appears to avail only a limited number of tenants in the Province.

## 2. Security of Tenure Independent of Rent Control

There appears to be a tendency today for European countries to separate rent control and security of tenure schemes. It has been stated that: "Continental experience suggests that rents can be freed whilst preserving reasonable security of tenure, and equally, that rents can be controlled without interference with the contractual termination of tenancies."<sup>47</sup> Unfortunately there is very little English literature on the nature of the systems existing in the various European countries. Information is, however, available concerning West German and Swiss legislation which provides some measure of security of tenure for tenants.

### (a) *West Germany*

In West Germany, rents are generally uncontrolled.<sup>48</sup> Nevertheless, security of tenure exists for all tenants by virtue of the so-called "social clause" introduced in 1968.<sup>49</sup> The clause provides that:

- (1) If the contractual termination of the lease for rooms, due to special circumstances of the individual case, would result in an encroachment upon the living conditions of the lessee or his family the hardship of which cannot be justified even after due consideration of the lessor's interests, the lessee can object to the notice and demand of the lessor the continuation of the lease as long as this is reasonable taking into account all circumstances.
- (2) If the lessor cannot be expected to continue the lease on the present terms the lessee can demand a continuation of the lease only after an appropriate amendment of the terms.
- (3) If no agreement can be reached the duration of the lease and the terms according to which it will be continued are determined by court judgment.

Thus, tenants in Germany have what amounts to a "veto" over termination of their tenancies. Tenants can lodge an appeal against a termination notice and the court will have to balance the hardship to the tenant against the reasonable interests of the landlord. It seems that as early as 1970 abundant case law had already appeared, relating to the interpretation of the clause, and the courts seem to have been interpreting it very restrictively. They have determined that it will only be used in "exceptional" cases.<sup>50</sup>

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46. See Audain, *op. cit. supra*, n. 35, at 32.

47. L. Neville Brown, "Comparative Rent Control" (1970) 19 International and Comparative Law Quarterly 205, 209. At 214 he says that although traditionally the civil law view of a tenancy was that it was merely a contract, today, in Europe, "[t]he notion of tenants-rights, or the concept of the tenant enjoying a status over and beyond his contractual relationship with the landlord, appears to be a general trend."

48. Apart from the fact that poor tenants may qualify for rent assistance out of public funds, and rent usury (i.e., demanding an exorbitant rent) is a criminal offence.

49. S. 556-aBGB.

50. For a detailed discussion of the West German scheme, see Brown, *op. cit. supra* n. 47, at 210-211; and Michael Lipsky and Carl A. Neumann, "Landlord - Tenant Law in the United States and West Germany: A Comparison of Legal Approaches," (1969-70) 44 Tulane Law Review 36, at 63-64.

51. Lipsky and Neuman, *op. cit. supra*, at 63-64.



Despite its relatively limited application, two American critics of the scheme have described it as providing:<sup>51</sup>

... a system in which tenant rights are assumed to have equal priority with those of landlords. The German law suggests a respectable, socially desirable defence against an order for eviction. In cases where low-income or large family units are scarce, or where the housing market is restricted by discrimination, a case can be made that the likelihood of some tenants finding acceptable accommodations in a short period of time are slender and thus it would be a hardship on the tenant to move immediately. Under these circumstances, determined by judicial or administrative findings of fact, a stay of eviction might be granted, until both parties agree on additional terms to the rental agreement. In this procedure mediation by the court might include consideration of the cause of which the landlord wants the apartments vacated, since the statute requires a consideration of the full interests of the lessor as well as the lessee ...

(b) *Switzerland*

A report published in mid-1970 indicated<sup>52</sup> the Federal Parliament of Switzerland was bringing in reforming legislation aimed at providing a limited form of security of tenure. The effect of the legislation would be to curtail contractual freedom between landlords and tenants by allowing the prolongation of an expired or terminated tenancy for up to one year on the ground of hardship. The aim was to operate this limited security of tenure quite independently of rent control, which would be gradually restricted to areas of acute housing shortage only.

(c) *United States*

In the United States a concept of security of tenure has gradually been emerging in relation to housing projects operated by public housing authorities. A series of directives<sup>53</sup> from the Department of Housing and Urban Development (HUD) have been designed to force public housing authorities not to terminate leases arbitrarily.<sup>54</sup> Until recently, however, the status of the HUD directives

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52. See Brown, *op. cit. supra*, n. 47; at 211.

53. The HUD Circular of February 7/67 required that every evicted tenant be given a reason for his or her eviction and that the tenant, in a "private conversation or other appropriate manner" be "given an opportunity to make such a reply or explanation as he may wish." It was said to have been promulgated to end "simple, unexplained cancellation of leases." A further HUD Circular of Feb. 22/71 directed that: "A tenant shall be afforded an opportunity for a hearing before an impartial official of a hearing panel if he disputes within a reasonable time any Local Housing Authority (LHA) action or failure to act in accordance with the lease requirements, or any LHA action or failure to act involving interpretation or of the LHA's regulations, policies, or procedures which adversely affect the tenant's rights, duties, welfare, or status." And furthermore that: "Notice of termination may only be given for good cause, such as non-payment of rent, serious or repeated damage to premises, creation of physical hazards, or over-income status."

54. Formerly, public landlords were held to no higher standards than those of the private sector. However, in *Rudder v. U.S.* 226 F. 2d 51 (D.C. Cir. 1955), the Court held that "the government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." The HUD directives were a clear recognition of this constitutional boundary.

55. E.g., *Escalera v. New York City Housing Authority* 425 F. 2d 85 (2d Cir. 1970); *Vinson v. Greensburg Housing Authority* 29 App. Div. 2d 388, 288 N.Y.S. 2d 159 (1968); *Thorpe v. Housing Authority of the City of Durham* 386 U.S. 670 (1967); *Rolle v. New York City Housing Authority* 425 F. 2d 853 (2d Cir. 1970).

remained unclear. In several decisions<sup>55</sup> it has been held that the directives are binding on public housing authorities and it has been indicated that the Fourteenth Amendment requirement of due process of law is applicable to the actions of public housing officials. Thus a citizen may not be deprived of a continued tenancy in public housing, or required to pay an additional rent, without affording him the minimum procedural safeguards required by due process of law.<sup>56</sup>

The actual rights which tenants have acquired remain somewhat uncertain. Presumably, tenants must be given reasons for eviction from public housing projects and they must be given an opportunity to answer. At the very least this would seem to involve the right to a hearing, the right to be represented and the right to cross-examine witnesses.<sup>57</sup> The implication is that eviction can only be supportable where it is for "just cause." There have, however, been few directives from Legislatures, administrators, or courts as to what this entails.<sup>58</sup>

Thus, while no security of tenure exists in the United States in the private sector outside the rent control jurisdictions of New York City and Massachusetts,<sup>59</sup> the residents of public housing can no longer be evicted at the will of the landlord. This development has been widely acclaimed as one step aiding the serious problems of the urban poor.<sup>60</sup>

(d) *Canada*

Two of the more interesting schemes of security of tenure existing independently of rent control are Canadian. One scheme has been operating in Manitoba since 1971, the other has been operating in Surrey, British Columbia.

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56. See Administrative Law Note, (1970) 37 Brooklyn Law Review 184, at 185.

57. See John E. Amerman, "Comment: Constitutional Law Public Housing," (1967-68) 43 Notre Dame Lawyer 453; and "Developments in Contemporary Landlord-Tenant Laws: An Annotated Bibliography," (1973) 26 Vanderbilt Law Review 689.

58. Apart from the HUD directives outlined in n. 53 *supra*. There are no legislative guidelines other than a short reference in the U.S. Housing Code 1967 and legislation in Michigan which indicates that there must be no eviction without "just cause," which includes a failure to comply with rules and regulations, the use of a unit for an unlawful purpose, the maintenance of unsafe, unsanitary, or unhealthful conditions, and over-income; judicial guidelines have been minimal.

59. See text at n. 34 *supra*. It appears that the emphasis at the moment in the private sector in the U.S. is directed toward the institution of protection against retaliatory eviction in all jurisdictions and the guarantee of safe and sanitary housing. See Robert J. Morgan, "Proposed Statutory Alterations of the Landlord-Tenant Relationship for the State of Illinois," (1970) 19 De Paul Law Review 752; C.G. Bruno, "New Jersey Landlord-Tenant Law: Proposals for Reform," (1969) 1 Rutgers-Camden Law Journal 299.

60. For example, in "Administrative Law: A Tenant May Not Be Deprived of Continued Tenancy in Public Housing Without First Being Afforded the Minimum Procedural Safeguards Guaranteed by Due Process," (197D) 37 Brooklyn Law Review 184, 192 the author commented that: "The governmental interest approach may well provide the necessary vehicle to transport the beneficiaries of public assistance out of the category of constitutional 'non-persons'. In the field of public housing, the avowed goal has been to free the poor from the disease, danger, and anomie rampant in the urban slum; to free them so that they may develop their talents and interests to the fullest extent, and by so liberating them, to allow for their assumption of productive roles in American society. Can this goal be realized as long as a tenant may never feel secure from unjustifiable eviction? The holding in *Escatera v. New York City Housing Authority* implicitly rejects such a blatant contradiction."

61. *The Landlord and Tenant Act*, S.M. 1971; c. 35, amending *The Landlord and Tenant Act*, S.M. 1970, c. 106, now C.C.S.M., c. L70.

Each of these schemes will be examined in some detail.

(i) Manitoba

The provisions of the Manitoba legislation,<sup>61</sup> aimed at creating security of tenure without reliance on rent regulation, are as follows:

103 (1) In this section

(a) "term of tenancy" means the length of time over which the tenancy agreement is to run; and

(b) "rental payment period" means the interval at which rent is payable under a tenancy agreement but notwithstanding any agreement to the contrary, for the purpose of this section, no rental payment period shall exceed one month.

(2) A rental payment period need not necessarily coincide with a calendar period.

(3) Where a tenancy agreement has no predetermined expiry date, a notice to terminate shall be given by the landlord or the tenant on or before the last day of any rental payment period to be effective on the last day of the ensuing rental payment period.

(3.1) Where the term of a tenancy agreement is less than twelve months a notice to terminate shall be given by the landlord or tenant at least one month prior to the predetermined expiry date of the tenancy agreement to be effective on the predetermined expiry date of the tenancy agreement.

(4) Where the term of a tenancy agreement is twelve months or more a notice to terminate shall be given by the landlord or tenant at least two months prior to the predetermined expiry date of the tenancy agreement to be effective on the predetermined expiry date of the tenancy agreement.

(5) Where the term of a tenancy agreement is twelve months or more the landlord shall in writing advise the tenant at least three months prior to the predetermined expiry date of the tenancy agreement of the tenant's responsibility to give notice in accordance with subsection (4) if the tenant wishes to terminate the tenancy agreement and where a landlord fails to comply with this subsection the tenant may at his option

(a) terminate the tenancy agreement on the predetermined expiry date of the tenancy agreement without notice; or

(b) continue the tenancy subject to subsection (6).

(6) Where a tenant

(a) is not in default of any of his obligations under this Act or his tenancy agreement; or

(b) the landlord or owner does not require the premises for his own occupancy; or

(c) the premises are not administered by or for the Government of

Canada or Manitoba or a municipality, or any agency thereof, or otherwise administered under the *National Housing Act, 1954*(Canada);

a tenant shall have the right to renew the tenancy agreement, subject to subsection (1) of section 116, after the tenancy agreement has expired; but where a dispute arises under clause (a) or (b) the matter shall be referred to the rentalsman for determination.

(7) Where a landlord or tenant is aggrieved with a decision of the rentalsman under subsection (6), the landlord or tenant within thirty days after the date of determination by the rentalsman pay appeal the decision to a court for review but pending the appeal decision, the landlord shall not be entitled to possession of the premises in dispute.

(8) Where a landlord provides residential premises

(a) to a person in consideration in whole or in part, of custodial or management services, or the arrangement is cancelled by either party, or

(b) to a tenant who is an employee of the landlord as a term of, or in connection with his employment or the employment is terminated by either party,

the landlord, notwithstanding any other provision of this Act, shall be entitled to take possession of the premises on giving not less than one month's notice to the tenant.

116 (1) A landlord shall not increase the rent payable under a tenancy agreement or any renewal, extension, revision or assignment thereof, or be entitled to recover any additional rent resulting from such a increase unless he gives to the tenant a written notice of the increase in rent at least three months prior to the date on which the increase is to be effective.

The statute also provides the following defences to proceedings for possession:

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.

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.

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

- (a) a tenant is in arrears of rent; or
  - (b) Repealed, S.M. 1971, c. 35, s. 21.
  - (c) a tenant has violated subsection (2) of section 98.<sup>62</sup>
- 113 (6) Notwithstanding subsection (4), where a bona fide sale of residential premises that is not subject to a written tenancy agreement for a specific period, takes place and the purchaser intends to occupy the entire residential premises himself, he may obtain possession thereof by giving the tenant one month's notice to vacate the premises.<sup>63</sup>
- 114 In the renting of premises or the renewal of tenancies, no landlord shall discriminate against any prospective tenant or tenant by refusing to rent or renew
- (a) because of the race, religion, religious creed, colour, ancestry, ethnic or national origin of; or
  - (b) because of membership or participation in an association of tenants by;
- the prospective tenant or tenant.<sup>64</sup>

Thus Manitoba took an initial step towards security of tenure in 1970 with the enactment of legislation prohibiting eviction during the school year. At the same time an anti-discrimination provision was included in the legislation by virtue of section 114. In 1971 bolder steps were taken towards a more comprehensive scheme of tenant security - tenants were provided with the right to remain in rented premises unless the landlord could show that certain circumstances existed. The key feature of the security of tenure scheme is section 103(6) which at first blush appears to provide the landlord with very few grounds on which he can show cause. It should be noted, however, that the ground set out in section 103(6)(a) requiring the landlord to show that the tenant "is not in default of any of his obligations under the Act or his tenancy agreement ..." may provide the landlord with many grounds for cause.

As has been pointed out elsewhere in this Report the current Manitoba scheme appears to be working adequately. The scheme is applied both to tenancies for a term and to periodic tenancies. One commentator has, however, questioned the technical accuracy of the legislation,<sup>65</sup> and has suggested that it contains a number of imperfections.<sup>66</sup> As indicated above, section 103(6) is the

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62. S. 98(a) relates to the duties of the tenant in regard to cleanliness and damage.

63. S. 113(6) was enacted in *The Landlord and Tenant Amendment Act*, S.M. 1971, c. 35.

64. Ss. 113(3)-(5) and s. 114 were enacted in *The Landlord and Tenant Amendment Act*, S.M. 1970, c. 106.

65. M. Gorsky, "An Examination and Assessment of the Amendments to the Manitoba Landlord and Tenant Act" (1972), 5 Man. L.J. 59.

66. *Ibid.* at 60-66.

67. *Ibid.* at 62.

68. Furthermore, it should be noted that the defences under s. 113 apply only to periodic tenancies, as fixed term tenancies do not require a "notice to quit." This would seem to be another inadvertent flaw. See Gorsky, *op. cit. supra*, at 63.

central point of the scheme, but it appears to apply only to tenancids for a term certain. This is because the section speaks in terms of "the right to renew the tenancy agreement," and as there is no concept of renewal of a periodic tenancy, the security provision can only apply to tenancies for fixed terms.<sup>67</sup> This can surely not have been the intention of the Legislature for the tenants having a tenancy from month-to-month (or other periodic tenancy) and normally most in need of protection.

A further flaw in the Manitoba scheme is the failure to make provision against landlords who may impose exorbitant rent increases as a condition of renewing or continuing the tenancy, and thus effectively evict tenants without having to comply with the security provisions. The defences in section 113(2) do not provide for a situation where a retaliatory rent increase is imposed.<sup>68</sup>

(ii) Surrey, British Columbia

The other security of tenure system which applies in Canada independently of rent control is in Surrey, British Columbia. It was created under By-law 3129 of The Corporation of the District of Surrey, and is operated by the Surrey Landlord and Tenant Advisory Board (set up under section 66 of the *Landlord and Tenant Act*). The By-law provides that a notice to quit can be appealed by a tenant to the Board. The notice will be revoked unless the landlord is able to prove that one of the enumerated circumstances exists. The By-law (paragraph 1) provides:

Where a tenant received notice to quit from a landlord, he may appeal this notice to quit to the board. The Board shall revoke the notice to quit unless the landlord proves that one of the following circumstances applies:

- (a) occupancy by the tenant has resulted in deterioration of the premises beyond reasonable wear and tear;
- (b) the tenant is in arrears for a period of twenty-seven days;
- (c) the tenant is a nuisance to his neighbours;
- (d) the tenant is utilizing the premises for illegal activity;
- (e) he, the landlord, requires the premises for occupancy
- (f) the tenant has deliberately misrepresented the premises to a potential buyer or tenant;
- (g) the building is to be demolished;
- (h) the building is to be held empty for sale.

A number of observations may be made about the Surrey scheme. First, it appears to be limited to providing security of tenure only in the case of periodic tenancies. The By-law specifically refers to notices to quit which need only be given in the case of tenancies from month-to-month or other periodic tenancies. Tenancies for a fixed term do not require a notice to quit.<sup>69</sup> Secondly, it should be

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69. See M. Gorsky, *op. cit. supra*, n. 65, at 63.

70. For example, in Britain, Victoria, and New South Wales.

noted that the tenant is required to appeal a notice to quit rather than the landlord's being required to apply to a court or other tribunal for an order for possession, which is the case in other security of tenure schemes.<sup>70</sup> It is apposite to note that the grounds on which a landlord may show cause are more limited than in many other schemes. In particular there is no ground based upon breaches of the *Landlord and Tenant Act*, Part II or upon breach of the tenancy agreement itself.<sup>71</sup>

There does not appear to have been a great volume of tenant appeals before the Surrey Board. In 1972 there were 12 applications by tenants disputing eviction notice while in the first eight months of 1973, there were approximately 30 applications.<sup>72</sup> It is perhaps appropriate to indicate the nature of the various applications under the security of tenure provisions which have come before the Surrey Landlord and Tenant Advisory Board. The following table shows a break-down of the applications in 1972 and 1973 (up to August):

|   | No. of<br>Orders<br>Sought | No. Disputed<br>Successfully | Per Cent<br>Disputed<br>Successfully |
|---|----------------------------|------------------------------|--------------------------------------|
| Landlord as Applicant<br>(Seeking Possession Order) |                            |                              |                                      |
| Tenant in arrears 27 days                           | 2                          | -                            | -                                    |
| Landlord requires premises personally               | 1                          | -                            | -                                    |
| Building to be held empty for sale                  | 1                          | -                            | -                                    |
| Totals  | 4                          | -                            | -                                    |
| Tenant as Applicant<br>(Disputing Eviction Order)   |                            |                              |                                      |
| No reason given                                     | 9                          |                              | 5 56                                 |
| Tenant has deteriorated premises                    | 3                          |                              | 2 66                                 |
| Tenant in arrears 27 days                           | 2                          | 2                            | 100                                  |
| Tenant nuisance to neighbours                       | 6                          | -                            | -                                    |
| Tenants using premises for illegal activity         | 1                          |                              | - -                                  |
| Landlord requires premises personally               | 5                          |                              | 4 80                                 |
| Tenant has misrepresented premises                  |                            | -                            | --                                   |
| Building to be demolished                           | 1                          |                              | 1 100                                |
| Building to be held empty for sale                  | 3                          |                              | 1 33                                 |
| Illegal rent increase                               | 7                          | 3                            | 43                                   |
| Too many people / pets on premises                  |                            | 2                            | 2100                                 |
| Other   | 3                          |                              | 2 66                                 |
| Total   | 42                         |                              | 22 52 <sup>1</sup>                   |

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<sup>1</sup> Average

The Surrey scheme appears to be working well, and is said to be fully

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71. Cf. s.103(6) of the Manitoba legislation which is outlined in the text, n. 61 *supra*.

72. It should be noted that Surrey is not an area where the tenant population is particularly high. The 1971 Census figures reveal that only 21.7 per cent of all dwellings in Surrey are rented. (See Appendix "F").



accepted by landlords and tenants alike.<sup>73</sup> In particular, there do not appear to be any difficulties in obtaining evidence from tenants (i.e. the applicants themselves or other tenants in the same building). Apparently, the Surrey Board accepts letters or affidavits from tenants in support of claims being made before the Board. If the supplier of the information wishes to remain anonymous this is honoured by the Board, so long as this does not jeopardize the case of the other party to the application.

It does not appear that extra pressure is being applied to prospective tenants in the screening process because of the existence of a tenant security scheme, although this may be because the demands on rented accommodation in Surrey are not as high as they are in Vancouver City.

In short, from the information available to the Commission, it seems that the introduction of a concept of tenant security in Surrey has not substantially, if at all, disrupted relations between landlords and tenants there.

#### **D. An Evaluation of Tenant Security**

It is essential to note that substantial numbers of the population in the Province of British Columbia now make their homes in rented premises. The 1971 Census of Canada<sup>74</sup> showed that 36.7 per cent of all dwellings<sup>75</sup> in the Province were rented. This figure is up from 33.8 per cent in 1966. In the Lower Mainland area,<sup>76</sup> the figure rises to 41.6 per cent; and in Vancouver City 53.1 per cent of all dwellings are rented rather than owned.<sup>77</sup> Thus substantial numbers of people in the Province<sup>78</sup> live under a system where their continued occupation of their homes is dependent on the good will of the landlord.

The notion that a landlord should be free to determine a periodic tenancy and should be free to refuse to renew a tenancy for a fixed term items directly from the doctrine of freedom of contract and the concept of mutuality of termination rights. In the context of present day landlord and tenant relations, however, to adhere rigidly to such concepts would be to ignore the realities of the situation.<sup>79</sup>

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73. According to the administrator of the scheme. This information was obtained from a telephone interview on 25 October 1973, conducted by a member of the Commission's research team.

74. 1971 Census of Canada, "Dwellings by Tenure and Structural Type." Statistics Canada. Catalogue 93-727, vol. III, part 3 (Bulletin 2.3-2) June 1/73.

75. The definition of "dwelling" is: "a structurally separate set of living quarters with a private entrance from outside or from a common hallway or stairway inside the building, i.e., the entrance must not be through someone else's living quarters."

76. This is the "Vancouver Census District," which includes West Vancouver, North Vancouver, Richmond, Delta, Surrey, Coquitlam, Port Moody, Burnaby, Vancouver City, White Rock, and Sea Island.

77. For a more extensive statistical analysis for the area, see Appendix F to this Report.

78. 1971 Census results, breaking down the percentage of the population in the province who are tenants, are not yet available.

79. The enactment of Part II of the *Landlord and Tenant Act* in 1970 marked a significant departure from the concept of freedom of contract in this area of the law.

80. Ontario Interim Report 11.

In 1968 the Ontario Law Reform Commission said:<sup>80</sup> It is not now possible to accept freedom of contract at any given time as a fact in the area of the landlord-tenant relationship any more than it is in the mortgagor mortgagee relationship." Ideas based on theories of free economic competition in the area of rental accommodation, when land and housing are in short supply, need to be reexamined. Equality of bargaining power between landlord and tenant borders on the fictional when the apartment vacancy rate is said to be 1.0 per cent in Metropolitan Vancouver and 0.6 per cent in Vancouver City. Moreover, arguments of mutuality<sup>81</sup> in landlord and tenant relations are weakened by the fact that the termination of a tenancy generally involves more serious economic and social consequences for the tenant than for the landlord.<sup>82</sup> Thus it would seem that reliance on the principles of a free market is not sufficient to preclude serious consideration of a concept of security of tenure in British Columbia.

We have thought it appropriate to consider the social implications of a system where tenants can be dislodged at will. While the landlord's interest in rented premises will generally be a purely economic one, a tenant will usually regard the premises as a home and he may have a special attachment to the premises. Many commentators have noted that a secure home is a fundamental need of all families and all individuals;<sup>83</sup> and where termination of a tenancy can take place within a short period of time, and justification is not required, this need is not fulfilled.<sup>84</sup> Lack of tenant security may also have severe practical consequences. For example, the need for a secure home is accentuated where school age children are involved. The situation may also be serious in practical terms where the tenancy of an

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81. In some submissions made to us it was argued that if landlords were to be required to justify the termination of tenancies, tenants should be required to do likewise. This argument seems to ignore the fact that landlords may already make at least partial provision for this by requiring the signing of a lease for a term.

82. Not only is it very difficult to find alternative accommodation today, but also the tenant must bear the cost of the move and the consequences of social upheaval. The landlord's task of filling vacant accommodation can scarcely be a difficult one in contemporary circumstances.

83. Lyndal Evans, Minority Report, Report of the Committee on the Rent Acts, *supra*, n. 8, at p. 228, expressed this thought. Adela Nevitt in "The Nature of Rent Controlling Legislation in the U.K.," Centre of Environmental Studies: University Working Papers, Jan. 1970, points out that man's attitude to land, and to his home, is an irrational one. She criticizes economists, whose: "... writings start and finish with the assumption that one house is the same as another of a similar size. This view ignores the sense of attachment which an occupier develops for his own particular piece of territory. Under private conditions the eviction of one man by another is a matter of physical strength and, all animals, including man, are capable of the ultimate absurdity of sacrificing their lives in defence of a piece of land. In a modern society the trial of strength is conducted through the pricing mechanism and the richer bid away property from the poorer. We have no reason to think that the defeated and dispossessed feel that this form of contest is any 'fairer' than a shooting match." (Pp. 9-10). In a similar vein, Jerome Rose (in *Landlords and Tenants: A complete Guide to the Residential Rental Relationship*, New Jersey, 1973), at p. 3, states: "The status of tenant is in fundamental contraction to man's innate quest for secure shelter and to his territorial instincts."

84. David Donnison in the Canadian Council on Social Development Seminar publication, *op. cit.*, *supra*, n. 34, draws the analogy between security of tenure and security of employment. He says: An increasing range of employers now assume that people must be given security in their jobs, possibly until retirement and certainly for a considerable period ahead. You cannot simply ride people out of their jobs and time you want. For a family with children, whose education depends on continuing in the same school and whose welfare may depend upon preserving links between family and community, security in the home is just as important as job security ..." (At pp. 107-108).

85. This is particularly true if that person has resided in the same place for a long period of time, so that his roots are there; or where moving in itself, and finding alternative accommodation, is difficult for him.

elderly person is terminated.<sup>85</sup> The cost of upheaval to the tenant, both economically and psychologically, may be substantial.

There are other unfortunate practical manifestations which may arise from unsecure tenancies. Tenants who have no certain right to remain in premises beyond a short-term period seem less likely to be interested in maintaining.<sup>86</sup> Furthermore, while Part II of the *Landlord and Tenant Act* does provide protection for tenants from retaliatory eviction (because of complaints to any governmental authority that the landlord is in violation of health and safety standards or because of an attempt to secure or enforce legal rights),<sup>87</sup> tenants may be less likely to attempt to enforce their legal rights as long as they are not granted a comprehensive right of security. Retaliatory eviction may be particularly difficult to prove where it is open to a landlord to terminate a tenancy for any other reason whatever.

The landlord and tenant relationship should not, however, be assessed from the tenant's point of view only.

Landlords, and their spokesmen, have advanced a number of reasons why they feel increased tenant security is not desirable. We were told, first, that under existing rental practices unjustified terminations do not occur because it is not in the landlord's best interest to terminate a tenancy without a very good reason for doing so. one landlord; in his brief, put it as follows:

No landlord behaves irresponsibly in evicting tenants. It is not to his advantage to do so. Rehabilitating the premises for a new tenant usually costs the equivalent of a month's rent, and may also involve a loss of revenue in the process. The prime reason for evicting a tenant is that he is making life miserable for other tenants in the building. It may be that his life style is incompatible with that of the other tenants. It is the responsibility of the landlord to insure the quiet enjoyment of the majority of his tenants. It is imperative that he not be restricted in providing the desired living conditions for this majority.

Those sentiments were repeated in a large number of briefs and presentations at our hearings.

We were also told that if a landlord were required to justify the termination of a tenancy the burden of proof would be an intolerable one. Numerous landlords reported encountering situations where they were satisfied that the premises were being used for prostitution, narcotics distribution, or other illegal activities, but would be unable to prove those allegations if required to do so in a court of law. The argument is that such behaviour will cause the good tenant to move. That would supposedly leave the landlord helpless. He would be unable to adduce sufficient evidence to convince a court that termination is justified; but the evidence, and inferences to be drawn therefrom would be sufficiently clear to

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86. Rose, *op. cit. supra* no. 83, says at p. 227: "Tenants of private and public landlords have little incentive to preserve, protect and maintain the structures that contain their units. As long as all increases in value of the property inure to the benefit of the landlord, tenants of private and public landlords are unwilling Contributors to the costs of repair. The tenants' attitude is reinforced by the realization that their interest in the premises may be terminated by the summary and often arbitrary determination of the landlord ..."

87. S. 61.

induce the good tenant to move.

We were also told that the good tenant does not normally wish to "get involved." The tenant who has a complaint regarding the behaviour of his neighbour may be willing to complain informally to the owner or manager but he is seldom prepared to go any further. He would prefer to move rather than assist the landlord by giving formal evidence concerning the misbehaviour of his neighbour.<sup>88</sup>

A further theme, which runs through almost all submissions made by landlords, is the notion that if the landlord is required to give the tenant reasons for terminating his tenancy, and those reasons contain defamatory allegations, the landlord will expose himself to the possibility of a defamation action by that tenant.<sup>89</sup>

In the final analysis, however, the arguments against tenant security presented by landlords appear to allow the conclusion that landlords would not find the concept unworkable provided that certain evidentiary rules are relaxed, that a speedy and efficient means of dislodging undesirable tenants is devised, and that provision is made for the granting of possession to landlords in special circumstances, such as those where the landlord requires the premises for his personal use, where the building is to be demolished or where it has been sold, and so on. We recommend a scheme to meet these conditions elsewhere in this Report.<sup>90</sup>

A scheme of tenant security which is administered fairly and speedily should place landlords under no real disadvantage. It can be assumed that landlords' objectives are economic; that they wish to gain profit from the rents collected from rented dwellings. Thus, it is not contrary to their interest to be required to continue the tenancy of tenants who pay their rent on time, fulfil their duties as tenants, and are neither disorderly nor destructive.

We have concluded that there are positive and needed advantages in the institution of tenant security, and that the advantages will, in a properly administered scheme, outweigh the disadvantages. In our view, the broad objectives of such a scheme should be:

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88. The information which we have concerning the operation of both the Manitoba and Surrey schemes of tenant security does not support this view. Under neither scheme does it appear that landlords have difficulty in persuading tenants who complain to give evidence against an offending tenant. Taking into account the low vacancy rate in rented accommodation in the Province, it does not seem realistic to suggest that most tenants would rather move than give evidence in order to preserve their peace of mind.

89. This view seems to be based on misconception of the law of defamation. First, statements are not defamatory if true. Secondly, a defamatory statement is not actionable if made only to the person who alleges that he has been defamed. Thus, a landlord who gives notice to a tenant in allegedly defamatory terms does not incur liability unless the notice is published to someone other than the tenant. Neither can there be an action for defamation where the landlord makes his statement in a Court of law. In any event, it was held in *Toogood v. Spyring* (1834) 1 C.M. & R. 181; 149 E.R. 1044, the relationship of landlord and tenant justifies complaints by one to the other concerning the conduct of other tenants. In other words, the relationship is protected by qualified privilege and an action for defamation will lie only where the statement is made maliciously. See generally *Fleming, The Law of Torts* 455-525.

90. See *infra* and Chapter III *supra*.

91. L. Neville Brown, "Comparative Rent Control" (1970) 19 I.C.L.Q. 205, 290.

- (a) to provide tenants with a right to remain in their rented homes by prohibiting unjustifiable terminations of tenancies;
- (b) to ensure that the landlord is able to terminate the tenancies of tenants who do not comply with their obligations as tenants; and
- (c) to ensure that the landlord can regain possession of rented premises in circumstances where it would be unfair not to do so.

We have also concluded that a scheme of tenant security may be introduced independently of a scheme of rent control, provided that some attempt is made to regulate the situation where a landlord uses the weapon of the rent increase in order to dislodge a tenant. We refer to the question of rent control later in this Chapter, and refrain from making a recommendation on the question. At the same time, however, we do propose a scheme whereby a tenant who feels that he has been singled out for a rent increase in order to dislodge him may obtain redress.

A leading English commentator has indicated that:<sup>91</sup> "Continental experience suggests that rents can be freed while preserving reasonable security of tenure;" and Professor Donnison has said that:<sup>92</sup>

Insecurity is often an even worse problem than high rents, particularly for elderly people and families with young children. Too often this problem has been dealt with through rent control, rather than being treated as a separate issue. The two are obviously related: no one can be sure of retaining his home if his rent can be suddenly and sharply raised. But with some exceptions ... every tenant ... whether protected by rent regulation or not, should be assured that if he pays his rent and keeps to the usual rules he cannot be evicted from his home unless the landlord provides a fair and adequate alternative.

In the following pages we outline the scheme of tenant security which we recommend for this Province.

## **E. Recommendations**

The termination of periodic tenancies is now governed by sections 52, 55, 56, and 57 of the *Landlord and Tenant Act*. The text of those provisions has been set out earlier in this Chapter. Section 52 sets out the manner of termination and sections 55, 56; and 57 set out the time limits within which a notice to terminate must be given to be effective. In our view, those provisions should, in the first instance and in somewhat modified form, continue to govern the termination of periodic tenancies. Any special provisions relating to tenant security should become relevant only when the landlord's right to give a notice terminating the tenancy is disputed by the tenant.

Reference has been made to modifying these sections. Most of the modifications which we propose are most appropriately dealt with in the context of particular problems arising out of tenant security; however one such modification can be conveniently discussed at this point.

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<sup>92</sup>. "The Regulation of House Rents: Some Background Notes" in *Is There A Case For Rent Control?* *Op. cit. Supra*, n. 34, at 10.

It is the practice in the case of month-to-month tenancies that the rent for any given month be paid on the first day of that month. When that rent is unpaid the landlord's right to terminate the tenancy is governed by section 56 and any notice to terminate which the landlord serves can only be effective to terminate the tenancy at the end of the following month. Thus, the landlord is obliged to permit the tenant to fall into arrears for up to two months before he has any status to initiate proceedings for possession. This seems unduly long and there is considerable justification for the complaint, by landlords, that section 55 places an unfair burden on them when rent has not been paid.

It is instructive to note the remedies available to Manitoba landlords in these circumstances. Summary proceedings are available for possession on failure to pay rent. The relevant sections of *The Landlord and Tenant Act*<sup>93</sup> provide:

- 77 (1) If a tenant fails to pay his rent within three days of the time agreed on, and wrongfully refuses or neglects upon demand made in writing, to pay the rent or to deliver up the premises demised, which demand shall be served upon the tenant or upon some grown-up person upon the premises, or, if the premises are vacant, be affixed to the dwelling or other building upon the premises or upon some portion of the fences thereon, the landlord or his agent may file with the clerk of the County Court of the County Court district in which the premises are situated, or partly situated, an affidavit setting forth the terms of the demise or occupancy, the amount of rent in arrear and the time for which it is so in arrear, producing the demand made for the payment of rent or delivery of the possession, and stating the refusal of the tenant to pay the rent or to deliver up possession, and the answer of the tenant, if any answer was made, and that the tenant has no right of set-off or reason for withholding possession.

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93. N. 61 *supra*.

- 77 (2) Upon the filing, the clerk shall cause to be issued from the court a summons, in Form 3 in the Schedule, calling upon the tenant, at the time and place appointed in the summons, to show cause why an order should not be made for delivering up possession of the premises to the landlord; and the summons shall be served in the same manner as the demand and at least three days before the day so appointed.
- 77 (3) Upon the return of the summons, the judge of the court or, in his absence from the place of return of summons, a magistrate, shall hear the evidence adduced upon oath, and make such order, either to confirm the tenant in possession or to deliver up possession to the landlord, as the facts of the case may warrant; and the order may be in Form 4 in the Schedule.

Some aspects of those provisions are attractive, such as the requirement that a written demand for payment be made by the landlord. That would preserve the tenant's rights where, for example, a cheque mailed to the landlord had been lost or become misdirected. On the other hand, the emphasis which the *Manitoba Act* puts on speed may work a hardship on tenants in some cases.

We have concluded that when an instalment of rent is not paid the landlord should deliver a written demand after which the tenant would have a period of grace of, say, five days in which to make payment. If, after the period of grace has expired, the rent remains unpaid the landlord should be free to deliver a notice to the tenant which is effective to terminate the tenancy at the end of the rental period relating to the arrears. Under the existing legislation and under recommendations made elsewhere in this Report the landlord would continue to have the power to require that the tenant provide security for the last month's rent. The landlord who requires such security will be protected and no arrears can accrue before the landlord has status to apply for possession. This seems to provide an equitable balance of the interests of all parties.

The tenant security scheme which we propose is comparable to that currently operating in the District of Surrey. It is our opinion that existing tenancies should not be disturbed unless the landlord can demonstrate that specified circumstances exist. When a tenant receives a notice from his landlord terminating a periodic tenancy, that notice should, at the option of the tenant, be subject to review by some person or authority who should have the power to set aside the notice unless circumstances exist which "justify" it. This review function is one which we propose should be carried out by the rentalsman. This procedure will be discussed in more specific terms below.

The circumstances which in our opinion would justify the termination of the periodic tenancy by a landlord are the following:

- (a) The notice was served in accordance with our recommendation relating to unpaid rent;
- (b) The tenant has failed to obey any court order related to his occupancy of the premises;
- (c) The conduct of the tenant, or persons permitted on the premises by him, is such that the quiet enjoyment of other tenants is disturbed;
- (d) Occupancy by the tenant has resulted in deterioration of the premises beyond reasonable wear and tear;

- (e) The landlord *bona fide* requires the premises for occupancy by himself or his immediate family;
- (f) The premises are in a building which is to be demolished;
- (g) The tenant has failed to make an agreed statutory deposit with the rentalsman within 30 days of the commencement of the tenancy;
- (h) The tenant has deliberately misrepresented the premises to a potential buyer or tenant;
- (i) The tenancy was for an "off season" period only, of premises otherwise used as a hotel or for recreational purposes, and the tenant was aware of the fact at the time the tenancy commenced;
- (j) The premises are permanently occupied by a greater number of minors than is permitted by an express limitation in the tenancy agreement;
- (k) The safety, or any other legitimate interest of neighbouring tenants or of the landlord is seriously impaired by any act or omission of the tenant or persons permitted on the premises by him.

This list represents the attempt of this Commission to strike an equitable balance between the interests of the tenant, the landlord, and neighbouring tenants. In some cases our reason for including a "circumstance" in that list is self-evident but, with respect to others, specific comment is called for.

It has been suggested to us that a breach, by the tenant, of a tenancy agreement should provide just cause for a termination of the tenancy. Where that breach involves behaviour which would ordinarily justify termination this creates little difficulty; but where the breach is of a covenant which is outside of or beyond the Act,<sup>94</sup> this suggestion would open the door to termination for relatively trivial infractions. On the other hand, it can be argued that the landlord has a legitimate interest in enforcing the reasonable terms of a tenancy agreement with the ultimate sanction of the termination of the tenancy. Item (b) is our response to that interest. In our view, the proper course for a landlord to follow upon breach of the tenancy agreement is to make an application to Small Claims Court for an order, under the provision comparable to section 60B, prohibiting the tenant from contravening the provisions of the Act or the terms of the tenancy agreement or ordering him to perform and carry out those obligations. If the tenant then disobeys the order, termination would be justified.

Circumstance (g) is designed to relate to the scheme which we propose with respect to security deposits. Elsewhere in this Report<sup>95</sup> we recommend that all permissible security deposits be held by the rentalsman. Circumstances may arise where it is impossible to deposit the agreed security deposit with the rentalsman

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94. See Chapter VI.

95. See Chapter V.

96. R.S.B.C. 1960, c. 195.



at or before the commencement of the tenancy, but the tenant agrees to do so at an early date. The failure of the tenant to perform such an undertaking should justify termination by the landlord.

Circumstance (i) relates to premises which function as residential premises for only part of the calendar year. Some motels, for example, let a number of their units on a tenancy basis during the winter months and pursuant to the *Innkeepers Act*<sup>96</sup> during the summer months. Similarly, a summer cabin used by the owner or rented for recreational purposes during the summer, may be rented to a tenant for residential purposes in the winter.

Circumstance (j) has been included only after much deliberation. It relates to the situation where there is an increase in the number of children who occupy rented premises. This might occur through birth, adoption, or a change in custody. In Chapter X of this Report we consider on a more general level the difficulties associated with the introduction of children into a building which is "adult oriented" and conclude that landlords should not be forced to accept families with children as tenants. It therefore seems reasonable that the landlord should be permitted to preserve the character of the building by terminating a tenancy which is inconsistent with that character. In practice this seemingly harsh ground of termination will be mitigated in the following ways:

- (a) Tenants contemplating an addition to the family will have ample notice that their security will be in jeopardy and will have ample opportunity to seek alternative accommodation;
- (b) Most such tenants will wish to seek larger premises.

Circumstance (k) is a "catch-all" provision designed to cope with other types of tenant misbehaviour not specifically enumerated. For example; in such schemes it is not uncommon to specify that termination is justified where the tenant is utilizing the premises for illegal activity.<sup>97</sup> In our view, such a provision is too wide and may encompass behaviour totally unrelated to the tenancy. The criminal law provides penalties for unlawful conduct and there is little to be said for adding the potential penalty of dispossession, particularly when the original offence may be and punishable by a small fine. Where the offence is related to the tenant's occupancy of the premises, to the extent that it does not violate the prohibition against disturbing the quiet enjoyment of other tenants, it would, if serious, normally fall within heading (k).

Circumstances (e) and (f) provide for termination in situations where no "H fault" can be ascribed to the tenant. In all cases involving demolition, and most cases where the landlord requires the premises for his own use, the necessity to give notice will be foreseeable by the landlord well in advance of the time at which it must actually be given. We have therefore concluded that, in those cases, it is not unreasonable to require that the landlord give the tenant two months' notice.

It is implicit in our scheme that the tenant should have some means of ascertaining what the landlord's reasons are when he purports to terminate a tenancy. It has been suggested that the reasons should be included in the notice.

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97. See Surrey By-law 3129, Schedule A, clause 1 (d).

In our view, to provide such reasons in the first instance might lead to undesirable confrontations which would otherwise be avoided if this were handled in a different fashion. We have concluded that where a landlord delivers a notice of termination the tenant should have the right to demand written reasons for the termination along with particulars of any alleged acts or omissions of the tenant which might justify termination. Those reasons and particulars should be delivered by the landlord within 48 hours of that demand. Moreover, all notices by landlords purporting to terminate a periodic tenancy should clearly inform the tenant that he has a right to demand reasons and particulars and that he has a right to apply to the rentalsman for a review of that notice. The tenant should also be made aware of the applicable time limits. We favour the development of a statutory form of landlord's notice, perhaps to be included as a schedule to the proposed Act, which clearly sets out the information which ought to be communicated to the tenant concerning his rights on termination.

Numerous landlords have urged that the law should be more responsive to exceptional cases of tenant misbehaviour and provide some mechanism for the speedy termination of tenancies where warranted. We are told that the normal one-month notice period does not strike an equitable balance between the rights and interests of the tenant and those of the landlord and neighbouring tenants in such cases. One landlord put it this way:

[An aim of legislation should be] to provide for immediate possession from a real troublemaker to prevent him or her from using the law as a shield for poor citizenship and lack of responsibility to others.

There is no real quarrel between landlords and tenants on this point. One brief submitted by a tenants' group stated:

We also believe that if our proposed amendment [on tenant security] were enacted then in cases of particularly flagrant anti-social behaviour, ... [a tribunal] ... should have the right to *order immediate* evictions, that is, the power to waive the normal one rental period notice.<sup>98</sup>

We have concluded that a speedy termination procedure should be available to the landlord in these exceptional cases. Adequate safeguards to the tenant can be built in by allowing such terminating only with the consent of the rentalsman. Upon a landlord's application for speedy termination, the rentalsman would conduct such hearing or investigation as he thinks necessary and should be empowered to give his consent upon such terms and conditions as circumstances may require. He should also be given the power to specify how speedy the termination will be. As a speedy termination involves a determination of the merits by the rentalsman, it seems reasonable that no further review of a notice, given with the rentalsman's consent, should be available.

It is imperative that all disputes concerning the justification for giving notice should be determined before the purported termination date. While we expect the rentalsman's adjudication of such disputes to be swift, it would be unrealistic to expect that the scheme should function without well defined time limits for review. We have concluded that it would not be unfair to require that tenants, who wish to request a review of a notice of termination, take affirmative steps no less than 15 days before the effective termination date. This should provide suffi-

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98.           Emphasis in brief.

cient time for all concerned.

That time limit may, however, lead to possible anomalies such as that arising out of the following situation:

January 1 - tenant fails to pay rent for the month of January.

January 4 - landlord delivers a written demand for payment.

January 6 - tenant pays rent for January to landlord.

January 20 - landlord delivers notice terminating the tenancy as of January 31.

Landlord gives as his reason nonpayment of rent.

The proposed 15-day deadline would prevent the tenant from having the notice reviewed in such a case if the landlord remained adamant that he had not been paid. Some mistake might well occur which leads the landlord to a sincere belief that he has not been paid. It seems unfair to limit the right of review in such cases. We have concluded that some flexibility is justified where a notice purporting to rest on nonpayment of rent is delivered late in the month and would give the rentalsman power to extend the time limit in such cases.

A further anomaly would occur with respect to weekly tenancies. As section 55 is presently worded, a notice given on day seven of one week is effective on day seven of the following week. A 15-day time limit would invariably bar relief to the week-to-week tenant whose tenancy has been unjustifiably terminated.

Most week-to-week occupancies are licences and the number of true week-to-week residential tenancies is very small. In many cases where such a tenancy is created it is put on a week-to-week basis, as opposed to a month-to-month basis, not for the flexibility which "short notice" gives the parties, but to relate the frequency of rental payments to the period of some recurring circumstance collateral to the tenancy agreement. For example, the tenant who is paid by the week may wish to have his rental payments coincide with the income which he receives and has entered into a weekly tenancy as a matter of convenience.

Bearing these considerations in mind, we have concluded that the notice period with respect to weekly tenancies could be lengthened without disturbing existing rental patterns significantly. Section 55(1) should, therefore, be amended to provide that four weeks' notice is necessary to terminate a weekly tenancy.

While most tenancies in British Columbia are on a month-to-month basis, there is a significantly large number of tenancies for a term to warrant our attention. Under the existing law, when a tenancy for a term expires the tenant loses his right to occupy the premises unless a renewal can be negotiated or is provided for in the tenancy agreement itself. We feel that there should be, added to any contractual rights which a tenant or a term may have, a statutory right to renew. We would be loathe to see the tenant for a term placed in a worse position than the periodic tenant with security of tenure.

What form should the statutory right of renewal take? The Manitoba provisions relating to the rights of renewal have been set out earlier in this

Chapter. The tenant for a term is given an automatic right to renew the tenancy argument so long as he is not in default and the landlord does not require the premises for his own use. That renewal procedure is circumscribed by a number of notice requirements if the term is twelve months or more. The tenant wishing to terminate the tenancy on its expiry date must give the landlord two months' notice and the landlord is required to give three months' notice advising the tenant he must give two months' notice to terminate the tenancy. This seems unnecessarily cumbersome. Moreover, we question the desirability of requiring that the renewal be for the same term as the existing tenancy.

In our view the statutory renewal should be on a month-to-month basis. That would leave the relationship of the parties on a slightly more flexible basis than if it were renewed for the full term. It seems appropriate that the tenant be required to give the landlord a month's notice if he intends to leave the premises at the end of the term but apart from that notice requirement renewal on the statutory basis should be automatic unless the parties behave inconsistently. One form of inconsistent behaviour might be the renewal of the tenancy for a specified term, either under a renewal provision of the tenancy agreement, or independently of the agreement.

One form of "inconsistent behaviour" should be specifically provided for. Where, upon the expiration of a tenancy for a term, circumstances exist which would justify the termination of a periodic tenancy the landlord should be able to bring proceedings for possession. This exception should, however, be subject to a requirement that a landlord who felt he was entitled to possession at the end of the term, serve on the tenant a written notice setting out his refusal to renew and the grounds therefor at least one month before the end of the term. Such a notice would be reviewable.

A tenancy agreement for a term is likely to be in writing and may contain a number of terms relating to the use of the premises. It seems desirable that such terms should be preserved in the renewed tenancy. It also seems reasonable that if the tenant had been in possession for a year or more and the rent had not been increased in the year prior to the expiration of the term, the landlord should be permitted to increase the rent at the time of the renewal, so long as the notice requirements relating to rental increases were observed.

We have proposed, in this Chapter, what we believe to be a reasonable scheme of tenant security. The apparent success of a similar scheme currently operating in Surrey justifies some optimism on our part that the expanded version which we recommend would, if implemented, be acceptable to all concerned. For convenience, our recommendations are summarized below. Except as noted below those recommendations represent the unanimous views of the Commission. One reservation was expressed by a member of the Commission with respect to the grounds upon which the termination of a tenancy is "justified." Peter Fraser is opposed to the inclusion of a "catch all" ground such as that set out in recommendation 2(k) below. The other recommendations made in this Chapter have his support.

The Commission recommends that:

1. *Subject to the following recommendations, sections 52, 553 56, and 5 should continue to govern the termination of periodic tenancies but with these modifications:*
  - (a) *Section 55(1) should be amended to provide that four weeks' notice is necessary to terminate a weekly tenancy;*

*and a notice to terminate a weekly tenancy should be given on or before the last day of one week of the tenancy to be effective on the last day of the week four weeks hence.*

(b) *Where a landlord purports to terminate a periodic tenancy, the period of which is less than two months for any of the following reasons:*

(i) *The premises are in a building which is to be demolished;*

(ii) *The landlord bona fide requires the premises for occupancy by himself or his immediate family,*

*he shall give the tenant no less than two months' notice.*

© *If a tenant fails to pay his rent within three days of the time agreed on the landlord may make a written demand for payment; and if the tenant fails to pay the rent within five days of that demand the landlord may:*

(i) *serve a notice on the tenant terminating the tenancy, effective the last day of the rental period for which the rent is unpaid; and*

(ii) *apply to the rentalsman for all or part of such statutory rent deposit, as may have been made by the tenant.*

(d) *Where the conduct of a tenant is such that a landlord would be justified in terminating a periodic tenancy and the quiet enjoyment or safety of neighbouring tenants is impaired to the extent that it would be inequitable to them to permit such conduct to continue, or the tenant is causing extraordinary damage, a landlord may with the consent of the rentalsman and after such investigation or hearing and upon such terms and conditions as the rentalsman thinks proper, terminate the tenancy upon such shorter notice, in prescribed form, as the rentalsman may allow; and that notice should not be subject to further review by the rentalsman.*

2. *When a tenant receives a notice from his landlord terminating his periodic tenancy, that notice be subject to review by the rentalsman who shall set aside the notice unless one or more of the following circumstances applies:*

(a) *The notice was served in accordance with the foregoing recommendation for unpaid rent;*

(b) *The tenant has failed to obey any court order related to his occupancy of the premises;*

(c) *The conduct of the tenant, or persons permitted on the premises by him is such that the quiet enjoyment of other tenants is disturbed;*

(d) *Occupancy by the tenant has resulted in deterioration of the premises beyond reasonable wear and tear;*

(e) *The landlord bona fide requires the premises for occupancy by himself or his immediate family;*

(f) *The premises are in a building which is to be demolished;*

(g) *The tenant has failed to make an agreed statutory deposit with the rentalsman within 30 days of the commencement of the tenancy;*

(h) *The tenant has deliberately misrepresented the premises to a potential buyer or tenant;*

(i) *The tenancy was for an "off season" period only, of premises otherwise used as a hotel or for recreational purposes; and the tenant was aware of that fact at the time the tenancy commenced;*

(i) *The premises are permanently occupied by a greater number of minors than is permitted by an express limitation in the tenancy agreement.*

- (k) *The safety, or any other legitimate interest of neighbouring tenants or of the landlord is seriously impaired by any act or omission of the tenant or persons permitted on the premises by him.*
3. *When a landlord delivers to a tenant a notice terminating a tenancy, the landlord shall, upon the request of the tenant and no later than 48 hours after such request is made, deliver to the tenant, in writing, his reasons for termination along with particulars of any alleged acts or omissions of the tenant.*
4. *The notice referred to in the previous recommendation should be in a prescribed form clearly setting out:*
- (a) *the right of the tenant to written reasons and particulars for the termination; and*
- (b) *the right of the tenant to apply to the rentalsman for review of the notice and the time limit governing that application.*
5. *A request to the rentalsman to review a notice terminating a tenancy should be made no later than 15 days before the date upon which the notice purports to terminate the tenancy, except where there is a bona fide dispute as to whether the tenant has allowed rent to fall into arrears, in which case the rentalsman may extend the time within which the tenant may request such review.*
6. *Upon the expiration of a tenancy agreement for a term, the parties shall be deemed to have renewed the agreement on the same terms and conditions, but as a tenancy from month-to-month, except where*
- (a) *circumstances exist which would justify the termination of a periodic tenancy and the landlord has delivered to the tenant a written notice setting out his refusal to renew and the grounds therefor no less than one month before the end of the term;*
- (b) *the tenant has delivered to the landlord, no less than one month before the end of the term, a written notice of his intention to vacate the premises at the end of the term;*
- (c) *the parties have negotiated a new tenancy agreement.*
7. *A notice delivered by a landlord pursuant to the foregoing recommendation should be subject to review by the rentalsman in the same manner as if it had purported to terminate a periodic tenancy.*
8. *Where a tenancy for a term is deemed to be renewed as a month-to-month tenancy, and a rental increase would have been permissible had the original tenancy been from month-to-month, the landlord may require that the rent payable for the new tenancy be at a higher rate but subsections (2), (3), and (4) of section 51 should apply to such increases.*

## Part II - Rent Control

The question of controls on rents did not, as such, form part of our study and very few people who made submissions to us urged the imposition of rent control. A number of landlords and landlords' groups, however, raised the matter with us in order to speak against it. One tenants' group was careful to point out that they were not in favour of rent control in the traditional sense but advocated the collective bargaining process between tenants and landlords as a means of influencing landlords in the rent-setting exercise.

In one brief, rent control was advocated, and the following submission made.

A Bureau of Rent Registry should be established under city jurisdiction to set a uniform fair rental practice. The Bureau [should] maintain a list of suites and rent charged against suites. To facilitate the registry of suites through the Bureau, all revenue houses and apartment blocks [should] have a licence to operate, and such licensing [ought to] be done through the Bureau. Consequently, the job of keeping statistics, issuing licences and enforcing appropriate standards of maintenance of suites [should] be greatly facilitated.

The Bureau [should] establish a maximum rent-fee schedule. The schedule [should] be based on mortgage companies' policy of computing revenue by adding 10% to the landlord's monthly mortgage payment plus property tax per monthly assessment.

In constructing the rent-fee schedule, the Bureau [should] further take into account [whether the suite is furnished, whether facilities are shared, what amenities are provided, etc.] ...

Tenants [should] have the right to consult the Bureau to find if their rent is above the maximum ... Landlords [should be able to] raise rents by 10% per annum, but rents [could] be raised over 10% to a maximum of 25% only upon proof of improvements to the suite ...

Any increase in tax (should) be passed on to tenants.

In its 1968 Report the Ontario Law Reform Commission pointed out that there are a number of differently conceived rent control schemes.<sup>99</sup>

*First* there is the method of changing the common law landlord and tenant relationship by conferring upon existing courts the power to assist tenants threatened either with eviction or an "unreasonable" demand for rental. This was the characteristic of various American plans during World War I. *Second*, there is the "rent freeze" method which was employed in Canada during World War II. It is also the characteristic of the legislation passed under the United States federal *Emergency Price Control Act* of 1942. The third device is "fair lent" legislation which provides machinery for testing any queried rental as to whether it affords a "fair return" to the landlord. An example of this approach is found in the Virginia *Emergency Fair Rent Act* of 1947, and to a degree in

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99. *Ontario Interim Report* 68.

100. In Britain, the Australian States of Victoria and New South Wales, the State of Massachusetts, and New York City.

101. *See Rent Restrictions Act*, S.N. 1943, c. 45.

102. *Ibid.*, s. 1 (b) (i, ii).

103. S.N. 1973, c. 54. The legislation was proclaimed on May 31/73.

the United States federal legislation of 1949.

Passing reference has already been made earlier in this Chapter to schemes of rent control in operation outside Canada.<sup>100</sup> Within Canada it is not a common phenomenon in peace-time.

During World War II the Federal Government found it necessary to implement a rent control scheme, accompanied by security of tenure. A full description of the scheme is set out in the Chapter of this Report in which we discuss the *Rent Control Act* now in force in British Columbia. The provinces carried on the schemes for some time after the federal government withdrew in 1951. By the late 1950's, however, all provincial schemes had been terminated except for those in Newfoundland and Quebec.

From 1943 until 1972, legislation existed in Newfoundland which gave the government power to appoint rent restrictions boards in various parts of the province.<sup>101</sup> The legislation made provision for a rent review procedure which applied to all dwellings except those which were rented furnished or which included board.<sup>102</sup> Recently a new Act - the *Landlord and Tenant (Residential Tenancies) Act*<sup>103</sup> was enacted to regulate residential premises in the Province. The legislation provides that Residential Tenancy Boards shall have the power, inter alia, to review at the request of a landlord or a tenant the rent charged for residential premises, and to approve or vary the rent.<sup>104</sup>

Quebec has retained the only full-scale rent control scheme in Canada. It operates on an "opting-in" basis for each municipality (it is operative in over 70 municipalities today) and provides that tenants or landlords who fail to reach an

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104. *Ibid.*, s. 20 (7). The subsection was proclaimed on May 31/73.

It is the function of a Board, and it shall have power,

- (a) to investigate and review matters affecting landlords and tenants and provide and disseminate information concerning rental practices and remedies;
- (b) to mediate disputes between landlords and tenants and give advice and direction to landlords and tenants in disputes;
- (c) to investigate allegations of violations of the provision of this Act and the statutory condition provided for by Section 7;
- (d) to review the rent charged for residential premises at the written request of a landlord or a tenant, determine whether the rent be approved or, from a date specified by the Board, varied; and
- (e) to accept rent payable by a tenant and hold the same in trust pending performance by a landlord or any act the landlord is required by law to perform, and any landlord or tenant desiring that the Board shall carry out, with respect and any landlord or tenant desiring that the Board shall carry out, with respect to him, any function or power referred to in this subsection may apply to the Board in writing requesting the carrying out of such function of power and the Board shall proceed with all convenient despatch to comply with such request.

105. An Act to Promote Conciliation Between Lessees and Property Owner, 1951.



agreement on a new rent on the expiry of a lease may apply to the local rent administrator for a new rent to be fixed. Unless it is specifically requested by the municipal council, the legislation<sup>105</sup> does not apply to dwellings for which the rent on December 1, 1962 exceeded \$215 a month in Montreal and \$100 elsewhere. Municipalities can, however, apply to have controls placed on all residential properties which were built not later than April 30, 1968 and which rent for less than a specified amount.<sup>106</sup>

The question whether a system of rent control should be instituted in British Columbia is not one which this Commission is competent to decide, and we find ourselves in agreement with the position taken by the Ontario Law Reform Commission in 1968, stated as follows:<sup>107</sup>

Rent is an important element in the cost of living but it is only one element. A consideration of any system of rent control cannot be dissociated from consideration of control over all those elements which go into the cost of construction and maintenance of housing accommodation. This includes the cost of land, building supplies, wages, and the [sic] food and clothing for the wage-earners and their families, together with municipal and other taxes. The wisdom of such controls is something that requires a wide economic study and policy decisions that go far beyond the powers of this Commission as a law reform body.

We can, nevertheless, point to suggestions that rent control should be instituted only when no other course of action is available. An expression of this view is to be found in the writing of Professor Donnison, who has stated that:<sup>108</sup>

Governments should always seek other and more direct routes to their ends before resorting to rent control. Since the supply of housing in the inner city is inelastic in the short run - i.e., unresponsive for awhile to changes in price - and since tenants have more votes than landlords, it is always tempting votes than landlords, it is always tempting to impose rent controls as a temporary solution to an urgent problem. Their most destructive effects appear much later, and the longer controls continue, the harder it becomes to eliminate them, for the good reason that the immediate effect of freezing rents will generally be even worse. An industry which has grown unprofitable, whether through price controls or other reasons, does not shed its least efficient producers: it is the most effective who go, leaving in their place the ineffective and the unscrupulous. Thus, governments should first consider what they can do through subsidies (e.g., rent allowances for private as well as public tenants), public provisions (e.g., by building or acquiring houses), giving security of tenure, selective extension of opportunities for access to owner-occupied or public housing (mortgages and loans for those who really need them) and higher priority for unmarried mothers or other groups excluded by housing managers in the public sector, and policies that may get higher incomes to the target groups (e.g., through better job opportunities, subsidized public transport, or larger family allowances and pensions).

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106. For a detailed discussion of the legislation, see Audain, "Rent Regulation: Sketches of Various Schemes" in *Is There a Case for Rent Control? Background Papers and Proceedings of a Canadian Council on Social Development Seminar on Rent Policy* 31-33 (1973); see also Ontario Interim Report 66-68.

107. *Ibid.*, at 69-70.

108. See paper presented to the Canadian Council on Social Development Seminar, n. 8 *supra*, at 7.

One point remains to be made. We have recommended that a scheme of tenant security be implemented in this Province, and have stated our belief that it can successfully be operated without concomitant controls on rent. This belief must, of course, be modified by a recognition of the fact that the security of tenure which a tenant may enjoy may be put out of his reach by an increase in rent which he is unable to afford. A model tenant against whom no complaint is likely to be made may be dislodged by a rental increase more easily than an undesirable tenant may be evicted for cause. On the broad front this may be a problem which can be solved only by the institution of a substantial rent control system. We do not believe ourselves to be in a position to express a properly informed view of rent control, but this does not prevent us from recommending that landlords be prohibited from imposing discriminatory rent increases for the sole purpose of dislodging a tenant.

We think it unfortunately possible that in the face of a scheme of tenant security some landlords may resort to the weapon of the rent increase in order to be rid of tenants who might otherwise qualify to stay. In such instances we think the tenant should have the right to apply to the rentalsman for a ruling that the rent increase is ineffective.

Because this recommendation intrudes on the area of rent control we emphasize the fact that the rentalsman's task ought to be not to determine whether or not the rent increase was exorbitant or justifiable, but rather to determine whether it was imposed on a discriminatory basis in order to dislodge the tenant. So that tenants will be inhibited from taking advantage of this provision in order to turn the rentalsman into a *de facto* rent control body, we recommend that where any complaint of a discriminatory rent increase is made, the burden of proving the fact of discrimination ought to remain at all times on the tenant. In other words, it ought never to be sufficient for a tenant merely to prove that his rent has been increased. He ought also to bring evidence that the landlord has not imposed similar increases on tenants who occupy similar premises or has not imposed similar increases in the past with respect to the same premises. We would go even further and limit the tenant's case only to evidence of what his own landlord has done. To allow the tenant to bring evidence of what other landlords charge for comparable premises would be to ask the rentalsman to engage in the very difficult task of judging on a province-wide basis what is a reasonable rent in all the circumstances. That is not the purpose of the exercise. It is, instead, to determine whether or not the landlord has singled out the tenant for a rent increase in order to force him to leave the premises where he might otherwise be in a position to stay.

Finally, the rentalsman's power to declare a discriminatory rent increase ineffective ought not to prevent the landlord from imposing any rent increase at all. In the event that the tenant does prove his case; the landlord should, if it is otherwise lawful, be permitted to impose an increase which is not discriminatory. It should not be part of the rentalsman's task on the proving of discrimination to set a fair rent. He should merely declare the fact of discrimination and leave it to the landlord to modify the increase according to the standards he has set for other tenants. If the tenant still believes the increase to be discriminatory he may bring another complaint before the rentalsman, with the burden of proof still remaining on him. We believe, however, that the effect of the first hearing would make this an extremely unlikely occurrence.

The Commission recommends that:

*The proposed Act empower the rentalsman, on the complaint of a tenant that he has been discriminated against in the setting of a rent increase with the purpose of dislodging him from the premises, the burden of proving which shall be on the tenant, to declare that the increase is discriminatory and ineffective.*

## CHAPTER V

## SECURITY DEPOSITS

### A. Introduction

In any contract it is not unusual that one party will wish to take measures to protect himself against the consequences of the other party failing to perform his part of the bargain satisfactorily. Where money is loaned or credit is extended the lender may wish to take a security interest in land or goods. Very often a contractor will be required to post a performance bond. Landlords have been no less anxious to protect their interests to the fullest extent possible, and the usual mechanism for achieving that goal has been the security deposit.

Traditionally, British Columbia landlords have taken deposits from tenants to protect themselves against three different kinds of potential liability.

- (a) *Nonpayment of rent* - At one time it was a practice among some landlords to extract from an incoming tenant a series of postdated cheques. The notion was that the existence of these cheques would prompt the tenant to live up to his obligations much more readily than might otherwise be the case. A widespread misunderstanding concerning the criminal sanctions attached to bad cheques adds impetus to this. In other cases, landlords would collect the last month's rent in advance. This protection added to the landlord's common law right to distrain for arrears of rent.
- (b) *Damage to the premises* - The purpose of a damage deposit has been to provide a fund against which the landlord could claim in cases where the tenant damaged the premises to an extent going beyond reasonable wear and tear.
- © *Uncleaned premises* - The distinction between damage deposits and cleaning deposits is somewhat blurred. Technically, the cleaning deposit was designed to cover the situation where, by the tenancy agreement or otherwise, the tenant was obliged to leave the premises in a faultless condition. Very often deposits have been taken purporting to cover both damage and cleaning.

At common law, freedom of contract prevails and there are no restrictions on the right of a landlord to extract whatever deposit he can. In the late 1960's the security deposit became a matter of public concern. There was a widespread feeling that total freedom of contract had led to a number of abuses on the part of landlords, and various jurisdictions imposed restrictions such as limitations on amount, type and permissible uses of security deposits.

### B. British Columbia: The Present Position

In British Columbia, the first legislative statement relating to security deposits was by the City of Vancouver in 1969. By-law number 4448 was passed which provided, *inter alia*, in schedule A":<sup>1</sup>

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1. The by-law purported to be passed under the authority of the *Rent-Control Act*. See c. 12.

1. (a) No Landlord, or agent of the Landlord, shall demand or accept from any Tenant, or prospective Tenant a deposit to be used to repair damage to premises occupied by the Tenant, or to be applied to any amounts which may become payable to the Landlord as a result of the breach by the Tenant of any of the conditions of the lease in excess of the following amounts:

|                                     |         |
|-------------------------------------|---------|
| In the case of unfurnished premises | \$25.00 |
| In the case of furnished premises   | \$50.00 |

(b) If a Landlord accepts a deposit not prohibited in subsection (a) he shall return such deposit to the Tenant within 15 days of the date on which the Tenant vacates the premises unless in the meantime he has delivered to the Tenant a detailed statement, supported by such evidence as in the circumstances may be reasonable, showing the cost of repairs the Landlord is required to effect or the amounts owing to the Landlord as a result of a breach by the Tenant of any conditions of the lease or rental agreement.

© If the Tenant disputes anything contained in the statement delivered to him by the Landlord he may bring the matter before the Board which shall make a binding decision as to the disposition of the deposit.

The by-law does not specifically purport to regulate deposits covering future rent.

The law was further changed in 1970 by Part II of the *Landlord and Tenant Act*. The relevant sections provide:

37. (1) Unless a municipality, by by-law otherwise provides, a landlord shall not require or receive a security deposit from a tenant under a tenancy agreement entered into or renewed after this Part comes into force other than the rent payment for a rent period not exceeding one month, which payment shall be applied in payment of the rent for the last rent period under the tenancy agreement.  
  
(2) A landlord shall pay annually, or fifteen days after the tenancy is terminated, whichever is earlier, to the tenant interest on the security deposit for rent referred to in subsection (1) at the rate of six per cent per annum.  
  
(3) 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.
38. (1) This section applies to security deposits held by landlords at the time this Part comes into force, other than security deposits for rent only as described in section 37.  
  
(2) The landlord shall pay annually to the tenant interest on any moneys held by him as a security deposit at the rate of six per cent per annum.  
  
(3) Subject to subsection (4), the landlord shall pay the security deposit to the tenant, together with the unpaid interest that has accrued thereon and been retained, within fifteen days after the tenancy is terminated or renewed, but a judge may, upon summary application therefor, extend the time to such longer period as he considers proper.

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

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

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

(5) A landlord may apply to a judge for an order authorizing the retention of all or part of a security deposit, and section 60 applies to the application with the necessary changes and so far as is applicable.

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

(7) Where, on the coming into force of this section, a by-law of a municipality applies to security deposits, any of the provisions of this section that are inconsistent with, or repugnant to, the by-law do not apply in respect of that municipality.

62. (1) Any person who contravenes any provision of the Act or fails to obey an order made under this Part is guilty of an offence and is liable, on summary conviction, to a fine not exceeding one thousand dollars.

(2) Where a landlord is convicted of an offence of contravening section 37 or 38, the judge making the conviction may order the landlord to pay to the tenant the security deposit and interest or any part thereof that is unpaid.

In examining the legal effect of those provisions, reference must first be made to the statutory definition of "security deposit." Section 34(l)(d) provides:

"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.

Section 37(1) can be regarded as a blanket prohibition against security deposits subject to two exceptions. First, a landlord is permitted to take a security deposit for rent. The money so taken must be applied in payment of the rent for the last period of the tenancy and the amount of the deposit must not exceed the money due for the last month's rent payment. Second, the Legislature left it open for municipalities, by by-law, to permit the taking of security deposits for damage, setting up a local option scheme in preference to a general prohibition. Landlords are prohibited from requiring the delivery of post-dated cheques.

### **C. Shortcomings of the Present Legislative Scheme**

The purpose of the existing legislation seems to be the regulation of security deposits, the balancing of conflicting interests of landlords and tenants and the provision of a convenient forum for the resolution of disputes. An analysis of the legislation, however, reveals that there are gaps which could defeat that purpose.

It might be assumed that the Legislature intended that all security deposits for rent, whether in existence when Part II was enacted or taken after that date, would

bear interest at six per cent. Section 37(2) provides that interest is payable on security deposits for rent "referred to in subsection (1)" but that subsection covers only tenancy agreements "entered into or renewed after this Part comes into force." As security deposits for rent are expressly outside the scope of section 38, it therefore appears that, on the strict wording of the Act, no interest is payable on security deposits for rent taken prior to April 6, 1970.<sup>2</sup>

The enforcement provisions of the Vancouver by-law, and the dispute resolving powers of the Vancouver Rental Accommodation Grievance Board have recently been held to be invalid.<sup>3</sup> Section 38 sets out elaborate procedures for dealing with damage deposits held at the time Part II came into force and places jurisdiction in the Provincial Court. Section 37 is silent on repayment and retention and it may therefore be argued that there is no means of enforcing the valid portions of the Vancouver by-law with respect to post-1970 damage deposits. We understand that, in practice, the Provincial Court has accepted jurisdiction and applied the provisions of section 38 *mutatis mutandis*.

The Act is silent on procedures relating to the disposition of the security deposit for rent if the tenant abandons the premises or if he leaves before the end of the tenancy agreement with notice. There is no provision regulating the nature of the deposit or how it is to be handled by the landlord during the tenancy. The nature of the legal relationship is uncertain. Does the landlord hold the security deposit as trustee, pledger, bailor or debtor? The legal nature of the relationship with respect to the security deposit is important in ascertaining the tenant's rights where the landlord goes bankrupt or absconds with the deposit, or where the landlord's interest in the rented premises is terminated.

The extent to which the Act has protected the tenant with respect to damage deposits is open to some question. Notwithstanding the fact that subsections (3), (4), and (5) of section 38 clearly place the onus on the landlord to obtain a court order permitting him to retain any amount out of the security deposit,<sup>4</sup> it seems to be the practice of a substantial number of landlords to retain the deposit in all cases and to refund it only when it appears that the tenant is about to take legal steps to have it returned. Statistics gathered in the Vancouver Small Claims Court for the year 1972 indicate that in 50 per cent of the cases where tenants were plaintiffs they were seeking the return of a damage deposit even though, theoretically, the legal onus was on the landlord to apply for a court order for retention. There is also evidence that, in municipalities outside Vancouver where damage deposits are not permitted, landlords are still requiring them.

From the landlord's point of view, existing procedures seem equally unsatisfactory. We were frequently told by landlords in written briefs and presentations at our hearings that it is seldom worth the time and trouble required to go to Small Claims Court and obtain a retention order. The conscientious landlord will frequently return the full deposit to the tenant even though he may have a legitimate claim on it.

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2. Unless the tenancy agreement has been renewed since that date, in which case it comes within s. 37 (1).

3. See c. 12.

4. Pre-1970 deposits and post-1970 deposits where the Courts have taken jurisdiction. See text at n. 3.

In our view, a fresh approach to the question of security deposits is required. Our search for a new approach has caused us to consider schemes in other jurisdictions designed to reconcile the competing interests of landlords and tenants.

#### D. Comparative Study

##### 1. General

Useful focal point for a comparative study of the legislative regulation of security deposits is provided in a recent commentary where it is pointed out that "the tenant's payment of money to the landlord on the execution of a lease raises four basic issues concerning the nature of the payment and the rights of the parties."<sup>5</sup> The issues referred to are:<sup>6</sup>

*Purpose of the payment* - The purpose of the payment depends on the intention of the parties entering the lease agreement and frequently will be given the construction most favourable to the tenant. The payment may be (1) advance payment of rent, (2) consideration for granting the lease, (3) liquidated damages, or (4) a deposit to secure payment of rent or fulfilment of all lease covenants. Only the last of these four is properly described as a security deposit, although modern statutes often treat alike advance payments of rent and security deposits. Consideration for granting a lease seldom causes problems unless an inartfully drawn lease agreement fails to articulate clearly the intentions of the parties. Liquidated damages clauses frequently are subject to challenge as penalties which are disfavoured and unenforceable.

*Nature of the deposit* - A deposit to secure payment of rent or performance of covenants may be characterized as a pledge, a trust fund, or a debt. Title and permissible use of the fund depend primarily upon the characterization and purpose of the payment. Ascertaining the nature of the payment is especially important if one of the parties becomes insolvent during the term of the lease. Many state statutes now resolve these questions.

*Permissible use of the security deposit* - Statutes or the lease agreement itself may impose limits upon the lessor's use of the security deposit. The lessor may be prohibited from commingling the funds with his own and may be required to pay interest to the lessee.

*Disposition of the security deposit* - The landlord may retain the security deposit until the tenant renders the performance secured by the deposit, unless the landlord wrongfully evicts the tenant or misuses the deposit. The money paid as security constitutes a fund upon which the landlord may draw to compensate himself for a tenant's breach of covenants covered by the security. The tenant is entitled to the timely return of the deposit subject only to the rightful claims of the landlord consistent with the lease provisions.

##### 2. Canada

The matter of security deposits for the performance of obligations under tenancy agreements has become the subject of legislative activity in most provinces and territories in Canada over the last few years. Eight Provinces and

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5. Contemporary Landlord and Tenant Law (1973), 4 Vand. 689, 693-4.

6. Ibid.



both territories have enacted legislation regulating security deposits.<sup>7</sup> For convenience we have set out the relevant provisions of this legislation in tabular form on the following page.

[CHART OMITTED]

In all the jurisdictions indicated except Manitoba and Newfoundland the definition of security deposit is identical to that set out in section 34 of the *British Columbia Act*. The *Manitoba Act* provides the following definition:<sup>8</sup>

"Security deposit" means money in the form of cash or cheque 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 payment of rent in arrears or for damage to the premises.

The *Newfoundland Act*<sup>9</sup> defines security deposit in terms of any money or property paid by a tenant to a landlord besides rent.

The legislation in force in Alberta, Newfoundland, Prince Edward Island, and Saskatchewan specifies that the landlord holds the security deposit as trustee.

It is obvious from the table that the emphasis in Canadian statutes is on the regulation of the amount of security deposits, the interest payable, and the disposition of the deposit on termination of the tenancy, except as noted above, or in the table, no mention is made of the handling or nature of the deposit or the disposition of the deposit on the termination of the landlord's interest.<sup>10</sup>

### 3. United States

Recently, a number of jurisdictions in the United States have favoured statutory regulation of the major security deposit question. Thirteen states, since 1970, have initiated legislation regulating security deposits or have substantially rewritten the security deposit sections in their landlord and tenant codes. These new state statutes generally provide non-waivable protection to the tenant.

One commentator has recently considered the scope of this legislation and indicated that:<sup>11</sup>

Some of the statutes cover only residential leases. Frequently they broadly define a security deposit to include any payment or deposit of money (including an advance payment of rent), the primary function of which is to secure the performance of a rental agreement or any part of such an agreement. Many statutes state that the tenant's claim to such a deposit shall be prior to the claim of any of the landlord's creditors, although California's law grants a prior claim to a trustee in bankruptcy. All of the new statutes regulate the manner in which

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7. Only New Brunswick and Quebec do not have similar legislation.

8. N. 9 *supra* s. 2 (c).

9. N. 10 *supra*.

10. E.g., Saskatchewan.

11. N. 5 *supra*, at 694.

the landlord may use or hold the security deposit funds. Some statutes characterize the landlord as a trustee holding for the benefit of tenants, and most prohibit the commingling of such funds. Additionally, some require the payment of interest to the tenant. Finally, most of the new statutes require repayment or itemized justification of the retention of the deposit within a strictly enforced time period ranging from two weeks to forty-five days.

A table, comparable to that setting out Canadian legislation, has been prepared and is included as an Appendix to this Report.

Many of the American statutes regulate the handling of deposits during the tenancy, and control their assignment on the disposition of the landlord's interest; but the interest on the deposit, or its use, is rare.

#### 4. Other Jurisdictions

Other relevant landlord and tenant systems such as those in England, Australia, New Zealand and are all treat security deposits within the context of "premiums" which, as a general rule, are prohibited. The prohibition against premiums seems aimed at preventing the circumvention of rent control legislation and the experience of those common law countries is not particularly helpful to us.<sup>12</sup>

In Germany,<sup>13</sup> Sweden,<sup>14</sup> and Switzerland<sup>15</sup> there are no prohibitions on security deposits but they are not generally used. In Switzerland, an efficient debt collection system seems to eliminate the need for security. In France a landlord is entitled to request a maximum of three months' rent in advance and to retain this until the tenancy is terminated.<sup>16</sup> He is entitled to subtract any damages for which the tenant is responsible and is obliged to return the balance to the tenant.

### E. Policy Considerations

The first issue confronting the Commission is whether security deposits should be prohibited entirely, controlled, or left strictly to be agreed upon between landlord and tenant. A number of reasons have been advanced to support the prohibition of security deposits in England and several other countries. Some of those reasons are:

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12. A more complete analysis of a law relating to premiums is provided as an Appendix to this Report.

13. Information concerning the position in Germany obtained from the Consulate of the Federal Republic of Germany: telephone interview Oct. 17/73.

14. Information about the Swedish law obtained from the Swedish Trade Commission in a telephone interview October/73. The law is set out in a 1967 Act.

15. Information obtained from the Consulate of Switzerland in a telephone interview Oct. 18/73.

16. According to Monsieur Bougonin, Information Officer, Consulate General de France.

17. Samuels, *Comment* (1968), 118 New L.J. 4.

18. *Ibid.*

- (a) The landlord has free use of the tenant's money and obtains a benefit in the form of interest;<sup>17</sup>
- (b) The general law gives landlords adequate remedies in the event of a breach of obligation by tenants and landlords should therefore pursue these remedies;<sup>18</sup>
- © The tenant might have some difficulty securing the return of money owing at the end of the tenancy if the landlord refuses to repay or becomes insolvent;<sup>19</sup>
- (d) It is difficult for the tenant to find the capital to pay a deposit over and above the sum needed for rent at the beginning of a tenancy;<sup>20</sup>
- (e) Security deposits are not necessary because breaches of obligations by tenants are not a significant problem.<sup>21</sup>

Other arguments have been advanced in favour of deposits. One commentator has stated that:<sup>22</sup>

A lease imposes reciprocal obligations on landlord and tenant and the instrument reflects a mutuality of consideration. In reality, however, the landlord surrenders his property and places it in the tenant's control, and at the same time for the lease term disables himself from entering into profitable arrangements with other interested parties. The tenant, by contrast, does little more than undertake a commitment of future performance. In essence the landlord exchanges a completed performance for a promise yet to be fulfilled. Failure to abide by the tenant's undertaking of course results in rights of action against him, but the trouble and expense of such remedial steps make them a poor substitute for performance, particularly in the case of a tenant who proves financially irresponsible, and in any event there is no compensation for opportunities lost during the lease term. The landlord therefore needs protection that, for the duration of the lease, the tenant will in fact faithfully discharge his custodianship of the property and that he will actually adhere to his commitments.

A lease, and particularly one of substantial duration, therefore typically requires the tenant at the outset or in the early lease years to deposit funds or other liquid assets which can be applied promptly in satisfaction of the tenant's

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19. *Ibid.*

20. *Ibid.*

21. Lamont, *The Landlord and Tenant Act Part IV* 4.

22. T. Weiss, *Security v. Advance Rent Under the Federal Income Tax* (1969), 42 Conn. B.J. 356.

23. Ontario Interim Report 21.

promise in the event of his deviation or delinquency.

This argument becomes more forceful if security of tenure is introduced. Further arguments were cited by the Ontario Law Reform Commission:<sup>23</sup>

Landlords ... justify the taking of security deposits on the basis of the need to have a means of controlling damage committed by tenants and also as a means of recovering at least part of such damage without recourse to the courts ... It may have some deterrent value; it saves cost of collection; it is the source of added revenue and may save the tenant who performs all of his obligations from contributing financially through increased rental flowing from the default of a tenant who is judgment proof ... American authorities, in jurisdictions having abolished the remedy of distress, have treated the security deposit as a means of compensating landlords for the loss of the right to distrain. This can only be partially correct, for the reason that the usual security deposit against damage cannot be employed to make up arrears of rent without the tenant's consent.

In a number of their submissions to us landlords stressed that the value of a damage deposit lies not only in providing a fund against which the landlord can proceed, but also in providing real incentive to the tenant to keep the premises clean and undamaged.

The arguments in favour of permitting some form of security deposit seem to us to be persuasive, particularly in view of the fact that we believe the arguments against security deposits may be met in large measure by controlling the circumstances under which deposits may be taken. It goes without saying that we do not favour leaving landlords and tenants to their own arrangements concerning deposits. The abuses which would almost certainly arise in the light of the unequal bargaining positions of the parties in today's housing situation make this an unattractive alternative.

## **F. Recommendations**

We have concluded that the most convenient method of regulating security deposits is to take them completely out of the hands of landlords and place them in the custody of an independent third party who would hold the funds as trustee for the tenant subject to any rightful claims by the landlord. We propose that the rentalsman should perform this function. This approach would solve a number of problems. It would, in a realistic way, place the substantive, as well as the legal, burden on the landlord to demonstrate that his claim is a valid one. It would also avoid any problems which might arise when a landlord sells his interest in the property. The right to claim against the deposit would enure to the benefit of whoever the landlord might be at the time the claim is made. It would avoid a competition between the tenant and the creditors of the bankrupt landlord. Moreover, the legal nature of the deposit would be put on a well defined basis. For convenience we shall refer to a security deposit paid to the rentalsman in accordance with this recommendation as a "statutory deposit."

Implicit in our views concerning security deposits is that only those authorized by statute should be permitted to be taken and that all other deposits

should be strictly prohibited, as should all other premiums or bonuses.<sup>24</sup> In our opinion, however, the definition of security deposit in section 34 of the Act requires reexamination. On the fact of it, the definition is wide and the courts have not been unimaginative in striking down arrangements designed to circumvent it. For example, in *Balfour v. Johnston*<sup>25</sup> there existed a contract, collateral to the tenancy agreement, requiring the tenant to pay a sum for "early redecoration" should he vacate within the first year of the tenancy. It was held that the collateral contract amounted to a security deposit. Judge Levey of the Provincial Court stated:<sup>26</sup>

I have come to the conclusion and hold that the document given by the tenant is a security deposit given by the tenant, being a "right" given by the tenant of a residential premises to a landlord as a security for the performance of the tenant's obligation to reside in the premises for at least a year. Additionally, the landlord's holding of the document of July 2, 1970, clearly renders any cause of action he may acquire against the tenant, more easily performed or more certain in the event of litigation. Since the statute makes reference to security deposits being [permissible] only by local option ... and since the City of Vancouver has not expressly authorized this type of security deposit, it is clearly unlawful.

Other devices used by landlords include the "non-refundable deposit" and the "non-refundable cleaning deposit." It is also possible that a landlord might require the tenant to find a "guarantor" to provide the security deposit. It is not clear how far such arrangements amount to a breach of the Act. Another technique which has been used in the past is to make the first month's rent substantially higher than subsequent payments. The scope for using this device was substantially restricted by the 1973 amendments to section 51 of the Act which confined the permissible frequency of rent increases to the premises rather than the tenancy.<sup>27</sup> Elsewhere in this Report we recommend that the frequency of rental increases again be related to the tenancy. The "balloon payment" device may, therefore, again become available.

In our view, all these attempts at circumventing the clear intent of the legislation can be defeated by a widened definition of "security deposits." Such a definition might read as follows:

Security deposit means money or any property or legal right advanced or deposited under a rental agreement by a tenant or anyone on his behalf, to a landlord or his agent or anyone on his behalf to be held by or for the account of the landlord, the primary function of which is to secure the performance of any obligation under the tenancy agreement or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition and without limiting the generality of the foregoing, this definition shall include

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24. See generally Appendix G. An example of a bonus or premium which would be prohibited as "key money" extracted by a landlord for the "privilege" of renting the premises.

25. Unreported - Vancouver Provincial Court, No. 6845/71.

26. *Ibid.*, at 3.

27. S.B.C. 1973, c. 47, s. 6.

advance payments of the last month's rent, deposits for damage for which the tenant is responsible, deposits for failure to pay rent, collateral contracts giving the landlord a right to demand consideration if the tenant quits early, non-refundable deposits, and requiring a rental payment early in a tenancy which is substantially larger than the others.

We have also concluded that permissible claims by landlords against the statutory deposit should be clearly limited. Statutory deposits should be available to landlords only with respect to claims for:

- (a) arrears of rent;
- (b) all or part of the final instalment of rent when a tenancy has been lawfully terminated;
- (c) reasonable loss of revenue by a landlord arising out of the unlawful termination of a tenancy by a tenant; and
- (d) losses arising out of the tenant's failure to observe the statutory duty imposed on him by section 49(2) of the Act to repair damage caused by his wilful or negligent conduct or that of persons who were permitted on the premises by him.

While in some jurisdictions the security deposit is "blended" (in the sense that there is a single deposit against which all permissible claims may be made), we have concluded that it is useful to maintain the distinction between deposits made with respect to the payment of rent, and deposits securing the landlord against damage to the premises. We would designate the former as a "statutory rent deposit" and the latter as a "statutory damage deposit." The statutory damage deposit would be available only for claims for damage under heading (d) above while the statutory rent deposit would be available for claims under headings (a), (b), and (c).

How should the maximum permissible statutory deposit be defined? The options seem to be as follows:

- (a) as a percentage of the monthly rent as in Manitoba;
- (b) by specifying a dollar figure as in Vancouver Bylaw No. 4448;
- (c) by some combination of (a) and (b) as in Saskatchewan.<sup>28</sup>

We have concluded that it is most appropriate to relate the permissible amount of the deposit directly to the rent payable. In this way, the value of the premises, the presence or absence of furniture and appliances, and the extent of the tenant's monetary obligations will be most accurately reflected.

Recommendations made elsewhere in this Report extend security of tenure to the periodic tenant. Under the termination scheme which we envisage, the diligent landlord will be able to take proceedings to prevent the rent falling more

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28. See table *supra*.

29. Unfurnished premises, \$25; furnished premises, \$50.

30. Except to the extent that a deposit may need to be supplemented because of an intervening rental increase.

than one month into arrears. In these circumstances it seems equitable to permit the landlord to require the making of a statutory rent deposit equal to one month's rent and, in that way, protect himself fully. We have also concluded that one-half of one month's rent is an appropriate maximum with respect to the statutory damage deposit. We have some sympathy with those landlords who have urged that the current limitations under Vancouver By-law No. 4448 are inappropriately low.<sup>29</sup>

Thus, under our scheme the maximum permissible statutory deposit would be an amount equal to one and one-half times the first month's rent. While this may seem high when compared with the limits in other Canadian jurisdictions it should be pointed out that it is not too much greater than the permissible limit of one month's rent plus such other amount as may be provided by municipal by-law which presently prevails in British Columbia: It will also go some way towards mitigating the deterioration of the landlord's position arising out of granting security of tenure which does not exist, in the form we propose, elsewhere in Canada. Moreover, the good tenant should not suffer unduly. If he has faithfully performed all his obligations to the landlord, the statutory deposit should be available to be applied to the security which may be required by a new landlord if the tenant moves.

Consideration must also be given to whether the right to require a statutory deposit should be referable to the dwelling unit or to each tenant. We were told of one recent case where three women lived in a unit and each was asked to pay one month's rent as security. In another recent situation, two students signed a lease for the rental of a house for themselves and six others. The landlord required a damage deposit of \$25 from each tenant making a total of \$200. The intention of the Legislature in the *Landlord and Tenant Act* and of the City of Vancouver in By-law No. 4448 on this point is not clear. In our view, no legitimate purpose is served by permitting the maximum statutory deposit to be required of each occupant and that possibility should be foreclosed.

Under section 37(1) existing rent deposits "shall be applied in payment of the rent for the last rent period under the tenancy agreement." It is therefore the practice where a rent deposit has been taken that, when a tenancy is lawfully terminated, no further money changes hands.<sup>30</sup> This is a convenience to both landlord and tenant and is a practice which we would like to preserve to the extent possible. There is, therefore, a need for some simple device which will get the last month's rent out of the custody of the rentalsman and into the hands of the landlord quickly and efficiently. We suggest that the proposed Act contain a statutory form of notice for use by the tenant when a statutory rent deposit has been made. This notice could incorporate a direction to the rentalsman that he pay over the statutory rent deposit to the landlord, and would be akin to a statutory bill of exchange. It also seems reasonable that landlords' rights against statutory deposits should be easily transferable among landlords where the reversion has been sold or where the tenant has moved and wishes to transfer the

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31. Provided, of course, the prior landlord has no adverse claim to the deposit.

32. This would normally occur only when a landlord's claim is substantially larger than the statutory deposit.

benefit of the security deposit to his new landlord.<sup>31</sup>

In our opinion, the legal onus of asserting and proving his claim should continue to rest on the landlord. Where no such claim is asserted within some specified period of time, say the existing 15 days from the termination of the tenancy, the tenant's entitlement to the statutory deposit should be absolute. The landlord would be free to assert his claim in the following ways:

- (a) By delivering to the rentalsman the tenant's written consent to the payment of some or all of either the statutory damage deposit, the statutory rent deposit or both. The prescribed form of notice embodying the tenant's consent to payment of the statutory rent deposit would fall into this category.
- (b) The delivery by the landlord to the rentalsman of a "notice of claim" setting out the deposit against which he is claiming and the nature of his claim. It would also be desirable if the notice stated the amount; however, where severe damage is involved the amount may not always be ascertainable within the time limits provided. This clearly should not bar a landlord's claim.
- (c) A delivery to the rentalsman by the landlord of a copy of a summons or writ issued by a court of appropriate jurisdiction indicating that the landlord had commenced an action on a breach of obligation by the tenant, with respect to which a valid claim would otherwise lie against the statutory deposit. In such a case the rentalsman would hold the deposit and await the determination of the court.



Except where the landlord chooses to pursue his remedy in court,<sup>32</sup> we have concluded that the rentalsman is the proper party to adjudicate conflicting claims to a statutory deposit when a dispute arises. We would give him original jurisdiction with respect to statutory deposits and his determination would not be subject to appeal.

We are reluctant to make overly specific procedural recommendations with respect to such disputes. In our view procedures should be flexible and informal and developed by the rentalsman as experience dictates. We envisage that the rentalsman will attempt to determine, as quickly and informally as possible the extent to which a dispute actually exists and the extent to which the positions of the parties are irreconcilable. He might do this by telephone. If the disagreement turns on the existing state of the premises he might inspect them. If the parties are *ad idem* as to the extent of damage but not its value the rentalsman might first try to mediate the dispute before inspection. Circumstances may arise where the tenant cannot be found. In such cases a rentalsman should be free to proceed *ex parte* after such substitutional service, if any, as he feels is appropriate. We do, however, feel that where the rentalsman proceeds *ex parte*, it should be on the basis that the tenant has disputed the landlord's claim. In most cases the rentalsman will be at the mercy of the landlord regarding the tenant's new address (if available). The possibilities for abuse by the unscrupulous landlord are obvious.

When a contest over the disposition of a damage deposit arises, it frequently happens that the facts in dispute relate to the condition of the premises when the tenancy commenced. It has been suggested to us that many such disputes could be resolved if, before the tenant takes possession, landlord and tenant were to survey the apartment and note any damage on a statutory form of "check list." That document could be signed by both parties and would be *prima facie* evidence of the condition of the premises at the commencement of the tenancy. We understand that such a check list had been developed in Manitoba and its use, while not compulsory, is encouraged by the rentalsman.<sup>33</sup>

The check list suggestion has considerable appeal; however, it can be argued that there are several disadvantages, and in particular that it would tend to favour the landlord over the tenant. When a tenant initially inspects the premises with a view to renting he does not always turn his mind towards the specific, minute features a check list would require. He does not always count the existing cigarette burns in the carpet or the number of holes which have been left in each wall where the former tenant hung pictures. He makes an overall assessment asking himself whether the premises are "generally acceptable" and makes his decision to rent on that basis. Moreover, an incoming tenant might not wish to start the relationship with his landlord by performing a minute and time-consuming inspection insisting that every flaw be recorded. He might decide that some flaw is too trivial to record and then find that decision coming back to haunt him at a later date. The argument concludes that the tenant who signs such a check list would only be acknowledging that he received the premises in a habitable and acceptable condition; and if that is all that is read into the document it has little value in determining who should bear the cost of the cigarette burn in the carpet which the landlord alleges to be recent; and if more is read into it, it would be unfair to the

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33. A copy of the check list is reproduced in Professor Sinclair's *Survey of Landlord and Tenant Law - Working Report 60* (Law Reform Division Department of Justice, New Brunswick).

tenant.

Some of the arguments against the use of check lists might be met by deferring its completion to a time when the tenant has been in possession for, say, one month. That would give the tenant a full opportunity to acquaint himself with the condition of the premises and make a reasoned assessment of its condition. Having security of tenure, he would be less worried about annoying his landlord by recording minute flaws than would be the case if the check list were completed before the commencement of the tenancy. On the other hand, we can see disputes arising between landlord and tenant as to whether any specific item of damage occurred since the tenant moved in. At our hearings, a representative of an association of resident managers was asked about check lists. Her opinion was that the time required properly to complete such a document outweighed its advantages and few people would use them. We have no specific recommendation to make concerning check lists. The rentalsman might wish to encourage their use on an experimental basis. Experience derived from their limited use might then form the foundation of a more concrete policy.

#### **G. Rentalsman's Handling of Statutory Deposits**

We have recommended that the rentalsman hold all statutory deposits as trustee for the tenant. It follows that his handling of the funds will be subject to the provisions of the *Trustee Act*.<sup>34</sup> It is expected that the rentalsman would retain a portion of the funds which he receives in cash but would invest the larger part in permitted securities. Interest on those investments will be substantial. Recent census figures<sup>35</sup> indicate that almost a quarter of a million dwellings in British Columbia are rented. If one were to assign to those dwellings an average rental rate of \$150 per month and assume that, say, one-third of the landlords required that a full statutory deposit be made, and assuming further that the rentalsman were to invest those funds at five per cent, the interest generated would exceed one and one-quarter million dollars per year. How should that interest be applied?

A strong argument can be mounted that, in principle, the interest should be returned to the tenant. The only reasonable alternative to that seems to be to apply the interest to the cost of the rentalsman's operation. The Commission has chosen the latter course. Our reasons are numerous. First, the calculation and disbursement of interest to tenants at appropriate intervals would throw on the rentalsman's office a substantial burden which is difficult to justify on the basis of principle alone. Second, we have gained the impression during the course of considering submissions made to us that tenants are less interested in obtaining the interest on their deposits than making sure the landlord does not have the benefit of it. We suspect that large numbers of tenants would be, if not happy with, at least indifferent to, the notion that interest on their funds would be applied to support the rentalsman's operation. We also see the necessity of providing the rentalsman with a fund to effect repairs immediately in appropriate cases. Elsewhere we have recommended that the rentalsman be empowered to order that rental payments be made to him rather than the landlord for this purpose. Circumstances may, however, arise where it would take several months of such payments to build up a large enough fund to effect the necessary repairs. That may be too long. A fund provided by interest on statutory deposits would fill this gap.

Moreover, while it may seem inequitable that the rentalsman's operation be

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34. R.S.B.C. 1960, c. 390.

35. 1971.

funded with interest on tenant's money, two points are worth making. First; any attempt to "tax" landlords with respect to the cost of the operation would probably only result in that tax being passed back to the tenant in the form of increased rent. Secondly, a large portion of the rentalsman's operation will be devoted to making available to tenants remedies, such as the review of termination notice, which do not now exist. It does not seem particularly inequitable that a large part of the financial burden of maintaining the necessary administrative machinery should fall on the tenant.

Our final reasons for recommending that interest be applied to the cost of the rentalsman's operation are strictly pragmatic. The operation, as we conceive it, is an ambitious undertaking. We would endow the rentalsman and his staff with responsibilities calling for exceptional qualities. It follows that we wish to see the best possible persons retained to discharge the responsibilities we have described. It is our hope that a readily available source of funding will prevent any temptation to "cut corners" with respect to either personnel or facilities in the establishment of the rentalsman's office.

If the rentalsman system which we propose works, British Columbia will finally have an accessible and authoritative source of information and an appropriate forum for the speedy resolution of landlord and tenant disputes operating on a Province-wide scale. Examined in this light, the few dollars represented by interest foregone seems a small price to pay. The disposition of interest in the manner suggested is not, however, a matter of high principle with us and our recommendation should not be taken as a denial of the tenant's moral right to the interest. Rather it represents a practical solution to what we conceive to be a difficult administrative problem.

## **H. Summary of Recommendations**

For convenience, the recommendations made in this Chapter are summarized below.

The Commission recommends that:

1. *The landlord be permitted to require, at the commencement of a tenancy, that a tenant pay to the rentalsman a statutory rent deposit of an amount less than or equal to the first month's rent, or a statutory damage deposit of an amount less than or equal to one-half of the first month's rent, or both.*
2. *No more than one statutory rent deposit and one statutory damage deposit may be required with respect to any one dwelling unit regardless of the number of occupants.*
3. *Except for statutory deposits, all security deposits, premiums, and bonuses be prohibited.*
4. *The term "security deposit" be defined in a manner comparable to the following:*

*... money or any property or legal right advanced or deposited under a rental agreement by a tenant or anyone on his behalf, to a landlord or his agent or anyone on his behalf to be held by or for the account of the landlord, the primary function of which is to secure the performance of any obligation under the tenancy agreement or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition and without limiting the generality of the foregoing, this definition shall include advance payments of the last month's rent, deposits for damage for which the tenant is responsible, deposits for failure to pay rent, collateral contracts giving the landlord a right to demand consideration if the tenant quits early, and non-refundable deposits, and requiring a rental payment early in a tenancy which is substantially larger than the others.*

5. *The rentalsman hold all statutory deposits as trustee for the tenant, subject to any rightful claim by the landlord.*
6. *The rentalsman invest all statutory deposits in securities permitted by the Trustee Act.*
7. *Interest on statutory deposits be applied by the rentalsman to the costs of operation of his office.*
8. *The statutory rent deposit be available to the landlord only with respect to claims for:*
  - (a) *arrears of rent;*
  - (b) *all or part of the final installment of rent when a tenancy has been lawfully terminated; and*
  - (c) *reasonable loss of revenue by a landlord arising out of the unlawful termination of a tenancy by a tenant.*
9. *Upon the delivery of a notice by a tenant lawfully terminating a tenancy, the tenant may, in writing in prescribed form consent to immediate payment of the statutory rent deposit to the landlord and when such consent is delivered to the landlord he should be deemed to have received the amount of the rent deposit toward the satisfaction of such rent as may be or become payable.*
10. *Upon presentation by the landlord of the tenant's written consent given in accordance with the foregoing recommendations the rentalsman should pay to the landlord the statutory rent deposit.*
11. *The statutory damage deposit be available to the landlord only with respect to claims for losses arising out of the tenant's failure to observe the statutory duty imposed on him by section 49(2) to repair damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him; and it shall not be available with respect to the cost of cleaning or the breach of any covenant in the tenancy agreement relating to the use and maintenance of the premises which the rentalsman determines is unreasonable.*
12. *A landlord may assert a claim on a statutory deposit by delivering to the rentalsman*
  - (a) *the tenant's written consent to the claim;*
  - (b) *a notice of claim;*
  - (c) *a copy of a summons or writ for a claim relating to the statutory deposit,**no later than 15 days from the termination or expiration of a tenancy.*
13. *Except where the tenant has consented in writing to the landlord's claim, the rentalsman, upon receiving a landlord's notice of claim shall, if possible, determine if the tenant disputes that claim.*
14. *If the landlord's claim is disputed the rentalsman shall determine the dispute in accordance with the recommendations relating to procedure and disburse the statutory deposit accordingly.*
15. *If the tenant cannot be found, he should be deemed to have disputed and the rentalsman may proceed to determine the rights of the landlord on that basis in the absence of the tenant.*
16. *If, after 15 days have elapsed and no notice of claim has been delivered to the rentalsman by the landlord, the rentalsman shall, upon being satisfied that the tenancy has in fact terminated or expired, pay to the tenant, upon his application, the statutory deposit held.*
17. *The rentalsman may, at any time, pay the statutory deposit to the tenant, upon receiving the written consent of the landlord.*
18. *Rights against statutory deposits should be transferable*
  - (a) *at the option of the tenant, from a previous landlord to an existing landlord when the tenant has moved and provided the*

*previous landlord has no adverse claims;*

*(b) between landlords when the premises is sold.*

## CHAPTER VI

# CONTRACTUAL NATURE OF THE TENANCY AGREEMENT

### A. General

The introduction of Part II of the *Landlord and Tenant Act* represented a clear policy choice on the part of the Legislature to place the relationship between landlord and tenant on a purely contractual basis, and move away from the notion that, with respect to residential tenancies, the tenant has a leasehold estate conferring an interest in land. The most succinct expression of this policy is found in section 35 which provides:

For the purposes of this Part, the relationship of landlord and tenant is one of contract only, and a tenancy agreement does not confer on the tenant an interest in land.

That policy is also evident in other provisions throughout Part II. The word "lease" has been discarded in favour of the term tenancy agreement." Certain contractual concepts such as the doctrine of frustration, the obligation to mitigate damages and the interdependence of material covenants have been incorporated into Part II. Moreover, the doctrine of *interesse termini*, which is based on the promise that the tenant's interest is one in land, has been abolished.

On the other hand, leasehold estate concepts have not entirely disappeared. Section 43 speaks of covenants which "run with the land," a clearly non-contractual notion, and also refers to the "demise." The remedy of distress remains, although only in narrow circumstances. These features seem to have been inherited from the Ontario legislation. It should be noted that the Ontario *Landlord and Tenant Act* has no provision comparable to our section 35. Ontario took a selective approach to the transition from property to contract<sup>1</sup> and this allowed the draftsman to refer, in section 90 of the *Ontario Act*, to covenants "running with the land", without creating inconsistency with the contractual aspect of the relationship.

It is also important to realize that, by making the relationship solely one of contract, every aspect of the rules of contract apply including the concept of privity,<sup>2</sup> notions of mistake and illegality, and contractual damages principles. While we agree that the relationship should be one of contract, in our view a number of specific contractual rules require closer examination. The adoption of the common law rules, either directly, or by incorporation through section 35, may lead to undesirable results in the specific context of residential tenancies, and in the light of the recommendations made in this Report. We are also of the opinion that while, for the purposes of the relationship between landlord and tenant, the last traces of the leasehold estate concepts can be eliminated, rights of all parties

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1. See M. R. Gorsky, *The Landlord and Tenant Amendment Act, 1968-1969 - Some Problems of Statutory Interpretation* 479 (1970 Law Society of Upper Canada Lectures).

2. See *Savien v. Woods* (unreported - Vancouver Provincial Court, No. 6047/71).

3. R.S.B.C. 1960, c. 208.

under the *Land Registry Act*<sup>3</sup> should be preserved. These and other problems relating to the tenancy agreement and its contractual nature will be explored in this Chapter.

## **B. The Interdependence of Material Covenants**

The Ontario Law Reform Commission commented unfavourably on the common rules relating to the independence of lease covenants:<sup>4</sup>

This study has emphasized the unhappy legal positions of tenants which result from the lease being considered a conveyance of an estate in land. Very few covenants are implied in favour of the tenant and even where there are covenants agreed upon in favour of the tenant. An additional complication exists. The usual rules of contract law making bilateral contractual provisions mutually dependent will excuse one party from further performance upon a substantial breach of a material covenant by the other party. In the case of a lease, covenants are presumed to be independent, therefore a breach of the landlord's covenant, for example, to heat, does not relieve the tenant of his obligations, including the obligation to pay rent.

The logic of the distinction is difficult to discern. Historically the early agricultural economy, out of which our landlord and tenant law grew, placed principal importance on the conveyance of the leasehold interest. The supporting covenants being secondary, there emerged the continuing duty to pay rent even though the building is destroyed. Covenants may be broken by the landlord without any effect on the obligation to pay rent for his estate. Concepts rooted in an agricultural economy of a by-gone day provide little logical relevancy for today's landlord and tenant realities.

The Ontario Commission recommended that covenants in leases be treated as dependent each upon the others.

That recommendation was adopted by the Ontario Legislature and ultimately implemented in British Columbia as section 42 of the *Landlord and Tenant Act*. That section provides:

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

The result of the application of the "common law rules referred to is that a substantial breach by one party of a material contractual undertaking will excuse the other party from further performance. Three questions emerge from a consideration of the effect of section 42:

- (1) In what circumstances do the "common law rules" take effect?
- (2) What is the extent of the relief available to a party under these common law rules?
- (3) Should the common law rules be modified with respect to residential tenancies?

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4. Ontario Interim Report 56.



Each of these questions will be considered in turn.

It is only upon the breach of a material covenant that rights under section 42 arise. The common law has not developed any specific tests for determining when a covenant is or is not material. Rather, the courts have tended to consider each case on its particular facts in making this determination, and have defined "material" in very general terms. In its *Report on Review of Part IV of The Landlord and Tenant Act* the Ontario Law Reform Commission considered the effect of the comparable Ontario provision:<sup>5</sup>

The provisions of section 89 by express terms assimilate the law of contract into this area of landlord and tenant law. Special reference is made to the *Common Law Rules* respecting the effect of the breach of a material covenant by one party to a contract on the *obligation to perform* by the other party. It is well established by the common law that not every departure, no matter how insignificant, from full performance of every covenant, no matter how unimportant to the total transaction between the parties, will justify non-performance on the other side. The right to treat the contractual obligations as being at an end is subject to rather confining rules. Essentially it is a fundamental breach or something going to the root of the contract which will excuse performance on the other side. In the final analysis it is the adjudication by the judge of what is a substantial breach of a material covenant which will govern and not the caprice or whim of one of the parties.

There has not yet been time for the development of a substantial body of case law which would provide guidance as to what covenants are and are not material.<sup>6</sup>

We have considered the desirability of providing a statutory definition of "material" for the purposes of section 42. It has been suggested that be done by supplementing the common law rules with a number of specific covenants designated as "material." We reject this suggestion. First, the approach of the Courts has, in our view, been correct in deciding each case on its particular facts. A statutory definition might introduce an undesirable degree of rigidity. For example, if the landlord's obligation to heat the premises to a certain temperature were designated as material, a judge might find himself precluded from reaching a sensible decision when the heat supplied fell one degree short of the minimum. Second, alternative remedies are provided with respect to breaches of the more important obligations and consideration is given below to narrowing the effect of section 42. The recommendations which we make render less important the need for a statutory definition.

The Commission recommends that:

*The term "material" not be defined for the purposes of section 42.*

What relief is available to a party when the other is in breach of a material covenant? The recommendations of the Ontario Commission with respect to the

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5. Ontario Law Reform Commission, Report on Review of Part IV of *The Landlord and Tenant Act* 22 (1972 [hereafter referred to as *Ontario Review Report*] (emphasis in original text).

6. The tenant's obligation to pay rent has been held to be material. See *Zabro Holdings v. James* (unreported - Vancouver Provincial Court, No. 1288/70). Lamont suggests that the covenants to provide heat or repair are also material. See Lamont, *Residential Tenancies* 24 (2<sup>nd</sup> ed., 1973).

7. [1973] 3 O.R., 188.

8. *Ibid.*, at 191.

interdependence of covenants seem clearly aimed at relieving the tenant of an obligation to pay rent in such circumstances. Does section 42 achieve that aim? The comparable Ontario provision was construed in *Brahmsgate Investments Ltd. v. Finn*, a decision of the Ontario County Court.<sup>7</sup> Couture, Co. Ct. J. stated:<sup>8</sup>

Getting to the crux of the matter: is the law such that when a landlord is allegedly in breach of a contract, the law gives to the tenant the right to refuse to pay rent and the right to withhold same? In my opinion, it is not. Had this been the intention of the Legislature I am certain that the Act would have specifically provided that in the event a landlord was in breach of certain covenants he, the tenant, would have the right to withhold rent.

Counsel made allusion to a section of the *Landlord and Tenant Act*, R.S.O. 1960, c. 266 [now R.S.O. 1970, c. 236] relating to breaches in the part of the landlord. He referred to s. 88 [enacted 1968-69, c. 58, s. 3; now s. 891 of the *Landlord and Tenant Act*, Part 4, which deals with interdependent covenants [sic] and states that:

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

I would think that this in most instances would apply. In other words, if a landlord is in obvious breach of the covenants pertaining to quiet enjoyment or to maintaining in repair, then I would assume that it might normally mean that the tenant is no longer required to perform his own covenants. This would give the tenant the right to terminate the agreement. But I do not believe that it was intended by the Legislature that it would give the right to the tenant to refuse to pay rent and to remain on the premises without payment of such rentals.

The landlord is entitled to payment of his rent. The tenant is entitled to compliance with the covenants. If there is a breach on the part of the landlord, then the tenant has the right to sue him for specific performance and for damages arising as a result of the landlord's failure to conform with the terms of the tenancy agreement.

There appear to be no reported decisions of the Superior Courts of British Columbia which arrive at a similar or at an opposite conclusion. It does, however, seem implicit in decisions of the Provincial Court such as *Zabro Holdings v. James*<sup>9</sup> that the tenant does have a right to withhold rent when the landlord is in breach of a material covenant.

Apart from the general responsibility for repairs and fitness for habitation placed on the landlord by section 49(1) the Act is silent on the provision of

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9. N. 6 *supra*.

10. In *Vancouver*, s. 49 (1) may incorporate by reference the duties to supply services set out in Vancouver By-law 4448, Sch. A, 10 & 12. See Appendix.

services to the tenant.<sup>10</sup> Section 42 would, therefore, seem to permit the landlord to reduce or eliminate services where the tenant is in breach of his obligation to pay rent.

We must also consider the circumstances in which a breach by one party will entitle the other to treat the agreement as being at an end. The notion that a covenant may or may not be material is a contractual concept which was only introduced into the law of landlord and tenant in 1970. The common law drew a distinction between the relative importance of terms in a lease; and characterized the most important of those terms as "conditions." A breach of a condition by one party permitted the other to treat a lease as being at an end.<sup>11</sup> It is difficult to ascertain whether or not the courts will continue to draw this distinction or whether, with the introduction of section 42, the test has now become one of materiality. It might be argued that a breach of a material covenant will allow a party to treat the agreement, as at an end only if that covenant is also a term which would have been regarded as a "condition" at common law.<sup>12</sup> On the other hand, a tenancy agreement may contain a term, which the parties choose to characterize as a condition, but which would not be regarded as material if the contractual tests were applied. It seems desirable that the operation of section 42, its relation to the distinction between conditions and covenants, and the circumstances in which a party is entitled to treat the tenancy agreement as at an end should be clarified in any remedial legislation.

Section 42 has also introduced more general problems of a policy nature. Part II was not designed to encourage self-help remedies and in fact eliminated a number of such remedies which existed at common law. Nonetheless, section 42 directly allows self-help where it was not permitted at common law. This problem was referred to by Judge Levey in the *Zabro Holdings* case. He warned that the parties to a residential tenancy agreement should refrain from exercising their rights under section 42. He stated:<sup>13</sup>

... both parties must make a conscientious effort to obey the law. The *Landlord and Tenant Act* makes a provision that if either a landlord or a tenant has suffered a wrong, there is a remedy available by due process through the Courts. The Act has taken away the right of self-help by the landlord through the abolishing of distress, and the right to lock out a tenant. Matters such as have arisen in this case must be dealt with by due process of the law.

It seems inconsistent to set up a method of self-help and then restrict the right of persons to use that means of enforcing obligations under a tenancy agreement.

Elsewhere in this Report the landlord's duty to repair and supply services is considered and recommendations are made creating certain machinery and giving the rentalsman certain jurisdiction in cases where the landlord is in breach of these obligations. In particular, we recommend that the rentalsman be empowered to receive rents from the tenant and apply them so as to remedy the landlord's breach. Where such a statutory remedy is provided it should be used, and it seems

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11. See *Johnston v. Givens* [1941] O.R. 281 (Ont. C.A.). See also (1843) 11 M. & W. 5; 152 E.R. 693 (Exch.); and Williams, *Canadian Law of Landlord and Tenant* 496 *et seq.* (4<sup>th</sup> ed. R.W. Rhodes 1973).

12. *Quaere* the effect of *Brahmsgate Investments Ltd. v. Finn*, n. 7 *supra*.

13. N. 6 *supra*.

undesirable that the tenant should retain a right to withhold rent in circumstances where the rentalsman may intervene. If the right to withhold rent in those circumstances were abolished the range of situations in which that remedy might be available would be very narrow. It is difficult to postulate a material covenant which is outside the rentalsman's competence, except a covenant which is not otherwise material but which the parties, in the tenancy agreement, have specifically made material. In such cases, a right of action for damages seems an adequate remedy. We therefore favour the total elimination of the right of the tenant to withhold rent pursuant to section 42 as, what we conceive to be a much more satisfactory statutory remedy has been recommended.

Also in this Report are recommendations which would give the tenant basic rights relating to his security of tenure. These recommendations have, as their focal point, the termination of a periodic tenancy by notice, given by the landlord and the expiration of tenancies for a term. Where there has been a breach of condition (or perhaps, of a material covenant) by the tenant, the tenancy (be it a periodic tenancy or a tenancy agreement for a term) will terminate, not by notice or expiration, but in some other way. Our recommendations with respect to tenant security would not apply to tenancies terminated in that way. Section 42, in its present form, would open the door to landlords inserting, in standard form tenancy agreements, covenants, specified to be conditions, which are likely to be broken, thus circumventing the tenant security provisions. For example, a tenancy agreement might provide:

It is a condition of this agreement that the tenant shall mow the lawn once each week. Behaviour by a tenant which contravened that provision would not, *per se*, justify notice, but under section 42 might permit the landlord to treat the tenancy as having been terminated automatically without notice. We have concluded that this means of circumventing the general policy of our recommendations should be eliminated.

The Commission recommends that:

*The proposed Act contain a provision comparable to section 42 but with the following changes:*

- (a) *The breach of a material covenant by a landlord should not permit the tenant to withhold rent.*
- (b) *A breach of a material covenant on a condition by one party should entitle the other party to treat the tenancy agreement as being at an end, except where it is a breach by the tenant and is one which would not justify the termination of a periodic tenancy by the landlord.*

### **C. Freedom of Contract**

Before the introduction of Part II of the *Landlord and Tenant Act* almost complete freedom of contract prevailed. The law imposed very few limitations and left landlord and tenant to arrive at what ever bargain they felt circumstances demanded. As we pointed out in an earlier chapter freedom of contract, in practical terms, had come to operate entirely to the benefit of the landlord and the law was producing unreasonable and unfair results. Economic strength lay on the side of the landlord and the competitive forces of the rental accommodation market did not operate so as to permit the tenant to relieve himself of the onerous burdens placed on him by the common law or to resist the landlord who wished to subject the tenant to strict and sometimes unconscionable contractual terms.

Part II altered this situation dramatically. It set out certain statutory duties

which landlord and tenant were obliged to observe. The most important of these duties are contained in section 49 which sets out the landlord's responsibility to repair and the tenant's responsibility for ordinary cleanliness. The specific content of that provision is the subject of comment elsewhere in this Report. Section 34 (2) provides that Part II applies to all residential tenancies "notwithstanding any agreement or waiver to the contrary except as specifically provided in this Part." That provision seems aimed at preventing the parties from contracting out of the duties and obligations imposed on them by the Act. It does, however, raise a larger question. Does freedom of contract still operate to permit landlord and tenant to reach any bargain they choose, subject to specific requirements of the Act, or has their freedom of contract completely disappeared with the exception of those areas where the Act specifically or by necessary implication allows the parties to strike a bargain which would otherwise be prohibited?

That question may arise in two different ways. First, one party to a tenancy agreement may wish to impose on the other a higher duty than that set out in the Act. A landlord, for example, may want the tenancy agreement to provide that the tenant is to shampoo the carpets once each week. That would seem to be contracting not out of ordinary cleanliness but beyond it. Would such a provision be lawful?<sup>14</sup>

The "freedom of contract" issue also arises where the tenancy agreement purports to deal with aspects of the landlord and tenant relationship upon which the Act is totally silent. This may take the form of rules designed to regulate the use of facilities or areas shared in common, prohibitions relating to the use of the premises such as hanging pictures without the consent or supervision of the resident manager or requiring the tenant to use a special type of picture hanger. The legality of such a provision does not appear to have been tested in the courts.

What degree of freedom should landlords and tenants have to contract beyond the provisions of the Act or with respect to matters upon which the Act is silent? As a matter of social philosophy this Commission is not wedded to the notion that sanctity of contract must not be interfered with. Comments elsewhere in this Report reflect our position on this issue. It is not our view that, in the name of "freedom of contract," the law should permit one party to impose unreasonable obligations on the other. A landlord, for example, should not be permitted to require his tenants to shampoo the rug every week. Nor should unreasonable restrictions on the use of the premises be allowed.

The example given is extreme but does illustrate a possible consequence if total freedom of contract applies. Moreover, where an unreasonable term is introduced into a tenancy agreement, the party at whose insistence it is included is normally aware that it will not always be observed even though he might hope that it will. Its purpose is sometimes to induce a party to observe a higher standard of performance than might otherwise be forthcoming. For instance, a landlord might include in a tenancy agreement for a house, a provision that the tenant mow the lawn twice each week in the hopes that the tenant might thereby be induced to mow the lawn at least once each week rather than a fortnightly interval which might prevail if the tenancy agreement were silent on how often the law must be mowed. In other cases, an unreasonable term might be introduced in a tenancy agreement to provide the basis for termination of a tenancy or some other act which the law would not normally allow in the absence of a breach of

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14. For a recent Provincial Court decision denying the right to contract beyond the terms of s. 49 (2), see *Paul Heller Ltd. v. Irwin* (unreported - Vancouver Provincial Court, No. 4815/73).

the tenancy agreement.

On the other hand, each rental situation may be unique. The number of variables and their permutations and combinations are so great that it would be folly to attempt to design a *Landlord and Tenant Act* which will specifically cover any situation which might possibly emerge. It may therefore be argued that freedom of contract has a definite role to play and the parties themselves are the best judges of what the individual situation demands. For example, if the premises consist of a house and grounds it does not seem unreasonable that the parties should be able to provide for the care of the grounds in the tenancy agreement. Similarly, reasonable rules relating to the use of parking, laundry facilities or use of an apartment house swimming pool may be justified. Again, the development of specific rules seems better left to the parties rather than form the subject of statutory regulation.

We have, therefore, concluded that freedom of contract should be permitted to operate but the Act should contain safeguards against the introduction of unreasonably stringent rules, conditions and terms into tenancy agreements. Some useful guidance with respect to rules and restrictions in the Model Residential Landlord and Tenant Code. It provides:<sup>15</sup>

- (1) The tenant shall obey all obligations or restrictions, whether denominated by the landlord as "rules" or otherwise, concerning his use, occupation, and maintenance of his dwelling unit, appurtenances thereto, and the property of which the dwelling unit is a part if:
  - (a) Such obligations or restrictions are brought to the attention of the tenant at the time of his entry into the agreement to occupy the dwelling unit; or
  - (b) Such obligations or restrictions, if not so known by the tenant at the commencement of tenancy, are brought to the attention of the tenant and, if they work a substantial modification of his bargain, are consented to in writing by him.
- (2) No such restriction or obligation shall be enforceable against the tenant unless:
  - (a) It is for the purpose of promoting the convenience, safety, or welfare of the tenants of the property, or for the preservation of the landlord's property from abusive use, or for the fair distribution of services and facilities held out for the tenants generally.
  - (b) It is reasonably related to the purpose for which it is promulgated.
  - (c) It applies to all tenants of the property in a fair manner.
  - (d) It is sufficiently explicit in its prohibition, direction, or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply.

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15. American Bar Foundation, *Model Residential Landlord and Tenant Code*.

That provision is aimed at enabling the landlord to promulgate reasonable rules with respect to the premises and the tenancy while making unreasonable rules unenforceable against the tenant. It appears to assume, realistically in our view, that the residential tenant will seldom be in a position to impose unreasonable terms on the landlord. Similar legislation might be useful in defining the extent of freedom of contract with respect to areas where the *Landlord and Tenant Act* is silent. A legislative statement of this kind is broad enough to cover contracting beyond the provisions of the Act. It might also be noted that the provision in the Model Code contemplates that the rules might be posted. We would prefer to see such rules contained in a written tenancy agreement before they are enforceable.

The Commission recommends that:

1. *The proposed Act provide that a written tenancy agreement may contain, and that the tenant shall obey, all reasonable obligations or restrictions, which are not inconsistent with the Act, whether denominated by the landlord as "rules" or otherwise, concerning the tenant's use, occupation, and maintenance of his dwelling unit, appurtenances thereto, and the property of which the dwelling unit is a part.*

2. *For the purposes of the foregoing recommendation a restriction or obligation is reasonable only if:*
- (a) *it is for the purpose of promoting the convenience, safety or welfare of the tenants of the property or the preservation of the landlord's property from abusive use, for the fair distribution of services and facilities generally;*
  - (b) *it is reasonably related to the purposes for which it is promulgated;*
  - (c) *it applies to all tenants of the property in a fair manner; and*
  - (d) *it is sufficiently explicit in its prohibition, direction or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply.*

Having made recommendations relating to the rights of the parties to contract "beyond" the Act or in areas not covered by the Act, we must consider what remedies should be available to the parties for breaches of such agreements. Since we view the jurisdiction of the rentalsman as being strictly confined, in most cases such relief will be sought in the court.<sup>16</sup> We have considered whether, in such cases, the remedies of an aggrieved party should be confined to an action for damages.

The argument for restricting relief to damages in such cases is as follows. Section 60B of the *Landlord and Tenant Act* makes available, in Small Claims Court, remedies analogous to those of specific performance and injunction. A judge may, for example:

- (a) prohibit a landlord or a tenant from contravening ... the terms of the tenancy agreement; and
- (b) order a landlord or tenant to perform and carry out ... the terms of a tenancy agreement.

While these remedies may be appropriate, in some circumstances with respect to matters covered by the Act, it may be argued that their availability with respect to breaches of provisions of tenancy agreements relating to matters beyond or outside the Act is questionable. They open the door to contractual terms which might have the effect of defeating our recommendations with respect to tenant security. For example, to insert a provision in a tenancy agreement saying:

"The tenant agrees not to use or occupy the property so long as he is in breach of any provision of this agreement."

along with a reasonable term such as:

"The tenant agrees to water the lawn no less than once each week during the summer.

might, if the tenant is in breach, form the basis of an injunction barring the tenant from the premises in circumstances where the landlord would not be entitled to give notice terminating the tenancy. Analogous examples might be advanced with respect to specific performance.

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16. See Chapter IV.



We reject that argument. The *in personam* remedies are discretionary and are unlikely to be sought in cases where an award of damages is appropriate. Moreover, the "reasonableness" requirements should prevent their use in situations where it would lead to results contrary to the policy of the Act. So long as tenant security is not *directly* affected by permitting agreements outside or beyond the Act we see no point in restricting the landlord's remedies.

The Commission recommends that:

*Subject to recommendations made elsewhere, the remedies available for breach of a tenancy agreement not be restricted to damages.*

#### D. The Lord's Day Act

Section 4 of the *Lord's Day Act* provides:<sup>17</sup>

It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law in force on or after the 1<sup>st</sup> day of March 1907, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

The language of that provision seems, and has been held, to be wide enough to encompass tenancy agreements entered into on a Sunday.<sup>18</sup>

The words "except as provided ... in any provincial Act" used in section 4 seem to permit a provincial option with respect to its operation. In our opinion there is much to be gained for making a specific exception from the *Lord's Day Act* in respect of tenancy agreements. Sunday is one day when both landlord and tenant are usually free to negotiate tenancy agreements, and it seems pointless that such agreements should be vitiated by what many regard as an anachronistic provision.

The Commission recommends that:

*The proposed Act provide that the validity of tenancy agreements for residential premises shall not be affected by the Lord's Day Act.*

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17. R.S.C. 1970, c. L-13.

18. See *Conroy v. Shapiro Investments Ltd.* (unreported - Vancouver Provincial Court, No. 2654/73). There also appears to be a *Sunday Observance Act* in force in this Province, see R.S.B.C. 1948, c. 318. That Act is no more than a recital of the provisions of a number of older English Acts and a declaration that they are in force. The *Sunday Observance Act* was not carried forward into the 1960 revision, but it does not appear to have even been specifically repealed.

19. See Megarry & Wade, *The Law of Real Property* 726 (3<sup>rd</sup> ed., 1966). There are two exceptions to this general rule, namely, (a) the benefit of covenants are assignable in limited circumstances, (b) the benefit and burden of restrictive covenants are assignable under the doctrine of *Tulk v. Moxhay*. See *Regent Oil Co. v. J. A. Gregory (Hatch End) Ltd.* [1966] 1 Ch. 402 (C.A.).

20. E.g., a covenant to build a wall on the leased property or a covenant to rebuild premises in case of destruction by fire.

21. *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72 (K.B.).

## E. Privity and Rights on Assignment

The common rules which regulated the rights of parties when a landlord or a tenant had assigned his interest, or the tenant sublet, were many and complex. For example, on an assignment by the tenant, as a general rule the benefit and burden of all negative covenants which touch and concern the land, and positive covenants by agreement between the landlord and tenant, will run with the land. Moreover, all negative covenants, whether or not they touch and concern the land, will run if the assignee has notice of them. If the reversion is assigned by the lessor, the burden and benefit of covenants will generally pass only if they touch and concern the land and the assignment is by deed. When the tenant subleases his interest under a tenancy agreement there is neither a privity of contract nor privity of estate between the landlord and sublessee and the general common law rule is that no covenants were enforceable.<sup>19</sup>

Moreover, in relation to covenants running with the land, when there has been an assignment of an interest under a tenancy agreement, a distinction was drawn, at common law, between covenants concerning things in being (*in esse*) and things not in being (*in posse*).<sup>20</sup> Covenants relating to things not in existence where the assigns were not specifically named did not run with the land.<sup>21</sup> An *in essi* covenant ran without the assignees being named. This anachronism was corrected by section 43 which provides:

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.

When dealing with the effect of covenants, the common law was careful to provide that the only covenants which would affect successors in title of landlords and tenants were those which ran with the land. The traditional test for determining this question was to consider whether the covenant "touches or concerns" the land.<sup>22</sup> A long line of case law sets out those covenants which did or did not meet this test.<sup>23</sup> In section 43, the Legislature has used the words "relating to the rented premises" rather than "touches or concerns the land," and the question immediately arises as to the significance of the change. Was it intended that the category of covenants which run with the land be widened?

There appears to be no case law on this point and one must therefore speculate whether the common law rule that an option to purchase the reversion did not run with the land, and thus did not bind assignees of the landlord,<sup>24</sup> is still good law. Furthermore, it is uncertain whether it is still the law that a damage

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22. See *Spencer's Case*, *ibid*.

23. For a good summary of the cases, see Megarry and Wade, n. 19 *supra*, 729.

24. *Woodall v. Clifton* [1905] 2 Ch. 257 (C.A.).

25. *Re Dollar Land Corporation and Solomon* (1963), 39 D.L.R. (2d) 221 (Ont. H.C.).

26. Although the intention may have been merely to simplify the language of the Act for the lay reader. For a further discussion of this topic, see Lamont, n. 6 *supra*, 28-29.

deposit does not run with the land so as to bind an assignee of the landlord.<sup>25</sup> The words used in section 43 have opened this question and left in doubt the applicability of many of the common law decisions.<sup>26</sup>

In our view, the common law rules relating to the enforceability of covenants are unduly narrow. The elimination of the distinction between covenants *in posse* and covenants *in esse* is a useful first step toward broadening these rights but further reform seems desirable. In our opinion, covenants which were enforceable at common law should continue to be enforceable, but the common law position should be supplemented by a more general provision allowing both landlords and their assigns and tenants; or any person lawfully in possession of residential premises as an assignee or subtenant, to enforce all conditions and covenants relating to the premises. The materiality of the covenant should not affect its enforceability. In our view, section 43 should be replaced by the provision comparable to the following:

Without derogating from the rights of any person to enforce a covenant or condition at common law or otherwise under this Act, all covenants (material or otherwise) and conditions relating to residential premises or the land on which premises is situated shall be enforceable as between any person lawfully in possession of residential premises and any person owning an interest in a reversion of the premises.

Such a provision would have the effect of allowing the enforcement of covenants relating to the residential premises as between all persons having a "tenant-like" interest and those having a "landlord-like" interest. Neither the form of the assignment nor the presence or absence of a clause stating that assignees were bound would affect the question of enforceability. In each case it would be for the person attempting to enforce to prove his right to sue by being in lawful possession under an assignment or sub-lease, or by holding a valid interest in a reversion. The right of the parties to sue on the contract would not be affected. In essence, such a provision would destroy the need for privity of contract or estate under assignments or sub-leases as a prerequisite to enforcing covenants under the original tenancy agreement; but the rights of parties to sue where privity does exist would not be affected.

The Commission recommends that:

1. *The proposed Act contain, in place of section 43 a provision incorporating the following principles: All covenants, material or otherwise, and conditions relating to residential premises should be enforceable as between any person lawfully in possession of the premises and any person having an interest in a reversion of the premises.*
2. *The foregoing recommendation should not derogate from the rights of parties where, at common law, there exists privity of contract or privity of estate.*

## **F. Formalities and Land Registration**

Some consideration must be given to the relationship between residential

tenancies, the *Land Registry Act*,<sup>27</sup> the *Statute of Frauds*<sup>28</sup> and section 35 of the *Landlord and Tenant Act*. For convenience we again set out the text of that provision:

For the purposes of this Part, the relationship of landlord and tenant is one of contract only, and a tenancy agreement does not confer on the tenant an interest in land.

Because the effect of section 35 is confined to Part II only, it would appear that the common law rule that the tenant acquires an interest in land under a tenancy agreement is preserved for the purposes of the *Land Registry Act* and the *Statute of Frauds*.

Potential conflicts emerge with respect to the form of tenancy agreements. Nothing in Part II requires that a tenancy agreement be in writing to be enforceable for the purposes of that Part. Section 36 provides:

- (1) Where a tenancy agreement in writing is executed by a tenant after this Part comes into force, the landlord shall ensure that a fully executed duplicate original copy of the tenancy agreement is delivered to the tenant within twenty-one days after its execution and delivery by the tenant.
- (2) Where the copy of a tenancy agreement is not delivered in accordance with subsection (1), the obligations of the tenant thereunder cease until such copy is delivered to him.

The words "where a tenancy agreement in writing" in subsection (1) appear to contemplate that tenancy agreements may be entered into orally. Section 2 of the *Statute of Frauds* provides:

- (1) No agreement concerning an interest in land is enforceable by action unless evidenced in writing, signed by the party to be charged or by his agent.
- (2) No creation, assignment, or surrender of an interest in land is enforceable by action unless evidenced in writing, signed by the party creating, assigning, or surrendering the same or by his agent.
- (3) This section does not apply to any lease of an interest in land for a term of three years or less.

What is the status of an oral tenancy agreement for a term longer than three years? May a tenant enforce such an agreement? One might argue that the *Statute of Frauds* is inapplicable to residential tenancies because it is concerned only with interests in land and, by definition, the tenant's interest is not one in land for the purposes of Part II. On the other hand, it might be argued that the *Statute of Frauds* is clear and direct in its terms relating to the unenforceability of such agreements and should prevail because the right to enter into oral tenancy agreements for a term exceeding three years arises only by implication under the *Landlord and Tenant Act*.

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27. R.S.B.C. 1960, c. 208.

28. R.S.B.C. 1960, c. 369.

This conflict relating to form is compounded by section 38(l)(d) of the *Land Registry Act* which provides:

- (1) Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and, so long as it remains in force and uncanceled, shall be conclusive evidence at law and in equity, as against Her Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee simple in the land therein described against the whole world, subject to
- (d) any lease, or agreement for lease, for a period not exceeding three years, where there is actual occupation under the same;

The effect of that section is to sterilize the rights of a tenant who has entered into, but failed to register, a tenancy agreement for a term exceeding three years. A more precise consideration of the effects of a failure to register is beyond the scope of this Report.

As a matter of policy, the Commission has concluded that a tenancy agreement for a term exceeding three years is a major undertaking, and we see considerable virtue in rules 28a which require that such agreements be reduced to writing.<sup>29</sup> Moreover, a long term tenancy in an encumbrance of considerable magnitude. It is an encumbrance of which, in our opinion, a potential assignee of the reversion should receive notice in the course of a normal land registry search. It does not seem unreasonable that the tenant who acquires rights of this dimension should be required in comply with the *Land Registry Act* to protect those rights.

The Commission recommends that:

1. *Any conflict between the Statute of Frauds and the proposed Act to be resolved in favour of the Statute of Frauds.*
2. *Any conflict between the Land Registry Act and the proposed Act to be resolved in favour of the Land Registry Act.*

One further problem relating to formalities deserves consideration. Under section 36, where a written tenancy agreement is executed by the tenant, the landlord is required to deliver a fully executed duplicate original copy to the tenant within twenty-one days after its execution. Where a copy is not delivered in accordance with that rule, "the obligations of the tenant thereunder cease until such copy is delivered to him." What is the nature of the tenant's obligation between the twenty-first day and the day the copy is finally delivered? Section 36 may be interpreted in two different ways:

- (1) The tenant is under no obligation to pay rent for his occupancy of the premises during that period of time; or
- (2) The landlord's right to demand rent with respect to that period of time is deferred until a copy of the agreement is delivered, but not extinguished.

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29. Subject to the possible application of the doctrine of part performance.

There appear to be no reported cases which provide guidance.

The policy of section 36 is to encourage the landlord to deliver promptly to the tenant an executed copy of the tenancy agreement. That policy seems best served by the first interpretation which provides the stronger inducement. We would therefore favour the clarification of section 36 in a manner consistent with the first interpretation.

The Commission recommends that:

*Section 36(2) be clarified so as to indicate that the liability of the tenant to pay rent for his occupancy ceases until an executed copy of the tenancy agreement is delivered to him.*

## **G. Implied Terms**

When a landlord and tenant enter into a tenancy agreement, be it oral or written, the parties do not always turn their minds toward a complete consideration of their potential rights and liabilities. To cover cases where the lease did not cover all aspects of the tenancy, the common law developed a number of implied covenants deemed to be part of terms of every lease except to the extent that the parties expressly or by necessary implication excluded their application. They might be regarded as the leasehold counterpart of the implied terms and conditions which, by the *Sale of Goods Act*,<sup>30</sup> are deemed to be part of every contract for the sale of goods unless excluded. Among the landlord's covenants which were implied by law were:

- (a) that he would deliver possession to the tenant;
- (b) that the tenant would have quiet enjoyment with no physical interference with the land by the landlord or those holding under him;
- (c) that the landlord would not derogate from his grant and would refrain from acts which are inconsistent with the purpose for which the lease is granted;
- (d) that, in the case of furnished premises, the premises are reasonably fit for human habitation;

Among tenant's covenants which were implied by law were:

- (a) that he would keep the premises in repair;
- (b) that he would pay rent.

The foregoing should not be regarded as an exhaustive list of the covenants implied by law. In specific cases the court might also imply other covenants as flowing by necessary implication from the specific terms of the lease.

In some cases these implied covenants have been added to or altered by statute. The duty to repair, for example, has been shifted, by section 49 of the *Landlord and Tenant Act* to the landlord and the tenant's responsibility defined as ordinary cleanliness. Section 46 of the Act, relating to privacy, might be regarded as

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30. R.S.B.C. 1960, c. 344.

supplementing the implied covenant for quiet enjoyment.

A modern residential tenancy, particularly one in an apartment block, will bring to the tenant a range of services not contemplated by the common law during the development of the implied covenants. For example; an apartment dweller may enjoy heat, light, sewer services, water, hot water, garbage disposal, laundry facilities, sauna, parking, swimming pool, janitorial services, and the use of elevators. In some cases the tenancy agreement may provide for all these services but in many cases it will not. Where the tenancy agreement is silent on the provision of such services, it is not at all clear in what circumstances the courts would be prepared to imply a covenant that the landlord will provide these services. Elsewhere in this Report consideration is given to the extent to which a withdrawal of services should amount to a rental increase for the purposes of provisions which restrict the frequency of such increases. It seems a condition precedent to that question, that there be some duty on the landlord to provide the services which are withdrawn. The source of that duty must be the tenancy agreement. In our view, where a tenant has enjoyed certain services in association with the tenancy, the landlord should be under a legal duty to continue to supply those services.

The Commission recommends that:

*It be made an implied term of every tenancy agreement that, where services have been supplied by the landlord which have not been provided for in the tenancy agreement, the landlord shall continue to supply those services.*

At common law the implied covenants could be excluded by specific provision in the lease. We have serious reservations as to whether landlords should be permitted to contract out of duties established by the foregoing recommendation. A landlord might, for example, include in a tenancy agreement a provision such as the following:

It is understood that the provision and maintenance of elevators by the landlord is gratuitous and the landlord is free to withdraw elevator services at any time.<sup>31</sup>

That would leave the tenant no remedy if the landlord chose to shut down the elevators. In a twenty-storey apartment building the effect would be devastating. In our opinion the potential use of such a provision should be foreclosed.

The Commission recommends that:

*Landlords should not be permitted to contract out of the duties imposed under the foregoing recommendation.*

## **H. Interesse Termini**

At common law there is an implied condition in an agreement to lease that the landlord will give possession of the premises to the tenant on the promised date.<sup>32</sup> If the landlord breaches this obligation, the tenant is entitled to repudiate

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31. Such a provision might, however, fail to meet the "reasonableness" requirement to the extent that it may be applicable.

32. *Jinks v. Edwards* (1856); 11 Exch. 775; 156 E.R. 1045.

33. *Reaume v. Lalonde*, [1939] O.W.N. 167. The measure of damages is severely restricted by the rule in *Bain v. Fothergill* (1874), L.R. 7 H.L. 158.

the agreement and sue for damages.<sup>33</sup> Without, however, an actual entry by the tenant, no "estate" vests in him and consequently he has somewhat fewer rights before entry than after. Before entry the tenant had what was called an "interest in the term" or *interesse termini*. The extent of the difference between *interesse termini* and a full estate perfected by entry has not been completely delineated by the cases. It has, however, been held that a tenant having an *interesse termini* only, could not maintain an action for breach of the covenant for quiet enjoyment or an action for trespass.<sup>34</sup> On the other hand, it has been held that the tenant having an *interesse termini* may maintain an ejectment against a third party or a person in possession under the lessor.<sup>35</sup> It has been suggested that the principle of *interesse termini* deprived the tenant of the right to maintain an action for specific performance. Lamont states:<sup>36</sup>

The archaic principle of *interesse termini* has been abolished: Section 87(1). The application of the principle was to deprive a tenant, who had not been able to obtain possession, of the right to sue the landlord for specific performance. The tenant might have signed a lease or agreement to lease, and before he had gone into possession the landlord decided to refuse him possession. The tenant had no legal right arising from his *interesse termini* (interest in a term) to require the landlord to honour the lease and let him into possession.

We question the correctness of those observations. It has been pointed out that: "specific performance is inapplicable save to an agreement for a lease, but in such case the relief would be the execution of the lease hence the position [to gain possession] is not advanced."<sup>37</sup> The notion that *interesse termini* prevented the tenant from getting possession seems founded on speculation that; "the person who never had possession could not claim to recover it when he had no estate on which to found his claim."<sup>38</sup> That speculation does not seem to be supported by authority although there have been substantial dicta to the effect that a tenant does

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34. See Williams n. 11 *supra*.

35. See *Coe v. Clay* (1829), 5 Bing. 440; 130 E.R. 1131 (C.P.); *Cleveland v. Boyce* (1861), 21 U.C.R. 609.

36. Lamont, n. 6 *supra*, 34.

37. Laskin, Cases and Notes on Land Law 189 (rev. ed. 1964), as set out in Appendix F to the *Ontario Interim Report*.

38. *Ibid.*

39. See cases cited, *ibid.*

40. See Lamont, n. 6 *supra*, 53 and English, *The Landlord and Tenant Act Part II: First impressions*.

41. *Matthey v. Curling* [1922] 2 A.C. 180.

42. Doubts as to the correctness of this common law rule were expressed by Lord Wright in *Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* [1945] c. 221; however, the weight of judicial authority is that the doctrine of frustration does not apply to leases. See *Merkur v. H. Shoom & Co.* [1954] 1 D.L.R. 85 (Ont. C.A.).

43. See, e.g., *Macartney v. Queen-Yonge Investments* [1961] O.R. 41, 49, *per* Ferguson, J.



obtain an enforceable right to possession.<sup>39</sup>

The doctrine of *interesse termini* was expressly abolished by Part II. Section 40 provides:

- (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 effect of this change is to give the tenant the right to maintain an action for trespass and breach of the covenant for quiet enjoyment. To the extent that the common law prevented the tenant from maintaining an action for possession against the landlord, that disability has also been corrected.

It has been doubted whether the abolition of *interesse termini* will change landlord and tenant relations materially, as tenants may be unwilling to resort to legal action in the majority of cases.<sup>40</sup> Nevertheless, section 40 does provide tenants with some new remedies and indicates a tendency to move away from property notions in landlord and tenant relations. We see no good reason to recommend any alteration to the provision abolishing the doctrine of *interesse termini*.

## **I. Frustration of Contract**

At common law, a rule was developed that in the absence of express agreement to the contrary, the liability of the tenant to pay rent remains, even though the leased premises can no longer be used for the intended purpose, or is destroyed by fire.<sup>41</sup> A tenant must continue to pay rent despite the occurrence of some unforeseen event which renders the obligation unconscionable. He may not take advantage of the doctrine of frustration applicable to other contractual obligations.<sup>42</sup> This rule has been criticised as unfair to tenants in a number of cases,<sup>43</sup> and the Ontario Law Reform Commission recommended that the doctrine of frustration should be made applicable to residential tenancies.<sup>44</sup>

Part II effected this change in British Columbia. Section 41 expressly states that the doctrine of frustration of contract applies to tenancy agreements. It is doubtful whether it was necessary for the legislation to provide this, once it had been stated in section 35 that the relationship of landlord and tenant is one of

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44. *Ontario Interim Report* 55.

45. For a further discussion of this point, see *Ontario Interim Report* 54.

46. (1973) 34 D.L.R. (3d) 640 (Ont. Co. Ct.). The Ontario provision relating to the abolition of frustration is 88 of *The Landlord and Tenant Act*, R.S.O. 1970. C. 236.

47. Law Reform Commission of British Columbia, *Report on the Need for Frustrated Contracts Legislation in British Columbia* (1971).

contract only, as this section presumably introduced the doctrine of frustration into the area of residential tenancies, as well as removing the main justification for the common law rule to the contrary (i.e., that the tenancy created an interest in land).<sup>45</sup> Apparently, however, it was felt that the application of the doctrine of frustration should be emphasised in clear and express terms. Section 41, in effect, provides a new remedy for tenants and its availability, in circumstances where the purpose of the lease was frustrated, was confirmed in Ontario by the case of *Caithness Caledonia Ltd. v. Goss*.<sup>46</sup>

This Commission has, in an earlier Report,<sup>47</sup> considered the doctrine of frustration and recommended legislation to "provide redress to a party who performed obligations before the contract was frustrated and who received insufficient consideration in return to compensate him for what he has done."<sup>48</sup> In that Report<sup>49</sup> we made a recommendation that frustrated contracts legislation be made expressly applicable to frustrated leases.

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48. *Ibid.*, at 5.

49. The proposed "Frustrated Contracts Act" drafted by this Commission and included as Appendix G to our Report was, in 1973, adopted by the Conference of Commissioners on Uniformity of Legislation in Canada as their *Model Act*.

## CHAPTER VII

## STATUTORY DUTIES AND PROHIBITIONS

### A. Introduction

As has been mentioned elsewhere in this Report, the nature of the obligations between landlord and tenant were, at common law, largely a matter for negotiation between the parties to each tenancy agreement. In 1968 the Ontario Law Reform Commission said:<sup>1</sup>

For those who were instilled with the importance of maintaining freedom of contract and of enforcing contracts legally entered into, there is a natural reluctance to interfere in leasing arrangements. Canadian courts have steadfastly adhered to freedom of contract concepts in dealing with the landlord and tenant relationship.

This is not to say that if a tenancy agreement were silent on certain matters the law would not imply certain terms into the contract. Williams points out that:<sup>2</sup>

At common law if there is no express covenant or agreement, there is implied in every lease a covenant by the lessor for quiet enjoyment, and in the case of a furnished house a warranty of fitness at the commencement of the tenancy. There is also implied a covenant by the lessee to treat the premises in a tenant-like manner ...

In examining the substance of these implied covenants, however, the Ontario Commission concluded that the law was weighted in favour of landlords and that the principles of freedom of contract did not effect a proper balance of interests between landlord and tenant. The Commission said:<sup>3</sup>

The landlord and tenant relationship is not, if indeed it ever was, one where tenants have a real freedom to contract. Traditional statements which maintain that a tenant need not agree to the leasing covenants but can seek agreement on more suitable terms elsewhere are not borne out by what happens in the real world of landlords and tenants. If protection is necessary for tenants and if a balancing of the interests of the landlords and tenants is to be undertaken, then inevitably, some long standing concepts must suffer.

... [E]ven the most objective assessment of the landlord and tenant relationship discloses an impressive disparity between the rights and duties of the landlord and tenant ...

This assessment of the state of affairs between landlord and tenant in 1968 led the Ontario Commission to recommend a number of changes in the law of that Province which took, in effect, the form of recommendations to the

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1. *Ontario Interim Report* 43.

2. Williams, *Canadian Law of Landlord and Tenant* (4<sup>th</sup> ed. F.W. Rhodes 1973).

3. N. 1 *supra*.

Legislature that it imply in every residential tenancy agreement certain rules of conduct for landlords and tenants, regardless of the terms of the contract between an individual landlord and an individual tenant. The Ontario Legislature accepted these recommendations in large part,<sup>4</sup> and in 1970 the British Columbia Legislature also manifested a policy of setting out in statutory form a number of duties and prohibitions which were to apply between a landlord and a tenant irrespective of the terms of the contract between them.<sup>5</sup>

In this Chapter we examine the nature of some of these statutory duties and prohibitions.

## **B. Landlord's Responsibility to Repair**

In the matter of repair obligations the common law favoured landlords. Where unfurnished premises were let the landlord (in the absence of express stipulation to the contrary) warranted neither that the premises were fit for any particular purpose,<sup>6</sup> nor that he would put them in repair at the commencement of or during the term of the tenancy.<sup>7</sup> Furthermore, it was normal to impose a substantial repair obligation on tenants.<sup>8</sup> In the case of furnished premises there was an implied condition that the premises be fit for human habitation,<sup>9</sup> but the landlord was under no obligation to maintain them in that condition after the commencement of the tenancy.

In the face of these rules the Ontario Law Reform Commission recommended substantial changes in the law,<sup>10</sup> which were closely followed in British Columbia. Section 49(1) of the *Landlord and Tenant Act*<sup>11</sup> places an obligation to repair squarely on the landlord by providing that:

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

The section reverses the common law and imposes on a landlord the duty to

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4. See *The Landlord and Tenant Act*, R.S.O. 1970, c. 236, Part IV.

5. *Landlord and Tenant Amendment Act*, S.B.C. 1970, c. 18, Part II.

6. *Hart v. Windsor* (1844) 12 M. & W. 68; 154 E.R. 1114.

7. *Victor v. Lynch* [1944] 3 D.L.R. 94 (N.S.C.A.).

8. E. g., *Short Form of Leases Act*, R.S.B.C. 1960, c. 357, 2<sup>nd</sup> *Seb.*, cl. 3.

9. *Smith v. Marrable* (1843) 11 M. & W. 5; 154 E.R. 693.

10. See *The Landlord and Tenant Act*, R.S.O. 1970, c. 236, s. 96.

11. N. 5 *supra*.

12. N. 5 *supra*, s. 34 (2).

provide and maintain premises that are fit for habitation, to keep them in a good state of repair and to comply with any housing standards set by law. The landlord may not avoid this obligation by arguing that the tenant was aware of defects or non-repair when the agreement was entered into, and may not contract out of the obligation.<sup>12</sup>

What is the nature of the landlord's obligation? For an elaboration of the standard to be met, one might usefully turn to the common law. The courts have frequently been called upon to interpret the meaning of phrases in a tenancy agreement such as "good and substantial repair," and it appears that the adjectives often associated with the word "repair" do not increase the nature of the obligation. One of the more common definitions of the nature of the obligation is as follows:<sup>13</sup>

After making due allowance for the locality, character and age of the premises at the time of the lease he must keep them in the condition in which they would be kept by a reasonably minded owner.

There is a comparable provision in the Vancouver By-law which states that:<sup>14</sup>

Every landlord shall maintain all premises owned by him or under his control in such a state of decoration and repair as, having regard to the age, character and locality of the premises would make it reasonably fit for the occupation of a reasonably minded Tenant of the class who would be likely to rent it.

It has not been suggested to us either by landlords or tenants that the obligation imposed by section 49(1) is unreasonable or unsatisfactory, and we make no recommendation for altering its substance. On the other hand, we believe that section 49(1) would be made more comprehensible if a formula similar to that set out in *Proudfoot v. Hart*<sup>15</sup> or the Vancouver by-law<sup>16</sup> were adopted.

The Commission therefore recommends that:

*The proposed Act contain a definition of the landlord's obligation to repair in the following terms:*

*A landlord is responsible for providing and maintaining the residential premises in such a state of decoration and repair as, having regard to the age, character, and locality of the premises, would make it reasonably fit for the occupation of a reasonably minded tenant who would be likely to rent it, and for complying with health and safety standards, including any housing standards required by law, and*

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13. *Proudfoot v. Hart* (1890) 25 Q.B.D. 25. See also *Davey v. Christoff* (1916) 28 D.L.R. 447 (App. Div. Ont.).

14. By-law 4448, Vancouver Rental Accommodation Grievance Board By-law. The status at law of this by-law has been questioned elsewhere in this Report (Ch. XII).

15. N. 13 *supra*.

16. N. 14 *supra*.

*notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.*

### **C. Tenant's Responsibility for Cleanliness**

The tenant's obligations in respect of cleaning and repair are set out in section 49(2) of the Act. It provides that:

The tenant is responsible for the ordinary cleanliness of the residential 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, and for maintaining ordinary health, cleanliness, and sanitary standards throughout the premises.

The section embodies the common law rule on this subject, which required the tenant to use the premises "in a tenant-like manner."<sup>17</sup> Presumably a duty to maintain ordinary cleanliness means that the tenant must keep the walls, floors, and appurtenances in a state of reasonable cleanliness and should not allow them to deteriorate through misuse. The obligation does, in fact, appear to come very close to requiring the tenant to observe good housekeeping practices.<sup>18</sup>

Again the Commission has received no complaint that the principle of section 49(2) is unreasonable, although naturally there appear to be numerous disputes at any given time over whether the standard has or has not been met.

The Commission recommends that:

*The proposed Act contain a provision which continues to impose on tenants an obligation, of the kind now imposed by section 49(2) of the present Act, to maintain ordinary standards of cleanliness.*

### **D. The Tenant's Right to Privacy**

At common law it was held that the relationship of landlord and tenant automatically implied a covenant of quiet enjoyment by the landlord in favour of the tenant.<sup>19</sup> Thus the tenant had the right to be put into the possession of the whole of the rented premises.<sup>20</sup> Furthermore, the covenant required the landlord or any person claiming through him to refrain from interfering physically with the tenant's enjoyment of the land.<sup>21</sup> This obligation does not involve "quiet" enjoyment in the acoustic sense. If the tenant is inconvenienced by noise his

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17. *Warren v. Keen*, [1954] 1 Q.B. 15 (C.A.).

18. For a further discussion of this topic see Lamont, *Residential Tenancies* 43 (2<sup>nd</sup> ed. 1973).

19. *Markham v. Paget*, [1908] 1 Ch. 697.

20. *Miller v. Encer Products Ltd.*, [1956] Ch. 304 (C.A.).

21. *Kenny v. Preen*, [1963] 1 Q.B. 499 (C.A.); *Franco v. Lechman*, (1962) 36 D.L.R. (2d) 357 (Altd. C.A.).

22. For a detailed analysis of the covenant see Williams, *Canadian Law of Landlord and Tenant* 346 *et seq.* (4<sup>th</sup> ed. F.W. Rhodes 1973).

remedy will lie in tort. The common law covenant of quiet enjoyment is in effect an assurance against two things. First, it protects the tenant from the consequence of a landlord's defective title to the premises, and secondly, assures against any substantial interference by the landlord with the tenant's enjoyment of the premises for all usual purposes.<sup>22</sup>

An important feature of the covenant for quiet enjoyment was that there could be no breach of the covenant unless the tenant suffered some physical interference with the enjoyment of the rented premises. Thus in the English decision of *Browne v. Flower*<sup>23</sup> it was held that no action lay where the landlord erected an external staircase which passed the tenant's bedroom, notwithstanding that the tenant's privacy had been seriously affected. Anything less than physical interference was insufficient to constitute a breach of the covenant.

To a limited extent the common law has been expanded<sup>24</sup> in the case of residential tenancies by section. Thus the tenant had the right to be put into the possession 46 of the *Landlord and Tenant Act*. This section virtually guarantees the formerly implied common law covenant of quiet possession and goes somewhat further in preventing any entry to rented premises which is not in accordance with the section.

Section 46(1) regulates the right to enter the premises during the currency of the tenancy agreement,<sup>25</sup> while section 46(2) relates to the situation arising once notice of termination has been given.<sup>26</sup>

#### 1. During the Tenancy Agreement

Section 46(1) provides that:

Except

- (a) in cases of emergency; or
- (b) with the consent of the tenant given at the time of entry; or
- (c) where the tenant abandons the premises;

the landlord shall not exercise a right to enter the rented premises unless he has first given written notice to the tenant at least twenty-four hours before the time of entry, and the time of entry shall be between the hours of eight in the

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23. [1911] 1 Ch. 219.

24. Although it is not suggested that the result in *Browne v. Flower* would necessarily be different.

25. This subsection was introduced in the *Landlord and Tenant Amendment Act*, S.B.C. 1970, C. 18; s. 2.

26. Introduced in 1970 in the *Landlord and Tenant Amendment Act*, *supra* and amended in the *Landlord and Tenant Amendment Act*, S.B.C. 1973, c. 47, s. 3.

27. A dual breach was held to have taken place in *Re MacIsaac and Beretanos* (1971) 25 D.L.R. (3d) 610.

forenoon and nine o'clock in the afternoon as specified in the notice.

This subsection is largely coextensive with the common law, so that a physical interference with the tenant's enjoyment of the premises may constitute both a breach of the common law and a breach of the landlord's statutory duty.<sup>27</sup>

It has not been suggested to us that the substance of the terms of section 46(1) has caused difficulty,<sup>28</sup> and we make no recommendation for change.

## 2. On Notice of Termination

Section 46(2) of the Act, which regulates the right of a landlord to show the premises to purchasers or tenants once notice of termination has been given, provides that:

Where the landlord has the right to show the premises to prospective purchasers or tenants after notice of termination has been given, no landlord, or his servant or agent, shall exercise the right unless he has first notified the tenant at least eight hours before the time of entry, unless some shorter period is agreed upon, and the time of entry shall, unless otherwise agreed upon, be between eight in the forenoon and nine o'clock in the afternoon as specified in the notice.

When this subsection was first introduced in 1970<sup>29</sup> its terms did not extend to servants or agents of the landlord, a situation which was cured by the 1973 legislation.<sup>30</sup> We have noted that the effects of section 46(2) may be eliminated by agreement between the landlord and the tenant at any time.<sup>31</sup> A landlord could provide in a new rental agreement for a right to enter and show the premises to prospective purchasers or tenants upon 60 seconds oral notice at any time of the day or night.

While we do not wish to destroy the flexibility which freedom to contract out of the terms of section 46(2) gives, we think it possible that situations will arise where a tenant enters into such an agreement at the commencement of a tenancy, later to be confronted, on the giving of notice, with demands to which he had not given thought at the time of the agreement. We think it more realistic, therefore, while retaining the freedom to contract out of the provisions of section 46(2), to limit the time at which such contracting out may take place to the time at which notice of termination is given.

There is one situation in which we think a landlord should have the right to enter premises regardless of whether he has contracted for it or not. This situation

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28. Except in the situation where the landlord does not know whether or not the premises have been abandoned. This matter is the subject of a recommendation elsewhere in this Report (Ch. IX).

29. N. 26 *supra*.

30. *Ibid*.

31. See E. E. Bowes, "Discussions of the Amendments to the Landlord and Tenant Act" in *Recent Laws in Canada* (Annual Ed. 1973/74).



arises where the landlord, having given notice of termination of a tenancy, wishes to inspect the premises in order to assess the amount of his claim for damage, if any. The landlord should not, however, be entitled to exercise this right on more than one occasion outside of contract, and should exercise it speedily after notice of termination and at a reasonable time.

The Commission proposes, therefore, that the principle of section 46(2) of the existing *Landlord and Tenant Act* should be modified to the following limited extent. Within 48 hours of the giving of notice of termination of a tenancy, a landlord has the right to serve notice on the tenant that he wishes to enter the premises within the succeeding three days for the purpose of assessing damage to the premises. The landlord shall not exercise the right unless he has first notified the tenant at least eight hours before the time of entry, unless some shorter time is agreed upon, and the time of entry shall, unless otherwise agreed upon, be between eight in the forenoon and nine o'clock in the afternoon. Unless otherwise agreed upon the landlord shall enter on the premises on only one occasion for the purpose of assessing damage.

The Commission recommends that:

1. *The proposed Act contain a provision which is similar to section 46(2) of the present Act, but which limits the time at which a shorter period of notice may be agreed upon to the time at which notice of termination of the tenancy is given, whether by the landlord or the tenant.*
2. *The proposed Act contain a provision which permits a landlord, within 48 hours of the giving of notice of termination of a tenancy, to enter upon the premises within three days after he has indicated his intention to exercise such right, for the purpose of inspecting the premises for damage, provided that:*
  - (a) *the landlord shall not exercise the right unless he has first notified the tenant at least eight hours before the time of entry, unless some shorter period is agreed upon; and*
  - (b) *the time of entry shall, unless otherwise agreed upon, be between eight in the forenoon and nine o'clock in the afternoon as specified in the notice.*

## **E. Locks**

With the evident aim of preventing resort to self-help as a means of regaining possession of rented premises, the Ontario Law Reform Commission recommended in 1968 that a landlord or tenant who unlawfully changed the locks on doors giving access to the premises should be subject to prosecution and be liable to be fined upon conviction.<sup>32</sup> The Ontario legislation of 1970 contained a provision<sup>33</sup> forbidding the alteration of locks or locking systems during the currency of any tenancy agreement. The British Columbia Legislature introduced

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32. N. 1 *supra*, 79.

33. N. 4 *supra*, s. 95.

34. N. 5 *supra*.

a similar provision<sup>34</sup> in 1970, which was slightly amended<sup>35</sup> in 1973 so that section 48 now provides:

No landlord or his servant or agent shall, during the occupancy of the rented premises by the tenant, alter or cause to be altered the locking system on any door giving entry to the rented premises, except by mutual consent.

While the Commission does not retreat from the principle embodied in section 48, it appears that the operation of the section does work a hardship on landlords in certain circumstances. If the locking system in a large apartment block breaks down and needs to be replaced urgently for security purposes, the landlord may find himself in breach of section 48 unless he can secure the consent of all tenants. This is not always possible in, for example, a large apartment block. It seems to us, therefore, that there should be an exemption from the operation of section 48 in cases of genuine emergency where there is a threat to the security of the building.

We remain concerned, however, that the exemption may give rise to abuse in certain circumstances and we are not prepared to go so far as to extend the exemption to all locks. Neither a landlord nor a tenant should be permitted, without mutual consent, to alter locks on doors giving direct access to rented premises even where an emergency is thought to exist. It follows that our recommendation for the modification of section 48 would extend only to situations where there are two or more sets of premises under the one roof and where there is a common door which does not give entrance directly to either or any of the rented premises.

The Commission recommends that:

*The proposed Act contain a provision similar to section 48 in the existing Landlord and Tenant Act, with an exemption for a landlord or tenant who changes a lock in a case of emergency where there is a threat to security, this exemption not extending to locks on doors giving direct access to rented premises.*

## **F. Entry by Canvassers**

In respect of political canvassers landlords must permit free access to tenants. Section 47 of the Act provides that:

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.

The Commission recommends no modification of this provision.

It was suggested in one brief submitted to us that:

Section 47 allows canvassing of tenants by candidates for political office. These provisions should be broadened to include all visitors for tenants except those who are unsolicited. The landlord would only be entitled to bar

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35. N. 26 *supra*.

unsolicited visitors to the building.

The exact meaning of this submission is not entirely clear to us. If it is based on the premise that section 47, by directing a landlord to admit political canvassers, has the implied effect of permitting a landlord to exclude all other visitors at his option, we can only say that we do not agree that section 47 has this meaning. This interpretation of section 47 was not advanced in any other brief, and we are not aware of any decision of a court which would support it.<sup>36</sup> We do not, however, endorse the view that a landlord should be given the freedom to exclude solicited visitors from rented premises, and assuming that there is substantial doubt about the matter, we are prepared to recommend that it be set out in the proposed Act that this freedom is not implied by the existence of a provision of the nature of section 47.

It may be that the suggestion made to us refers obliquely to a problem raised in the Ontario Law Reform Commission Report<sup>37</sup> in 1968. This concerned the practice which is evidently common in Ontario of landlords restricting within multiple unit dwellings the vendors with whom tenants may deal for such commodities as bread, milk, and cleaning services. The Ontario Commission took the view that such restrictions on trading were imposed for valid reasons and stated that:

As far as the supply of such items as bread, milk and dry cleaning service is concerned the landlords' position is that an unrestricted admission of tradespeople causes too many people to be on the premises during the course of a day. This causes additional maintenance and repair expenses, inconvenience in elevator services at peak periods of use and an increase in the risk of theft and break-ins.

In no brief submitted to us was this matter mentioned, leading us to suppose that in this Province restrictions in multiple unit dwellings on trading with merchants who are solicited by tenants are not common. We recognize that a recommendation that landlords not be permitted to restrict the entry of solicited visitors on rented premises would go some way towards striking down restrictions on trading if they exist, but since no evidence was presented to us that they do, we do not think it necessary to modify the recommendation.

The Commission recommends:

*The proposed Act, in addition to containing a provision comparable to section 47 of the existing Landlord and Tenant Act, make it, clear that a landlord does not have the right to restrict the access to rented premises of persons whose visits are solicited by tenants of those premises.*

## G. Penalties

In the context of a discussion of statutory duties and prohibitions it is convenient to discuss the question of penalties under the *Landlord and Tenant Act*.

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36. This is not to say that a landlord may not at some time have endeavoured to make the argument. This is possible, although no such instance has been brought to our attention.

37. N. 1 *supra*, 48.

38. N. 5 *supra*, s. 62 (1).

In the 1970 legislation<sup>38</sup> certain acts by landlords and tenants were singled out by the Legislature as being punishable on summary conviction by the imposition of a fine not exceeding one thousand dollars. These were, briefly stated:

- (1) requiring and retaining security deposits in unlawful circumstances;
- (2) the nonpayment of interest on security deposits;
- (3) requiring post-dated rent cheques;
- (4) preventing entry by political canvassers;
- (5) altering locks in unlawful circumstances;
- (6) increasing rent unlawfully;
- (7) the unlawful taking of possession of rented premises by landlords.

In 1973 the penal aspect of the Act was substantially extended, and section 62 now provides that:<sup>39</sup>

- (1) Any person who contravenes any provision of this Act or fails to obey an order made under this Part is guilty of an offence and is liable, on summary conviction; to a fine not exceeding one thousand dollars.
- (2) Where a landlord is convicted of an offence of contravening section 37 or 38, the judge making the conviction may order the landlord to pay to the tenant the security deposit and interest or any part thereof which is unpaid. [*emphasis added*]

Thus it would appear that not only are the acts and omissions outlined above offences under the Act, but also every other act or omission to which the Act has reference. It would now seem to be an offence for a landlord, among other things, to fail to deliver to a tenant a written tenancy agreement where one exists,<sup>40</sup> and; on termination of the tenancy by the landlord, to fail to give notice of termination in writing.<sup>41</sup> Similarly, it would seem to be an offence for a tenant, on termination of the tenancy by him, to fail to give notice of termination in writing.<sup>42</sup>

It may be thought by some that the visiting of penal consequences on some of the acts and omissions outlined above may be too severe. It was not, however,

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39. *Landlord and Tenant Amendment Act*, S.B.C. 1973, c. 47, s. 13.

40. *Landlord and Tenant Amendment Act*, S.B.C. 1970, c. 13, s. 36 (1).

41. *Ibid.*, s. 53 (1).

42. *Ibid.*

represented to us in briefs and submissions made to us during the course of our study that this was a ground for widespread complaint and we are not prepared to go so far as to recommend its modification, except in two instances which we later mention. It seems, however, that there may be some doubt whether the element of *mens rea* must be present before there can be a successful prosecution under the Act. Where penal consequences may follow from a series of acts such as those outlined above which are not traditionally thought of as being offences, it is our view that it is consistent with established concepts of justice that the element of *mens rea* ought to be present before the act or omission is punishable.

The Commission recommends that:

*It be made clear in the proposed Act, that the element of mens rea must be present before an offence is committed under the Act.*

## H. Breach of Statutory Duty

The question of damages for breaches of duties imposed by new landlord and tenant legislation has arisen both in British Columbia and Ontario since the introduction of that legislation in 1970 in both Provinces.

In *Re MacIsaac and Beretanos*,<sup>43</sup> a decision of Judge Levey in the Provincial Court, a tenant sued for damages for breach of her landlord's duty not to enter unlawfully on the rented premises under section 46(1) of the *Landlord and Tenant Act* of British Columbia. It was held that as the duty was imposed on the landlord by statute, the Legislature must have intended that damages might be recovered for breach of the statutory covenant for quiet enjoyment, or for the tort of invasion of privacy created by section 46(1). In the result, damages were awarded in tort.

In *Cunningham v. Moore*<sup>44</sup> a tenant sued his landlord for injuries sustained on the rented premises, alleging that the injuries were caused by a breach of the landlord's duty to repair the premises under section 95(1) of *The Landlord and Tenant Act* of Ontario.<sup>45</sup> After an extensive analysis of the terms of the statute and a review of the case law on breach of statutory duty, it was held that the Ontario Legislature must have intended a remedy in tort to lie even though it had also provided a means of enforcing the statutory covenant to repair by a procedure set out in section 95(3) of the statute.

Important differences between the two cases will immediately be evident. In *Re MacIsaac and Beretanos* the tenant had not been physically injured by the landlord's breach, while in *Cunningham v. Moore* there had been physical injury. In *Re MacIsaac* it was implied that damages could have been recovered either in contract or in tort, while in *Cunningham v. Moore* only damages in tort were sought. The statutory provision in question in the former case was one which embodied common law principle (a

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43. (1971) 25 D.L.R. (3d) 610.

44. [1972] 3 O.R. 369, Scott, Co. Ct. J., affirmed in the High Court [1973] 1 O.R. 357.

45. N. 4 *supra*.

46. Fleming, *The Law of Torts* 426 (4<sup>th</sup> ed. 1971).

47. No. 5254/73, Vancouver Provincial Court, unreported.

covenant for quiet enjoyment implied at common law), while the provision in the latter case was new to the law.

As the obligation to repair and clean, and the obligation to give quiet enjoyment are by no means the only obligations imposed on landlords and tenants by the Act, it would seem that *Re MacIsaac and Beretanos* has raised the question whether a number of new statutory causes of action in tort have arisen as a result of the 1970 and 1973 amendments to the *Landlord and Tenant Act*, even though awards of damages for breach of statutory duty have been traditionally confined to instances where the plaintiff has suffered physical injury.<sup>46</sup>

Where the rentalsman does not have jurisdiction in this area of landlord and tenant relations, we see no reason to depart from established divisions between the law of tort and the law of contract divisions which we believe to have been confused in *Re MacIsaac and Beretanos*. We do not, however, think it necessary to make a specific recommendation to this effect, particularly in view of a later decision of Judge O'Donnell in the Provincial Court of British Columbia. In this decision, *Bott and Fraser v. Esto Holdings Ltd.*,<sup>47</sup> it was held that the landlord's breach of the statutory covenant to maintain habitable premises gave rise to an action in contract.

An added complication for the principle of damages for a breach of a duty or covenant under the Act in British Columbia has arisen by the expansion of section 62 in 1973 to make punishable by fine all contraventions of the Act. In *Bott and Foster v. Esto Holdings Ltd.*<sup>48</sup> there was a discussion whether the imposition of a penalty for a landlord's failure to maintain habitable premises altered the principle that damages might be awarded for breach of statutory covenant. Damages were awarded, section 62 notwithstanding, but some doubt exists in our minds whether the landlord's obligation to repair and to maintain habitable premises, or the tenant's obligation to clean, is subject to penalty in the case of nonperformance. Section 49 does not provide that the landlord *shall* repair or that the tenant *shall* clean, but instead sets out the fact that the one is *responsible* for repair and the other *responsible* for cleanliness. The setting out of obligations in terms of "responsibility" rather than the use of words which are directory raises a presumption at least that enforcement should be by civil remedy rather than by statutory penalty. This, in our view, is as it should be as we believe it to be inappropriate for a landlord's failure to repair and to maintain habitable premises, or a tenant's causing damage or failure to clean, to be visited by penal consequences unless municipal health standards are violated.

The Commission recommends that:

*The proposed Act, in the re-enactment of a provision comparable to section 49(1) and (2) of the present Act, also contain a provision which exempts failure to discharge the obligations imposed by section 49(1) and (2) from penal consequences.*

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48. *Ibid.*

## CHAPTER VIII

## RENTAL RATES

### A. Frequency of Rental Increases

The prices which tenants are required to pay for rental accommodation have not been immune to the inflationary trends which are evident in other sectors of the economy. Various levels of government, in various jurisdictions, have expressed concern over rental rates, but legislative reaction has varied. In some jurisdictions such as England and New York City quite sophisticated schemes of rent control have been introduced with mixed results.

The question of controlling rent increases was given some consideration by the Ontario Law Reform Commission.<sup>1</sup> Recommendations were made favouring a rent review system on a local option basis in those areas where the market conditions demanded it. Local rent review boards, however, would not have been given the power to reverse rental increases. Rather, those boards would have been given an ombudsman-like function with the ultimate power being that of publicity. The recommendations of the Ontario Commission did not find support with the Ontario Legislature and Part IV of *The Landlord and Tenant Act* of Ontario contains neither special provisions aimed at limiting the number or size of rent increases nor the local option scheme for rent review.

In passing Part II of the *Landlord and Tenant Act* in 1970 the British Columbia Legislature took a bolder step and included section 51. The relevant subsections then provided:

- (1) No landlord shall increase the rent for a residential premises and no tenancy agreement shall provide for an increase in rent for a residential premises during the first year of a tenancy agreement, or, where the tenancy agreement is for a term of less than one year during the term of the tenancy agreement and any renewals thereof upon to one year from the date of the original tenancy agreement.
- (2) No landlord shall increase the rent for a residential premises after the period of one year referred to in subsection (1) without first having notified the tenant in writing, in the manner provided in this Part, at least three months prior to the date of the increase.
- (3) An increase in rent by a landlord contrary to subsection (1) or (2) is void and unenforceable.
- (4) If a tenant, on the date stipulated in a notice under subsection (2) for commencement of the increase in rent, refuses to pay to the landlord the amount of the increase set out in the notice, the landlord may, on or after that date, serve on the tenant, in the manner provided in this Part, a notice of termination of the tenancy agreement at the end of fifteen days from the date of service of the notice, and section 56 does not apply to 4 notice under this section.

Essentially, no landlord was permitted to increase the rent during the first year of a tenancy and then only on three months' notice to the tenant. Notice could therefore be given in the ninth month of the first year of the tenancy to take effect on the expiry of the twelfth month. There was some question as to the frequency

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1. See Ontario Interim Report 63-72.

with which rental increases could be imposed after the first year of the tenancy. The wording of 51(1) suggested that rental increases could be effected every month thereafter provided that proper three months' notice preceded each separate increase.<sup>2</sup> On the other hand, the argument can be made that when rent was increased a new tenancy agreement came into being and the landlord would have been prevented from claiming any further rental increase for another year.

It might also be noted that the original wording of section 51(1) did not prevent a landlord from lawfully terminating a tenancy and then creating a new tenancy at a higher rental rate with the same tenant. In this context it is interesting to refer to the relevant paragraph in Schedule "A" of the Vancouver by-law governing rent increases. Paragraph 5 provides:<sup>3</sup>

No Landlord shall alter the rent payable by a Tenant with respect to any premises, or alter any other terms or conditions under which the premises are occupied by the Tenant, either by amending or renewing an existing lease, or by determining an existing tenancy and creating a new one, except upon three clear months' notice in writing to the Tenant.

While that provision did not restrict the frequency of rental increases it did attempt to prevent circumvention of notice requirement by ruling out the possibility of a landlord "determining an existing tenancy and creating a new one."

In 1973 section 51 was substantially amended. The relevant provisions of that section now read:

- (1) Where a person at any time after the section comes into force, or within the twelve months immediately preceding, establishes or increases the rent for residential premises, then, notwithstanding
  - (a) any tenancy agreement entered into before or after this subsection comes into force; or
  - (b) a change of tenant or landlord,no increase shall be collected until twelve months have expired following establishment of the rent or its last increase.
- (2) No landlord shall increase the rent for a residential premises without first having notified the tenant in writing, in the manner provided in this Part, at least three months prior to the date of the increase.
- (3) An increase in rent by a landlord contrary to subsection (1) or (2) is void and unenforceable.
- (4) If a tenant, on the date stipulated in a notice under subsection (2) for commencement of the increase in rent, refuses to pay to the landlord the amount of the increase set out in the notice, the landlord may, on or after that date, serve on the tenant, in the manner provided in this Part, a notice of termination of the tenancy agreement at the end of ten days from the date of service of the notice, and section 56 does not apply to a notice under this section.

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2. See E. E. Bowes, "Discussions of Amendments to the Landlord and Tenant Act" in *Recent Laws in Canada* (Annual ed. 1973/74).

3. By-law 4448.





The important change introduced is that the twelfth-month restriction on rental increases is now attached to the premises rather than the tenant. The reason for that amendment is not entirely clear. It has been suggested to us, however, that it was a response to the possibility that landlords were evading the provisions of former section 51 in the manner outlined above or by terminating tenancies and letting to new tenants at a higher rate.

The present section 51 has led to a number of difficulties. From the tenant's point of view, it is argued that the tenant is given less security with respect to rental rates than he had in 1970. Formerly, the rent would remain unchanged for a year irrespective of when the tenant moved. Now, if the tenant moves in six months after the anniversary date of the last increase he has only six months rental security. Difficulties also emerge with respect to the enforcement of the provision. There is no means by which the new tenant can, unless he happens to know the previous tenant, verify the date of the last rental increase or the previous rental rate. A number of proposals have been made to cope with this problem. It has been suggested<sup>4</sup> that some form of central registry is called for. Another solution might be to make it a statutory duty of the landlord to provide incoming tenants with the date of the last written increase together with the name (and, where possible, the address) of the previous tenant. Others have suggested that all rental rates and anniversary dates be posted in some common area of apartment buildings. Each of these proposed solutions seems to create difficulties of its own. The registry scheme would require the creation of a substantial bureaucracy to curb what might prove to be a very small number of abuses. The "posting" scheme seems to lead to an undesirable violation of a tenant's privacy. This might be particularly acute where a stabler long-term tenant who makes few demands on the landlord, pays rent at a substantially lower rate than other occupants of the building. Publicity of that fact could be a source of embarrassment to both landlord and tenant.

From the landlord's point of view the 1973 amendments lead to other difficulties. The conscientious landlord finds it distasteful, at the outset of a tenancy, to advise a prospective tenant that the rent will be raised at some future date less than a year away. The three month notice requirement would seem to put the landlord in an impossible position if the anniversary date comes very early. For example, if a new tenant moves in ten months after the last rental increase the landlord would be allowed to raise the rent in two months. The Act, however, requires that the tenant be given three months' notice. We understand that some landlords have adopted the position, and increased rents on the basis, that a notice properly delivered to an earlier tenant is effective to permit the landlord to raise the rent of a later tenant when the premises have changed hands between the time notice is served and the anniversary date. In placing that construction on section 51, those landlords may be running a substantial risk, having regard to the fact that an unlawful rental increase might subject them to a fine of up to \$1,000.

The existing law may create anomalous rental situations. For example, two identical vacant apartment units might sit side by side but the landlord would be required to rent them at different rates because the last rental increases were on different dates. It has been urged upon us that relating rental increases to the premises works a hardship on landlords where the previous rental rate was fixed at a lower level than the premises might otherwise command. This might occur, for example, where premises were let to a stable tenant known to be unlikely to make any great demands on the owner, where premises were let to a relative of the

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4. See Bowes, n. 2 *supra*.

owner, where premises were let during the "off season," or where premises suitable for occupancy by a number of people were let to a single tenant. In those situations a new tenancy might ordinarily justify a substantial increase in rent.

It has also been suggested to us that the present law discourages a landlord from improving the premises. The logical time to redecorate and renovate is between tenancies, and we are told that before 1973, if a landlord knew he could rent to a new tenant at a higher rate he might be prompted to invest time and funds in improving the premises. Where he is "locked in" for several months he is said to be less inclined to do so.

The Commission finds these arguments persuasive. The 1973 amendment seems to have done a disavour to all concerned except to the extent it may have prevented the termination of tenancies to obtain a higher rate of rent from a new tenant, and prevented frequent increases in the second and following years of an established tenancy. In our opinion these benefits can be retained while avoiding the complications introduced by relating rental increases to the premises rather than the tenant. Elsewhere in this Report, recommendations are made which, if implemented, would introduce a greater measure of security to the month-to-month tenant than the present law allows and which would prevent the termination of a tenancy by a landlord for the purpose of obtaining a higher rental rate. We have concluded that the best solution is to amend section 51(1) so as to restore the legal position which prevailed before 1973 but prevent more frequent increases in the second and following years of an established tenancy.

The Commission recommends that:

1. *The proposed Act contain a provision comparable to section 51 (1) as it was enacted in 1970, but amended to provide that in the second and following years of a tenancy rent shall not be increased more often than once every year.*

## **B. Definition of Rental Increases**

It seems appropriate at this point to consider the manner in which a rental increase should be defined. Our attention has been drawn to what might be called "hidden rental increases." It is not uncommon to find, particularly where an apartment block is involved, that a substantial number of services are offered to the new tenant as part of the "package." At some later time the landlord may find his costs of operation increasing. The alternatives open to a landlord in such a situation would seem to be the following:

- (a) Do nothing and accept a lower rate of return on his investment;
- (b) Cut operating costs in areas which do not affect the tenant. This might be done by the landlord undertaking duties formerly the responsibility of a caretaker or resident manager;
- (c) Cut operating costs in areas which do affect the tenant. This might be done, for example by maintaining the apartment swimming pool at 70°F. rather than 75°F. so as to effect a fuel saving, washing the outside windows only once a year rather than twice, or putting the resident caretaker on a part-time basis so that he is no longer readily available to answer the call of a tenant who requires his services.
- (d) Add a surcharge for "fringe benefits" which the tenant formerly enjoyed "free of charge." This often takes the form of putting a

coin box on laundry facilities in an apartment but may also manifest itself in a form of a charge for cable vision or parking with respect to which no specific charge had previously been made;

- (e) Raise the rent directly.

Unless there is a happy coincidence of anniversary dates the fifth alternative will not be available to the landlord because section 51(1) limits, and under our previous recommendation would continue to limit, the frequency of rental increases. Thus, landlords often turn to the third and fourth alternatives. For the purposes of section 51 should these steps constitute a rental increase? From the landlord's point of view it is very important to know whether or not they do. It is entirely possible for a landlord to install coin boxes on washing facilities without turning his mind toward section 51. If that amounts to a rental increase, under the present Act the landlord might find himself facing prosecution under the Act and a possible fine of \$1,000. He might also find himself prohibited from raising the rent on any suite in the apartment for a period of one year from the time the coin boxes were installed. That is a drastic result. On the other hand, a tenant who was attracted to, and who moved into, the premises when the "fringe benefits" were "free" would seem to have a legitimate complaint when he suddenly finds himself facing surcharges for parking and cable-vision, and a coin box on the washing machine.

It has been suggested that rental increases be defined so as to include such surcharges specifically. That would certainly give the landlord guidance but it might also amount to a complete prohibition in large buildings. In those cases there would be a great diversity of dates upon which a rental increase would be permitted and, for example, installing coin boxes at any particular time is likely to offend the Act with respect to a majority of tenants.

The withdrawal of services is a more subtle problem. In some cases the effect on the tenant may be so slight as to be negligible while in others the withdrawal of services may substantially impair the tenant's enjoyment of the premises. The same act may also affect different tenants in different ways. The difference between a swimming pool maintained at 75°F. and one maintained at 70°F. may go unnoticed by a majority of tenants but it may, in effect, deprive some tenants of the complete use of the pool. On the other hand, a change from 75°F. to 60°F. might deprive a majority of tenants of the use of the pool.

How can all competing interests be balanced equitably in these cases? The notice provision contained in the Vancouver City By-law, quoted earlier in this Chapter, extends to altering "any other terms or conditions under which the premises are occupied by the tenant." Presumably, both a surcharge and a withdrawal of services are encompassed by the provision. This formula seems unnecessarily rigid.

In our opinion this problem requires a considerable degree of flexibility and is one in which the services of the rentalsman may be usefully employed. Where the landlord wishes to impose a surcharge with respect to facilities enjoyed in common with other tenants he should be able, with the consent of the rentalsman, to do that. The rentalsman, on the other hand, should be able to make his consent conditional upon appropriate rebates being made to appropriate tenants, or other reasonable terms. If the rentalsman's consent is obtained, the surcharge should not amount to a rental increase for the purposes of section 51. Any surcharge imposed with respect to facilities which are not enjoyed in common with other

tenants should fall within the definition of rental increase.

Similarly, a withdrawal of services which adversely affects a majority of tenants in rented premises so that their enjoyment of the premises and associated facilities is substantially impaired, should constitute a rent increase, unless done with the consent of the rentalsman, who again should have the power to impose appropriate terms and conditions.

A withdrawal of services directed at an individual tenant and not with respect to facilities enjoyed in common with other tenants and which substantially impairs that tenant's enjoyment of the premises should fall within the definition of rental increase. A withdrawal of services which does not substantially impair the interests of a tenant or group of tenants should not amount to a rent increase.

Once an application to the rentalsman is made by a landlord it is expected that the rentalsman would consult with the tenants affected as fully as circumstances dictate. We are reluctant to recommend any specific procedural requirements as flexibility should be a key feature of the rentalsman's operations in this area.

We wish to emphasize in the strongest possible terms that our recommendations relating to what should or should not constitute a "rental increase" are made only for the purpose of defining and limiting the effect of section 51. Their only effect will be to assist in determining:

- (a) when a landlord is liable to be prosecuted under the Act for imposing an unlawful increase in rent; and
- (b) when a landlord is precluded from claiming a further rental increase.

In almost every case where services are withdrawn by a landlord he will, technically, be in breach of the tenancy agreement. It is not our intention, by recommending that certain withdrawals of services be exempted from section 51, that the tenants' right to sue for breach of contract be in any way affected. To the extent that, pursuant to terms imposed by the rentalsman, the landlord has made a rebate to the aggrieved tenant, that rebate should be set-off against any damages he might otherwise be awarded.

The Commission recommends that:

1. *The proposed Act include, for the purposes of the section comparable to section 51,*  

*a statutory definition of "rental increase" so as to include within that term:*

  - (a) *any additional charge levied by a landlord with respect to facilities previously enjoyed by a tenant at a lesser or no charge; and*
  - (b) *a withdrawal of services which results in the substantial impairment of the tenant's use and enjoyment of the rented premises and associated services and facilities except where the added charge or withdrawal of services has been consented to by the rentalsman in accordance with the following recommendations.*
2. *Where a landlord wishes to impose an added charge with respect to facilities enjoyed in common by a number of tenants and which had previously been enjoyed at a lesser or no charge; or when the landlord wishes to effect a withdrawal of services previously*

*available to a number of tenants in common and that withdrawal of services would substantially impair the use and enjoyment of the premises and associated services and facilities, the landlord may apply to the rentalsman who may consent to the added charge or withdrawal of services subject to such terms and conditions as it may seem just to impose.*

3. *The definition of rent increase should not prejudice the right of a tenant to bring in action against the landlord for breach of contract.*

### **C. Increased Occupancy**

One further problem with respect to the restrictions on rental increases has been drawn to our attention in the course of this study. We are told that one of the economic factors to be considered in setting rental rates is the number of persons who will occupy the premises. Additional occupants mean additional costs to the landlord. In some cases the additional costs may be negligible but in other cases, particularly when the landlord is responsible for providing utilities, it may be significant. For example, doubling the number of occupants of an apartment will normally double the consumption of water. Increased occupancy will also result in an increased level of general wear and tear to the premises.

We have some sympathy with the landlord who finds that rented premises are being occupied by a greater number of tenants than he bargained for which results in increased operating costs but falls short of objectionable overcrowding. We are, however, reluctant to recommend that the landlord be given a blanket right to increase the rent in such circumstances. That might lead to undesirable abuse. We feel the answer to the landlord's problem lies in permitting him to contract with the tenant, at the commencement of the tenancy or at the time a lawful rent increase is imposed, that if the number of permanent occupants of the premises increases the landlord shall be entitled to raise the rental rate by a fixed amount for each additional occupant. A rent increase pursuant to such an agreement should not constitute a rental increase for the purposes of the provision limiting the frequency of rental increases.<sup>5</sup>

The Commission foresees one area of dispute emerging. Landlord and tenant may not always be *ad idem* as to whether an additional occupant is merely a visitor or transient guest, or whether he is an additional permanent occupant in which case a rental increase, if contracted for, would be justified. We feel that the determination of such a dispute should be left to the rentalsman.

The Commission recommends that:

1. *Nothing in the provision limiting the frequency of rent increases should restrict the right of landlord and tenant to agree, at the commencement of a tenancy or at the time a rental increase is lawfully made, that if the number of permanent occupants of rented premises increases the rent may be raised by an agreed amount for each additional occupant; and a rental increase made pursuant to such an agreement should not constitute a rental increase for the purposes of that provision.*
2. *The rentalsman should be given jurisdiction to resolve any dispute between landlord and tenant as to whether or not an additional occupant is "permanent" for the purposes of the foregoing recommendation.*

### **D. Acceleration of Rent**

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5. Such a rent raise may in fact be lawful under the existing Act.

6. *Ontario Interim Report 51.*

Acceleration clauses are a common feature of agreements which involve the periodic payment of sums of money. Such clauses normally provide that if the person under the obligation to make the payments is in default, all payments to have been made in the future become due immediately. Often tenancy agreements for a specified term contained acceleration clauses.

The Ontario Law Reform Commission considered what they characterized as the "basic unfairness of acceleration provisions"<sup>6</sup> and recommended that they should be subject to certain controls. The Ontario Legislature responded by enacting section 97(1) of *The Landlord and Tenant Act* which relieves tenants of the obligation to pay accelerated rent if the tenant pays the arrears or performs outstanding obligations and pays any expenses incurred by the landlord.<sup>7</sup>

The reaction of the British Columbia Legislature in 1970 to acceleration clauses was stronger. In tenancy agreements relating to residential tenancies, acceleration clauses are prohibited and any such clause is deemed void and unenforceable. The relevant provision reads:

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, be 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.

There is no evidence that the existing prohibition against accelerated rent has visited a hardship on landlords. Not one of the numerous briefs which we received contained any reference to this prohibition and no change seems warranted.

The Commission recommends that:

*The existing prohibition against acceleration clauses in tenancy agreements set out in section 50 be retained in the proposed Act.*

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7. For a detailed discussion of these provisions, see Lamont, *Residential Tenancies* 76-77 (2<sup>nd</sup> ed., 1973).

## CHAPTER IX

## ABANDONMENT

### A. Definition

Abandonment of premises by a tenant gives the landlord various rights under Part II of the *Landlord and Tenant Act*. Since, however, abandonment is not defined in the Act, the circumstances which give rise to these rights are uncertain. Abandonment is mentioned in four sections in Part II:

39. (1) Except where a tenant *abandons the premises*, no landlord shall distrain for default in the payment of rent whether a right of distress has heretofore existed by statute, the common law, or contract.
45. 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.
46. (1) Except ...
- © where the tenant *abandons the premises*, the landlord shall not exercise a right to enter the rented premises unless he has first given written notice to the tenant at least twenty-four hours before the time of entry, and the time of entry shall be between the hours of eight o'clock in the forenoon and nine o'clock in the afternoon and specified in the notice.
61. (1) Unless a tenant has vacated or *abandoned rented premises*, the landlord shall not regain possession of the premises on the grounds he is entitled to possession; except under the authority of an order obtained under section 60.<sup>1</sup> [*emphasis added*].

Section 39 permits the landlord to distrain for arrears of rent, but only when a tenant abandons the premises. Section 45 relates to the question of mitigation of damages upon abandonment. Section 61 regulates the regaining of possession of the premises by a landlord, without a court order, where the premises have been vacated or abandoned. Section 46(1) exempts the landlord from the statutory prohibition against entering the premises "where the tenant abandons." From the landlord's viewpoint, it is important to know when these rights and duties arise. This point was stressed in one brief which we received:

... clarification, by statutory definition is required in order to define abandonment. It is a difficult thing to establish in law, as it now stands, because the tenant whom the landlord suspects has abandoned is seldom available to be questioned. The prudent landlord seeking to mitigate his damage is fearful of entering the premises until he is absolutely sure that abandonment has taken place.

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1. Emphasis added in each section.



We agree that a workable definition of abandonment is desirable. Such a definition might be either developed through case law or, preferably, embodied in a statute.

The brief quoted above offered a statutory definition for our consideration:

The rented premises shall be deemed to be abandoned where:

- (a) the rented premises are apparently vacated without prior written notice to the landlord, and where there is no written denial delivered by the tenant to the landlord within 48 hours of the placing of a notice declaring abandonment as stipulated in section 54(2)(b);
- (b) the rental is seven (7) days in arrears and where there is no written denial delivered by the tenant to the landlord within 96 hours of the placing of a notice declaring abandonment as stipulated in section 54(2)(b).

The principles embodied in the foregoing are not, however, consistent with the way in which the term "abandonment" has been used in relation to leases and in other fields of law. A short analysis will clarify this and offer some guidance in the preparation of statutory definition.

- (a) *United States* - American cases clearly state that abandonment, as applied to leases, involves an absolute voluntary and intentional relinquishment of the premises by a tenant. There must be, in other words, an act of abandonment accompanied by an intention to abandon.<sup>2</sup>
- (b) Canada
  - (i) Abandonment of Goods: This takes place when possession of goods is relinquished without an intention to transfer them to another.<sup>3</sup>

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2. See, *Pure Oil Co. v. Sturm*, 182 N.E. 875, 882; 43 Ohio App. 105 (1930). Abandonment is the voluntary, intentional relinquishment of a known right. There must be a concurring intention to abandon and an actual relinquishment of the property. In *Schuitzer v. Langar*, 113 N.J.L. 332, 180; 180 A. 234 (1935), a butcher closed up his shop and removed all perishable merchandise with the intention of giving up the business. Although he retained the key and did not notify the landlord of the intention to vacate, this was held to be an act and an intention sufficient to constitute an abandonment of the lease. In *Moore v. Northwest Fabricators Inc.*, 314 2d 941, 942; 51 Wash. 2d 26 (1957), the appellant indicated by words, acts, and conduct [rent not paid, land not farmed] that they could not or would not perform their obligations under the lease of farmland. The Supreme Court of Washington held that there was an intention to abandon the lease and to relinquish control of the premises. In *Baldwin v. Jacobs*, 116 N.W. 271, 272; 182 Iowa 789 (1918), the Supreme Court of Iowa held that the fact that a lessee moves to another place a few weeks before the termination of his term is not, in itself, an abandonment of the lease. In *Blackwell Oil & Gas Co. v. Whited*, P. 688, 692; 81 Okl. 45 it was held that abandonment rests upon the intention of the lessee to relinquish the premises and is, therefore a question of fact for the jury. See also, *Black's Law Dictionary* 12 (4<sup>th</sup> ed., 1968): To constitute an 'abandonment of leased premises, there must be an absolute relinquishment of premises by tenant consisting of act and intention.'

3. See *Peterson Lake Silver Vobalt Mining Co. v. Dominion Reduction Co.* (1917), 41 O.L.R. 182, *aff'd* 44 O.L.R. 177; 46 D.L.R. 724, *aff'd* 59 S.C.R. 649; 50 D.L.R. 52 (S.C.C.).

4. See *Handel v. O'Kelly* (1912), 3 W.W.R. 367; 8 D.L.R. 44 (Man. C.A.) The intention of a purchaser to abandon the contract may be inferred from long-continued default on the monthly payments); *Yanik v. Conibear* [1945] 1 W.W.R. 33; 1 D.L.R. 230 (Alta. S.C.) (A purchaser carelessly misread a new agreement and did not make payments; held not to be an abandonment)

- (ii) **Abandonment of Contract:** Canadian cases on abandonment of a contract for the sale of land state the need for an intention to abandon.<sup>4</sup> An act of abandonment is often difficult to ascertain here and the intention is considered to be the primary element.
- (iii) **Abandonment of Homestead:** Abandonment of a homestead has been defined as:

... a removal from the premises with the intention of acquiring elsewhere a residence which is not merely of a temporary character, and which is taken for purposes not inconsistent with the retention of the original premises as his home. The character of the new residence acquired [are] important factors in determining whether or not the debtor has abandoned the premises claimed as exempt as his actual place of residence ... where a new residence is acquired, it must only be a temporary one for a definite purpose, with a constant and abiding intention to return as soon as that purpose is accomplished.<sup>5</sup>

- (iv) **Abandonment of Residence:** For income tax purposes, a residence is abandoned when there is an act severing all ties and an intention not to return.<sup>6</sup>
- © **Conflict of Laws** - The question of abandonment of domicile in the conflict of laws arises when the Courts must decide the domicile of a party as a basis for choosing which of two or more competing laws apply. A domicile is considered abandoned when both the residence and the

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5. *Re Hethrington* (1910), 14 W.L.R. 529, 533, 534. In this case, land was seized by the Sheriff under an execution order, and the execution debtor claimed exemption for the land as his homestead. He left the land in 1907 and moved to a rented farm until March 1910, when he heard that "his homestead" was for sale and returned. The debtor said that the "homestead" was always his real home and he only left because he did not have the means to work it. The Court put the onus on the party to show that he had not abandoned it. To do this, he must show that the place is still his actual and bona fide residence, and that his absence therefrom has been only temporary. This case was applied in *Re McEachern Estate* [1933] 2 W.W.R. 177, 183 K.B. See also *Hart v. Rye* (1914); 16 D.L.R. 1; 5 W.W.R. 128 (Alta.). This was a case under the *Alberta Execution Ordinance* relating to homesteads: "Abandonment in such cases is removal from the premises with the intention of acquiring elsewhere a residence which is not merely of a temporary character and which is taken for purposes not consistent with the retention of the original premises as his home. The character of the new residence acquired and the purposes for which it was acquired are important factors in determining the questions of abandonment ... But where a new residence is acquired, it must only be a temporary one for a definite purpose, and with a constant and abiding intention to return as soon as possible."

6. See *Schujahn v. M.N.R.* [1962] Ex. C.R. 328; *Thompson v. M.N.R.* [1946] S.C.R. 209.

intention which must exist for its acquisition are given up.<sup>7</sup> It is not lost merely by giving up the residence nor merely by giving up the intention."<sup>8</sup>

All the above illustrations of "abandonment" have the common elements of an act and an intention.

A statutory definition of abandonment should therefore incorporate the principle that a landlord is entitled to treat rented premises as abandoned by the tenant when there has been an absolute relinquishment of the premises accompanied by an intention not to return. To assist the landlord in determining the tenant's intention some guidelines should be provided. It would be helpful to state that an intention to abandon may be manifested either expressly (where there is oral or written notice from the tenant to the landlord) or impliedly from the facts and circumstances surrounding the relinquishment of the premises.<sup>9</sup> It might also be useful to outline circumstances in which abandonment may be presumed. For example, a failure to occupy or remain in possession of residential premises, combined with a failure to pay rent, for a period of one month might raise a presumption of abandonment. We wish to emphasize, however, that so long as the rental payments are in good standing, a presumption should be raised that the tenant has not abandoned the premises.

Because a definition of the kind offered would require proof of an act and an intention, some consideration must be given to where the onus of proof lies. In *Re Hetherington and Hart v. Rye*,<sup>10</sup> the Court put the onus of proof on the party claiming that he had not abandoned the homestead, as it was to his advantage to show that he was within the terms of an exemption from execution set out in Alberta legislation. In the landlord and tenant relationship, we are of the view that the onus of proof of abandonment should be on the landlord in situations where abandonment leads to an increase in the landlord's rights. Under the present legislation the landlord's rights are increased under sections 39(1), 46(1), and 61(1) when abandonment occurs. Abandonment permits the landlord to ignore the waiting period imposed by the one month's notice requirement and to enter the premises immediately. He also obtains certain rights against the tenant's goods. In these circumstances it does not seem unfair that the onus of proof of abandonment should lie on the landlord.

For the purposes of section 45, which requires a landlord to mitigate his damages where a tenant abandons the premises, there is less reason for placing the onus of proof on the landlord, although it would be unlikely that the issue of onus of proof would arise in a practical situation, since the event of abandonment is merely the starting point of a duty to re-rent vesting in the landlord. It may happen, however, that a defaulting tenant would claim that there had been a breach of the duty to re-rent, in which case it seems reasonable that the onus of

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7. Dicey & Morris, *The Conflict of Laws* 105 (8<sup>th</sup> ed., 1967). *Udny v. Udny* (1869), L.R. 1, Sc. App. 441, 450; *Fleming v. Horniman* (1928), 44 T.L.R. 315; *Bradfield v. Swanton* [1931] I.R. 446.

8. Dicey & Morris, n. 7 *supra*, 106.

8. Dicey & Morris, n. 7 *supra*, 106.

9. Intention could be implied from the conduct, acts, or words of the tenant.

10. N. 5 *supra*.

proving abandonment should rest on the tenant.

With a statutory definition of abandonment, the landlord would have a basis for deciding when certain rights arise and would have a defense for the exercise of these rights if the matter were disputed. A definition would also help the tenant to decide if his rights had been violated. Finally, it would be of assistance to whatever body is charged with the resolution of disputes on abandonment.

The Commission recommends that:

1. *The Act contain a definition of "abandonment" incorporating the following principles:*
  - (a) *A landlord is entitled to treat rented premises as abandoned by the tenant when there has been absolute relinquishment of the premises accompanied by an intention not to return;*
  - (b) *Evidence of an intention not to return may be inferred from the facts and circumstances surrounding the relinquishment of the premises or from express, oral or written notice from tenant to Landlord.*
  - (c) *A failure to occupy or remain in possession of residential premises, combined with a failure to pay rent, for a period of one month shall raise a presumption of abandonment;*
  - (d) *So long as rental payments are in good standing, a presumption shall be raised that the tenant has not abandoned the premises.*
2. *The onus of proof of abandonment should rest on the Landlord, except where the tenant claims the landlord is in breach of a duty to re-rent following abandonment.*

## **B. Abandonment of Goods**

A distinction must be drawn between an abandonment of the premises by a tenant and the abandonment of goods by the tenant. A tenant may abandon the premises yet take his goods with him. A tenant may leave the premises after his tenancy has been lawfully terminated by notice or the expiration of a lease but leave goods behind. A third possibility is that a tenant may abandon both the premises and some or all of his goods. It is the third situation which appears to give rise to the landlord's right to distrain.

At common law a landlord has the right to seize, without legal process, the goods and chattels of a tenant who is in default in the payment of rent. That process is known as distress. As we pointed out in Chapter I, the right to distrain was extended by statute to situations where it was not permitted at common law. On the other hand, statutes were enacted which restricted the exercise of the right to distrain. The present *Distress Act*<sup>11</sup> is an example of such a statute. Section 3 of that Act provides:

- (1) The following goods and chattels are not liable to seizure by distress for rent or penalty:
  - (a) The beds; bedding, and bedsteads (including cradles and perambulators) in ordinary use by the debtor and his family:
  - (b) The necessary and ordinary wearing apparel of the debtor and

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11. R.S.B.C. 1960, c. 115.

his family:

- (c) One cooking-stove with pipe and furnishings, one other heating-stove with pipe, one set of cooking-utensils, one lamp, one table, one washstand with furnishings, six towels, one clock, one broom two pails, one axe, one saw, one shovel, one washtub, one washboard, three smoothing-irons, one sewing machine and attachments in domestic use, and for the debtor and for each member of his family the following: one chair, one plate, one cup and saucer, one knife, one fork, one spoon:
  - (d) All necessary fuel, meat, fish, flour, and vegetables for the ordinary consumption of the debtor and his family for thirty days:
  - (e) Tools and implements of or chattels ordinarily used in the debtor's trade or occupation, to the value of two hundred dollars.
- (2) The debtor may select out of the total tools, implements, or chattels referred to in clause (e) of subsection (1) the things which are exempted from seizure under that clause.

The anachronistic character of the exemptions is evident. That Act also contains provisions designed to protect the interest of their parties who may have rights in or to the goods.

The right of a landlord to distrain was severely restricted when Part II of the *Landlord and Tenant Act* was enacted in 1970. Section 39 of the Act abolished a landlord's right to distrain for default in the payment of rent except where a tenant has abandoned the premises. This followed a similar restriction placed upon distress by the *Ontario Act* pursuant to the recommendations of the Ontario Law Reform Commission.<sup>12</sup> In enacting section 39 the British Columbia Legislature took a clear policy decision to remove the dual concern of:

- (a) the threat of distress being held over tenants; and
- (b) the incidence of illegal distress against tenants who did not know the statutory limitations in relation to distress.<sup>13</sup>

Thus, except where rented premises have been abandoned the remedy of distress is the subject of a statutory prohibition. In so far as distress has been obtained where there has been an abandonment, the landlord must, presumably comply with other statutory and common law requirements.<sup>14</sup>

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12. *Ontario Interim Report* 13-20.

13. For a further discussion of this questions, see Lamont, *Residential Tenancies* 78 (2<sup>nd</sup> ed., 1973).

14. E.g., the *Distress Act*, R.S.B.C., 1960, c. 115. For a further consideration of these requirements, see Williams, *Canadian Law of Landlord and Tenant*, c. 8 (4<sup>th</sup> ed., F. W. Rhodes, 1973).

15. This is what has been done in Manitoba. See *The Landlord and Tenant Act*, S.M. 1970, c. 106, s. 88 and 94 (3) (a).

This limited right to distress creates a number of anomalies and problems. For example, the exemptions in the *Distress Act* seem clearly aimed at leaving the tenant with the minimum of goods he needs to carry on his day-to-day existence. On the other hand, the abandonment of rented premises containing those goods raises a presumption that the tenant neither wants nor needs them. Thus the protection of the *Distress Act* is unnecessary but the landlord is nonetheless required to comply with its provisions. Because of the existing ambiguity concerning the meaning of abandonment, it may be argued that the right to distrain cannot arise when the tenancy has been terminated by lawful notice or the expiration of a lease and goods are left behind, even if arrears of rent have accrued. Goods may also be abandoned by a tenant when no arrears of rent are due.

Three situations may, therefore, arise in which the landlord has possession of tenant's goods but may not exercise a right to distrain.

1. Where both the premises and the goods have been abandoned, rent is in arrears, but the goods are exempted by the *Distress Act*;
2. Where rent is in arrears and goods have been abandoned but the tenant gave up possession of the premises in circumstances which do not amount, to abandonment;
3. Where goods have been abandoned but rent is not in arrears.

Should the landlord be given rights against these goods when he has a claim against the tenant? What should he do with them if he has no such claim?

The soundest solution to these problems would appear to be the complete abolition of the landlord's right to distrain while giving him a statutory power to dispose of, or sell, abandoned goods, and giving him a general right of set-off against the proceeds of such a sale.<sup>15</sup> This would avoid the anachronistic effects of the *Distress Act* and consistent with the policy of Part II.

In this context it would be mentioned that we were urged by landlords to expand their right to distrain. More particularly it was suggested to us that the Act should be amended to restore to landlords the remedy of distress as it existed before the passing of Part II. We cannot agree. The clear policy of Part II is that remedies of self-help should be eliminated as far as possible, and a wide right of distress is contrary to this policy. We are satisfied that the right of a landlord to demand a statutory rent deposit is an adequate substitute for distress.

Recent legislation in Manitoba provides useful guidance as to the precise form which new legislation in this Province might take. Subsections (2), (2.1) and (3) of section 94 of *The Landlord and Tenant Act* of Manitoba<sup>16</sup> provide as follows:

- (2) Unless a tenant and a landlord have made a specific agreement to the contrary for storage of chattels, where a tenant leaves chattels on a premises after
  - (a) abandoning the premises in breach of the tenancy agreement;

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16. *Ibid.*

or

- (b) going out of possession of a premises upon termination of a tenancy agreement;

the landlord may remove the chattels from the premises and place them in a safe storage for a period of at least three months and at the same time provide the rentalsman with an inventory to the chattels so removed.

- (2.1) Notwithstanding subsection (2), where the landlord is of the opinion that chattels left on a premises by a tenant who has abandoned the premises or has gone out of possession of the premises upon termination or expiration of a tenancy agreement, have no value or that the storage of the chattels or any part thereof would be unsanitary, he may, with the consent of the rentalsman dispose of the chattels immediately in such manner as the rentalsman may authorize.
- (3) Where the tenant or any person claiming title to the chattels has not claimed the chattels after three months have expired, the landlord may by public auction sell them or any part thereof, and
  - (a) after the sale the landlord shall be entitled to recover back from the proceeds of the sale any actual expenses accrued in respect of the storage and cost of sale; and the amount of any judgment given under s. 110; and
  - (b) record details of the sale and disposition of the proceeds to the rentalsman; and
  - © pay any excess of the sale proceeds over to the rentalsman who shall in turn pay them out to the Minister of Finance if they are unclaimed by the tenant within one year of the sale.

These sections have been the subject of favourable academic comment,<sup>17</sup> although the commentator indicated that it would have been helpful if the legislation had given some guidance as to the procedure to be followed at the sale by public auction. It was also noted<sup>18</sup> that the legislation did not refer to the rights of third parties to the chattels, nor did it render the title of a purchaser at an auction immune from impeachment by the true owner. There is force in these criticisms and any future British Columbia legislation in this area should be shaped to meet them.

We would be reluctant to see too great a rigidity introduced into the auction procedure. Extensive advertising may or may not be desirable depending upon the nature of the goods and their value. For example, a tenant may have abandoned the goods worth approximately \$150. If the arrears of rent amount to \$200 it seems unreasonable to impose on the landlord a legal advertising requirement which is likely to cost \$100. On the other hand, the value of the goods may be substantial, and after the costs of storage and sale, and the

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17. See Borsky, *An Examination and Assessment of the Amendments to the Manitoba Landlord and Tenant Act* (1972) 5 Man. L.J. 59, 73.

18. *Ibid.*

landlord's claims have been satisfied, a large amount of money may be left to which the tenant is entitled. In such a case, extensive advertising may be warranted to see that the tenant's interests are fully protected by obtaining the best price. We are of the view that it would be appropriate to permit the rentalsman to determine what procedure should be followed at the sale in any given case.

It might also be noted that the right of set-off given in subsection (3)(a) only applies to a judgment which has been obtained under the Act. Our opinion is that the landlord should have a general right of set-off which includes the right to set-off arrears of rent. There is also some question under the present legislation as to whether the landlord may only distrain for rent up to the time of abandonment, pursuant to section 39, or whether he may use the remedy to recoup losses suffered up to the time he relets the premises. There seems to be no good reason why the landlord should not be entitled to full compensation so long as he is diligent in observing his duty to re-let the premises.

The reference in the Manitoba legislation to the rentalsman happily coincides with our own procedural recommendations made in an earlier Chapter. Section 94(3)(c) of the *Manitoba Act* provides for the disposal of unclaimed proceeds. While we agree that they should be remitted to the rentalsman we make no comment on any further disposition.

The Commission recommends that:

1. *The remedy of distress be abolished with respect to residential tenancies.*
2. *The proposed Act contain a provision comparable to subsections (2), (2.1), and (3) of section 94 of The Landlord And Tenant Act of Manitoba but with the following changes:*
  - (a) *The procedure to be followed at the sale should be left to the discretion of the rentalsman;*
  - (b) *The Landlord's right of set-off with respect to the proceeds of the sale should be general and include a right to set-off arrears of rent which had accrued before or after the tenant went out of possession of the premises;*
  - (c) *When goods have been abandoned the landlord should be obliged to check for encumbrances in the central registry if the a parent value of any item exceeds 550;*
  - (d) *If the landlord is in doubt whether an item exceeds \$50 in value the rentalsman may value the item and his valuation shall be binding on all parties;*
  - (e) *If any encumbrances are registered the encumbrancer shall be notified by the landlord forthwith;*
  - (f) *If the encumbrance is a security agreement, abandonment of the goods shall entitle the encumbrancer to treat the agreement as being in default.*
3. *The proposed Act provide that the ultimate purchaser of abandoned goods receives a clear title to them.*

### **C. Landlord's Duty to Re-rent After Abandonment**

Important changes to the common law were introduced by the 1970 legislation in respect of the duty of landlords to mitigate damages upon the



abandonment of premises by the tenant.<sup>19</sup> Before analyzing these changes, reference should be made to the common law position on this issue. The alternative courses of action open to a landlord where the tenant abandoned the premises were as follows:

- (a) The landlord could stand by and sue the tenant for rent as it fell due, and no question of damages arose. It was pointed out in the decision of *Goldbar v. Universal Sections & Mouldings Ltd.*<sup>20</sup> that so long as the landlord did not acquiesce in the tenant's abandonment of the demised premises, rent accruing due under the lease remained recoverable and the principle of mitigation of damages did not apply.<sup>21</sup>
- (b) The landlord could accept the tenant's surrender, leaving no further liability in the tenant apart from arrears of rent then due.
- (c) The tenancy agreement may have contained a clause stating that the landlord could as an agent of the tenant, re-rent the premises on behalf of the tenant, with the tenant remaining liable for any deficiencies in the rent. Such a provision was simply a contractual term of the lease preserving the landlord's right to obtain the rent set out in the original agreement in relation to the premises.
- (d) Finally, the landlord might notify the tenant that he intended to re-rent the premises on behalf of the tenant, but would look to the tenant for any deficiencies.

In the last three situations it is arguable that no question of damages arises. In each case it is a question of the landlord's terminating the lease by accepting the tenant's abandonment, but preserving his right to claim rent from the tenant.<sup>22</sup>

This view of the common law has been presented in the leading cases in the area.<sup>23</sup> The rules governing the conduct of landlords in this situation were very much influenced by the doctrine of surrender. A surrender in relation to a leasehold interest may be either (a) express or (b) by operation of law. An express surrender occurs by act of the parties and involves a yielding or delivery up of an interest in a lease to the person who has a higher or greater interest in relation thereto. Surrender by operation of law is conveniently summarized by Williams

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19. See s. 45.

20. [1963] 1 O.R. 189 (Ont. C.A.).

21. The landlord could not sue for the whole of the rent immediately upon abandonment (unless there was an effective acceleration clause in the tenancy agreement) but had to wait until the expiration of the term of the lease of sue periodically for the amounts of rent which fell due for payment from time to time. See Williams, n. 14 *supra*, 480.

22. In *Korsman v. Bergl*, [1967] 1 O.R. 576 (Ont. C.A.) such a claim was characterized as a claim for rent, less any rent from the re-renting.

23. See, *Goldbar v. Universal Sections & Mouldings Ltd.*, n. 20 *supra* and *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562. See also, Lamont n. 13 *supra*, 30-31.

as occurring where:<sup>24</sup>

... the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist; the law in such a case treats the doing of the act as amounting to a surrender. Such a surrender arises by operation of law as distinct from the act of the parties, it will take place independently of their intention and in some cases despite their expressed intention. The effect of a surrender by act and operation of law is as great as that of a surrender by act of the parties and is in some cases greater. Where a lease is validly surrendered, the lease is gone and the rent is also gone, and this principle is not affected by the fact that the lessee remains liable for breaches of covenant committed prior to the surrender.

Thus, the effect of a surrender is principally to terminate the tenancy. But a further consequence was to limit the landlord's rights to claim for any deficiency upon a reletting after the surrender. As Laskin J., said in the *Highway Properties* case:<sup>25</sup>

The further consequence of [a surrender was] not only the termination of the estate in the land but also the obliteration of all the terms in the document of lease, at least so far as it was sought to support a claim thereon for prospective loss.

It should be noted that the decision in the *Highway Properties* case limited the drastic effect of the doctrine of surrender by providing that, where the landlord resumed possession and advised the tenant that he would pursue any available right to damages, the landlord would not be denied a right to recover from the tenant.<sup>26</sup> This decision, which related to the common principles applicable to commercial tenancies, left unaffected the four alternative rights of the landlord upon abandonment set out above. In fact, it provided a fifth way in which a landlord might proceed.

When the Ontario Law Reform Commission examined this question,<sup>27</sup> it was made clear that the Commission deplored the fact that a landlord need do no more upon an abandonment by the tenant than sue for rent as it fell due. Consequently, it was recommended that:<sup>28</sup>

... where a tenant abandons the premises the present rule whereby the landlord is not required to mitigate his damages should be reversed so that the ordinary rules of contract relating to mitigation of damages will apply.

Pursuant to this recommendation, the Ontario Legislature enacted section 92 of *The Landlord and Tenant Act* which provides that:

Where a tenant abandons the premises in breach of the tenancy agreement,

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24. Williams, n. 14 472.

25. [1971] S.C.R. 562, 717.

26. For a discussion of the Supreme Court decision see Williams, n. 14 *supra*, 481. For a recent judicial application of the principle enunciated, see *Machula v. Tramer*, [1972] 1 W.W.R. 550 (Sask Dist. Ct.).

27. See, *Ontario Interim Report*.

28. *Ibid.* at 54.

29. Lamont n. 13 *supra*, 32.

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.

Is this provision effective to implement the clear objective of the Ontario Commission that a landlord should be obliged to try and re-rent the abandoned premises at the best available rent?

A strong argument can be made that it does not do so. The basis of this view is that section 92 relates to rights to "damages" and does not affect actions in respect of rent, such as those available to the landlord in three of the common law alternatives outlined earlier. As is stated by Lamont:<sup>29</sup>

... [section 92] is surely no more than stating that when the landlord adopts the alternative of claiming damages as he may now do by virtue of the *Highway Properties case*, *supra*, he must of course endeavour to mitigate those damages. But section 92 does not remove from the landlord the four [common law] alternative rights.

As will be indicated presently, even the wording of the section is sufficiently confused that a court may have severe difficulty ascertaining the intention of the Legislature. As the legislation stands at present it cannot be stated with certainty that a landlord has a duty to re-rent abandoned premises.

What is the present position in British Columbia? The 1970 legislation contained a section which was identical to section 92 of the *Ontario Act*. Presumably the intention of the Legislature was to force landlords to re-rent when premises were abandoned by tenants. Does the legislation have this effect? It is submitted that it does not. In British Columbia the position is further complicated by the fact that section 35 in Part II sets out that "the relationship of landlord and tenant is one of contract only". If normal contract rules were applied (disregarding the doctrine of surrender and other common law leasehold principles to the situation where a tenant abandoned the demised premises) the landlord would have a choice of either keeping the contract alive by continuing to press for performance, or accepting the breach and thus being discharged from his contractual obligations.<sup>30</sup> There is no question of the duty to mitigate obliging the landlord to accept the repudiation.<sup>31</sup> A strict application, therefore, of the normal common law contract rules would allow the landlord to retain his election.

Does section 45 alter this situation? A close examination of the working of that section reveals that "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." Quite apart from the difficulties which arise in relation to characterization of claims by the landlord when the tenant abandons

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30. See, Treitel, *The Law of Contracts* 735-736 (3<sup>rd</sup> ed., 1970).

31. *Frost v. Knight* (1872), L.R. 7 Ex. 111 *Tredgar Iron & Coal Co. v. Hawthorn Bros.* (1902), 18 T.L.A. 716. See also, Treitel, n. 30 *supra* 739.

32. See, text at n. 29, *supra*.

33. E.g., in the *Highway Properties* situation.

the premises,<sup>32</sup> a reference to the rule of law which applies where there has been "anticipatory" breach of contract indicates that there is no duty to mitigate. Thus section 45, from its very wording, cannot be regarded as achieving its objective.

It appears in fact that the Legislature intended that section 45 achieve two objectives at the same time. First, it relates to situations where the landlord is claiming damages,<sup>33</sup> and places the landlord under a duty to mitigate his loss; secondly, it is being used to create an exception to the normal contract rules, by stating that where there is an anticipatory breach by the tenant, the landlord must accept the breach. This intended dual role is scarcely satisfactory.

In fulfilling this dual role section 45, taken together with section 35, also seems to have the effect of eradicating the doctrine of surrender by implication of law. If a landlord has a duty to re-rent abandoned premises, there can be no question of a surrender arising by estoppel and terminating both the leasehold interest and the landlord's right to prospective damages. Now the leasehold interest is automatically terminated, but the landlord's right to damages is secured by his duty to mitigate.

We are of the view that substantial amendments to section 45 are desirable to remove the present inconsistency, reverse the common law position with respect to anticipatory breach, and settle the rights and liabilities of each of the parties.<sup>34</sup>

The Commission recommends that:

*In the proposed Act, section 45 of Part II be replaced by a provision incorporating the following principles:*

- (a) Both parties to a tenancy agreement are under a duty to mitigate their damages;*
- (b) The doctrine of surrender by implication of law be specifically abolished;*
- (c) The landlord be under a duty to re-rent abandoned or vacated premises at an economic rent in order to mitigate loss accruing consequent upon the abandonment or vacating of the premises;*
- (d) If there is any deficit resulting from the re-renting, the tenant be liable therefor.*

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34. For the way in which Vancouver By-law 4448 deals with the duty to re-rent, see paragraph 6 of Schedule "A", in Appendix.

## CHAPTER X

### DISCRIMINATION IN LANDLORD AND TENANT RELATIONS

One of the more difficult problems in landlord and tenant relations with which the Commission has had to come to grips has been that of discrimination by landlords against both prospective tenants and tenants who are in possession. In the former case it is widely alleged that some landlords, in screening prospective tenants, use criteria which are unacceptable. In the latter case it is also widely alleged that some landlords, on discovering that tenants in possession fall into certain categories or exhibit certain characteristics, serve notices of termination. In many cases the criteria by which landlords categorize tenants who should be given notice are the same (and as unacceptable) as those according to which the tenant would have been excluded from the tenancy in the first place, had the landlord been in full possession of the facts.

It was urged upon us a number of times during the course of our study that we should address ourselves to the matter of discrimination. In one brief submitted it was stated that:

The *Human Rights Act* contains a provision prohibiting discrimination in the sale or rental of housing "because of the race, religion, colour, nationality, ancestry, or place of origin of that person or class of persons" (Section 9). A prohibition of discrimination on the basis of sex or marital status is notably missing. We believe that such a prohibition is very much needed ... Landlords often refuse to rent available premises to [women, especially single mothers], preferring males or married couples.

In another brief it was submitted that the following change in the law was required:

Recognition of the principle that, except in stipulated circumstances, no landlord may lawfully refuse to rent vacant accommodation to the first applicant seeking that accommodation.

The only negative stipulations would be:

- (a) where the prospective tenant lacks ability to pay the proper rent for the accommodation;
- (b) where the prospective tenant has a previous record of destructive activity in reference to the premises occupied by him; and
- (c) where admission of the prospective tenant and his family would result in an increase of the population density in the particular building beyond the limit fixed by municipal by-law.

When these arguments were advanced at our public hearings it is fair to say that those representing landlords groups were less than enthusiastic about the principle that there should be an obligation to rent available premises to the first comers, and some were open in their avowals that at present they automatically turned away single parents with children.

The law of this Province and others is not, of course, completely silent in the matter of discrimination in the renting of premises. In Manitoba *The Landlord and Tenant*

*Act*<sup>1</sup> provides that:

In the renting of premises or the renewal of tenancies, no landlord shall discriminate against any prospective tenant or tenant by refusing to rent or renew

- (a) because of the race, religion, religious creed, colour, ancestry, ethnic or national origin of; or
- (b) because of membership or participation in an association of tenants by;

the prospective tenant or tenant.

Contravention of this section by any person is an offence punishable by a fine of not more than one thousand dollars.<sup>2</sup>

In Ontario *The Ontario Human Rights Code*<sup>3</sup> provides that:

No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,

- (a) deny to any person or class of persons occupancy of any commercial unit or any self-contained dwelling unit; or
- (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any self-contained dwelling unit,

because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons.

Contravention of this provision is punishable by a fine of not more than five hundred dollars.<sup>4</sup> In addition, the Ontario Human Rights Commission is charged with the responsibility of inquiring into any allegation of discrimination, and of recommending to the Minister of Labour what course of action should be taken.<sup>5</sup> The Minister has power to apply to the Supreme Court for an order enjoining

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1. R.S.M., C. 136, S. 114.

2. *Ibid.*, s. 117 (1).

3. R.S.O. 1970, c. 318, s. 3.

4. *Ibid.*, s. 15.

5. *Ibid.*, ss. 13, 14.

6. *Ibid.*, s. 18.

7. Bill No. 100 (1973, 2<sup>nd</sup> Sess.).

contravention.<sup>6</sup>

In British Columbia the *Human Rights Code of British Columbia Act*<sup>7</sup> provides that:

- (1) No person shall
  - (a) deny to any person or class or persons the right to occupy as a tenant any space that is advertised or otherwise in any way represented as being available for occupancy by a tenant; or
  - (b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of space,  
  
because of the race, sex, marital status, religion, colour, ancestry or place of origin of that person or class of persons, or of any other person or class of persons.
- (2) Subsection (1) does not apply where a person advertises or otherwise represents that space is available for occupancy by another person who is to share with him the use of any sleeping, bathroom, or cooking facilities in the space.

Contravention of this provision is punishable on summary conviction by the imposition of a fine of not more than one thousand dollars. The Act is further reinforced by the existence of provisions for a Human Rights Commission,<sup>8</sup> a Director of Human Rights,<sup>9</sup> and Boards of Inquiry.<sup>10</sup> Where a complaint of discrimination is received the Director is responsible for inquiring into and investigating the matter and endeavouring to effect a settlement.<sup>11</sup> The settlement may be approved by the Commission.<sup>12</sup> The Director may also refer the matter to a Board of Inquiry, which must then hold a hearing.<sup>13</sup> Section 17(2) of the Act provides that:

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8. *Ibid.*, s. 11.

9. *Ibid.*, s. 12.

10. *Ibid.*, s. 13.

11. *Ibid.*, s. 15.

12. *Ibid.*, s. 11 (5).

13. *Ibid.*, s. 16.

Where a board of inquiry is of the opinion that an allegation is justified, the board of inquiry shall order any person who contravened this Act to cease such contravention, and to refrain from committing the same or a similar contravention, and may

- (a) order a person who contravened the Act to make available to the person discriminated against such rights, opportunities or privileges as, in the opinion of the board, he was denied contrary to this Act;
- (b) order the person who contravened the Act to compensate the person discriminated against for all, or such part as the board may determine, of any wages or salary lost, or expenses incurred, by reason of the contravention of this Act; and
- (c) where the board is of the opinion that
  - (i) the person who contravened this Act did so knowingly or with a wanton disregard; and
  - (ii) the person discriminated against suffered aggravated damages in respect of his feelings or selfrespect, the board may order the person who contravened this Act to pay to the person discriminated against such compensation, not exceeding five thousand dollars, as the board may determine.

The existing British Columbia legislation does not go so far as to embody a principle that a landlord is obliged to rent premises to the first person who applies. Neither does it cover a number of situations where some landlords admit that they engage in discriminatory practices or where it is alleged that they do.

We gave lengthy and careful consideration to the argument that a landlord ought to rent available premises to the first person or persons who applied for them. Naturally, as a statement of moral ideal we found it appealing. Ultimately, however, we did not find ourselves in a position where we could recommend its implementation in legislation. For us, the crucial factor was a recognition of the fact that there are as many different ways of life as there are people and families, and that, for example, even where landlords of multiple unit premises overtly restrict the categories of people to whom they will rent, the relationship between the tenants of such buildings may be at best an uneasy one. We think it pointless to deny the fact that to force a landlord to introduce couples with young families into a building which houses elderly or middle-aged people exclusively may cause a good deal of undesirable unrest and dissatisfaction among all parties concerned. Similarly, a forced blending at close quarters of the ways of life of groups of young and elderly adults may give rise to consequences, the undesirability of which would far outstrip the value of adhering to however attractive a principle.

This does not, however, conclude the matter. There are some situations, where some landlords are said to discriminate, from which undesirable consequences would not, in our view, flow if discrimination were halted. Accordingly, it is our opinion that the prohibitions against discrimination contained in section 5(1) of the *Human Rights Code of British Columbia Act* might usefully, and should properly, be expanded.

First, it has been said that some landlords will refuse to rent available premises to couples who are not married. Whatever may be the reason for this discrimination, if it exists, we have no evidence which would lead us to believe that all unmarried couples, as a group exhibit characteristics which make them less



harmonious as tenants than other groups.

Secondly, it has been said that some landlords refuse to rent premises to prospective tenants because of the sexual orientation of the applicants. We once again cannot subscribe to the view that untenant-like behaviour can be ascribed automatically to those of one sexual preference over another.

Thirdly, we propose a provision, similar to that enacted in Manitoba,<sup>14</sup> that landlords be prohibited from refusing accommodation to any person because of that person's membership or participation in an association of tenants.

The question of discrimination on the basis of age, because it raises the question whether landlords should be permitted to adopt a policy of excluding children, was, for us, a good deal more anguished. We could scarcely be more sympathetic to the plight of families, more particularly single mothers with children, who cannot find accommodation because of the regrettably widespread practice of excluding children from rented premises. On the other hand, as we have already stated, we believe that forcing all groups in society to live at close quarters with families with children could give rise to significant unhappiness. Therefore, while the problem of finding accommodation for families remains and must be solved, we do not believe that the solution lies in placing a prohibition on discrimination against children by landlords. It goes without saying that our reluctance to recommend a prohibition does not mean that the practice ought to be encouraged. It should not be. In the ultimate event, however, we believe that to require landlords to accept families under pain of penalty would be too drastic a step.

The question of a sitting tenant's being given notice on any of the discriminatory grounds that are now prohibited by section 5(1) of the *Human Rights Code of British Columbia Act*, or on any of the additional grounds we propose should be introduced into that section, should not arise if our proposals for tenant security are accepted.

One further matter should be mentioned. It was submitted to us in one brief that any provision relating to prohibitions against discrimination in renting premises should more logically appear in the *Landlord and Tenant Act* than in the *Human Rights Code of British Columbia Act*. This is not a matter on which the Commission has firm views, but we mention it for the consideration of those who decide on appropriate placement for legislative provisions.

We do, however, believe that there is value in requiring a landlord to post a copy of section 5(1) of the *Human Rights Code of British Columbia Act* in a conspicuous place on rented premises, and we propose that this requirement be inserted in any re-enactment of the present section 58 of the *Landlord and Tenant Act*, which provides in part that:

Where a landlord rents more than one residential premises in the same building and retains possession of part for use of all tenants in common, the landlord shall post up conspicuously and maintain posted a copy of sections ...

The Commission recommends that:

1. *Section 5(1) of the Human Rights Code of British Columbia Act be expanded to prohibit*

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14. N. 1. *supra*.

*discrimination in the renting of premises on the basis of:*

- (a) domestic arrangements;*
- (b) sexual orientation;*
- (c) membership or participation in an association of tenants.*

2. *The proposed Act contain a provision, comparable to section 58 of the present Landlord and Tenant Act, requiring a landlord to post on rented premises a copy of section 5(1) of the Human Rights Code of British Columbia Act.*

## CHAPTER XI COLLECTIVE ACTION BY TENANTS

In formulating the terms of reference for this study the Commission had occasion to examine the earlier public pronouncements of both landlords and tenants to determine the main areas of concern, and suggestions for reform. One issue clearly raised by tenants' groups was that it is desirable to establish a formal framework within which collective bargaining between a group of tenants and their landlord could take place. It was felt that this study would be incomplete without an examination of that suggestion; therefore, when our advertisement soliciting briefs and submissions was published it invited comment, *inter alia*, on "How far the collective bargaining process is appropriate to landlord and tenant matters."

That query drew a considerable volume of response. Not unexpectedly, landlords and then representatives unanimously rejected collective bargaining as a useful means to an end in landlord and tenant relationships. Tenants' groups, on the other hand, were in favour of it. Of those individual tenants who made submissions, opinion seemed to be evenly split. One difficulty facing the Commission, in analyzing the submissions made, was that relatively few offered any concrete and reasoned suggestions as to why collective bargaining would, or would not, work and what the full implications of the formal introduction of collective bargaining would be.

Only one brief which favoured collective bargaining went so far as to set out a specific scheme. It seems appropriate to set this scheme out fully along with the introductory remarks:

Unless collective bargaining procedures are introduced and *introduced quickly and thoroughly*, the present wholesale attack on the living standards of hundreds of thousands will continue and social tensions mount.

By and large today's landlord is some large corporate real-estate financial concern controlling thousands of individual suites. They are enjoying booming profits. Of course there are a handful of individual landlords who are not in the same position. They too are mortgaged to the hilt to the bigger corporate finance landlords. They expect that the tenants will continue to "subsidize" their equity position now that the Federal Government has terminated the scandalous income tax concessions.

Tenants say that the time has come to stop this attack on our living standards and to put the interests of people before private property. The present government was elected on this general platform and it is time that it was implemented in the rental field.

For a substantial number of citizens rents already eat up fifty percent of their income. Quite literally this means shortening their lives. For thousands of others the proportion of income that constitutes rent is in the neighbourhood of one-third. Things have gotten far out of line.

Just what constitutes a "fair" rent is of course a complex question. However, there is no difficulty in saying that today rents are determined not by any equitable social standard but by "what the traffic will bear and then some."

It is inconceivable to us why one small section of society, the landlord, is under no obligation to *justify* its income, whereas the vast majority who work for wages are subject to the very closest scrutiny and even compulsion.

It may be of interest to note that since the very beginnings of the present capitalist system economists have pointed out that the landlords rent is essentially a monopoly price paid for his "ownership" as such, and that this "tribute" impedes economic development because it denies income to other productive sections of society. Adam Smith and David Ricardo, the founders of capitalist political economy both stated unequivocally that the interest of the landlords were objectively opposed to all other groups in society.

This is still the objective truth. If rents continue to be unreasonably high then of course industry will find it hard to recruit workers. After the payment of high rents, thousand upon thousand of tenants will have just that much less income to spend on other goods and services. In the first case the interests of employers are adversely affected; in the second case the interests of merchants, professionals, farmers, etc.

Hence it is high time that the privileged position of the landlords, a tiny minority, be curtailed, not only in the interests of tenants who constitute the vast majority in urban centers, but in the interests of society as a whole.

We are not proposing that landlords as such be abolished and "their" property confiscated. But we strongly advocate that all levels of government get into the housing market in a *very substantial* fashion, and thus break the present private monopoly that exists. This of course will take a certain amount of time, and so this action will not solve the immediate crisis.

Hence we propose the speedy establishment of a legal framework under which the principle of collective bargaining in landlord-tenant matters can take place, along with some requirement or justification of the income demanded by landlords.

Let us be perfectly clear. We are not advocating "rent controls" in the sense that most people understand that term. And we are not advocating a mechanical transfer of collective bargaining principles from the field of labour legislation. We are not interested in a vast bureaucracy being set up. But we are vitally interested in some framework in which we would have the right to participate in the decision making process. There is perhaps nothing quite so personal as a persons home, and as things stand now we are effectively denied a say in conditions.

Accordingly we propose the following:

- (a) In those apartment blocks of six or more suites, where a majority of tenants within a given time period join a tenant association, upon verification of this fact by the staff of the Board,<sup>1</sup> the association be given collective bargaining rights and the landlord be required to enter into collective negotiations with the block tenant association on all rental matters.
- (b) In all such instances the landlord be required by law to deduct from the rent of all tenants in the block the minimum sum of fifty cents per month, and to forward this sum to the block tenant association.
- © In the month prior to the expiration of any collective agreement the landlord would have the right to request the Board to verify again the majority membership condition, and if it were not maintained,

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1. In this brief a system of Municipal Rent Review Boards was proposed. These Boards, it was suggested, should be charged in each municipality with the duty of enforcing the provisions of the *Landlord and Tenant Act*, should be composed of an equal number of tenants' and landlords' representatives, and should be under the full-time, paid chairmanship of a person agreed upon by both tenants and landlords in each municipality.

the collective bargaining right would become invalid.

- (d) If agreement on rents and conditions cannot be reached, either party can call on the Board to provide mediation services and the Board itself conduct hearings and make public its recommendations for settlement.
- (e) If the landlord does not implement the recommendations of the Board, then the tenants would have the legal right to withhold their rents.
- (f) If the tenants do not comply then the landlord would be free to commence notice to quit action and such tenant refusal would constitute just cause for eviction.

A larger proportion of those representing the landlords' viewpoint sought to demonstrate that collective bargaining was unworkable and undesirable. The following submission might be regarded as typical:

Some queries come to mind on this question of tenants' unions.

- (a) Suppose 30% of the tenants form a union and post pickets outside the building to cut off supplies of oil, visits by plumbers, electricians, deliverymen, mailmen, etc. for the tenants who do not want to join! What redress have those tenants got? What redress has the landlord got? (just this sort of thing already happens in industry with "mystery pickets" and similar tactics.)
- (b) Tenants unions would have expenses. Who would pay them? What would be the dues? What if some tenants could not pay? Presumably the officers of the unions would want salaries; would they be paid by other tenants, some of them perhaps earning less than the officers themselves?
- (c) Presumably a tenants' union would want the right to strike. What would be the nature of such a strike? Would the tenants all move out and post pickets to prevent non-union tenants from moving in? Or would the tenants stay in and stop paying rent? Would the landlord then be free to cut off all services - water, heat, light, elevators, cleaning, etc.? If not, the tenants' union is simply being given power to confiscate any landlord's property at will ...

If some kind of tenant-unionism is permitted, here are the results I predict.

- i. Even heavier burdens will be laid on the "good tenants" to pay for the misconduct of the "bad tenants"...
- iii. A speedy development of "closed shops" in which the tenant must buy membership in the tenants' union before he can even apply for rental accommodation.
- iv. A drying-up of the supply of rental accommodation. (Indeed, the fear of this development is one of the influences that is already shrinking the supply in Vancouver.)

Other landlords pointed out that they are not free to bargain collectively with those who supply them with goods and services such as mortgage financing, taxes, fuel, and maintenance services. It is said that if they were required to bargain collectively with their tenants they would be put at an economic disadvantage.

We have quoted at length from two briefs representing opposing points of

view because they quite clearly demonstrate two different problems facing the Commission. First, those making submissions do not agree on what is meant by collective bargaining and how a formalized scheme might work. Second, the arguments for and against the concept are presented in a highly charged atmosphere.

More is required of a law reform commission than an endorsement of one ideological viewpoint or another. Rather, the proposition that a structure be introduced to permit formalized collective bargaining between the landlord and the tenant is one which must be re-assessed after an examination of the ends which it is designed to achieve and of whether it is, all things considered, the best means of achieving those ends. We would be less than honest, however, if we did not state a philosophical position of our own before proceeding to this examination. This position is one which has influenced us in a number of our decisions in this study and is, simply stated, that in the area of landlord and tenant relations the remedies of self-help ought to be discouraged if other means of solving disputes can be found.

At the risk of being said to have misunderstood the aims of the proposal for collective bargaining, it appears to us that it is designed to achieve four principal ends by group pressure. They are:

- (i) achieving tenant security in some measure;
- (ii) forcing a landlord to perform his obligations;
- (iii) the elimination of unreasonable terms in tenancy agreements; and
- (iv) same form of control over rent-setting. We examine these ends in turn, having regard to the recommendations already made in this Report.

1. *Tenant security* - We have already recommended that the concept of tenant security be given legislative recognition in this Province. Tenants might also achieve security in rented accommodation by the collective bargaining process but we are not prepared to say that this would be more effective than resort by individual tenants to the rentalsman in cases where notice has been delivered in circumstances which do not justify termination.

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2. *Enforcing the landlord's obligations* - Elsewhere in this Report we have made a number of recommendations designed to encourage a landlord to perform his obligations under the Act and under a tenancy agreement, and to provide a speedy means of enforcing them if he does not. The collective bargaining process is an alternative means of attempting this, but does not appear to have more intrinsic value or likelihood of success than the proposals put forward by the Commission.

3. *Eliminating unreasonable covenants* - Throughout our study we have been aware of the fact that some landlords are in the habit of inserting unreasonable covenants in their tenancy agreements and of attempting to enforce them by one means or another. One owner of a mobile home park in which families and children reside stipulates, for example, that "No visiting children [are] allowed unless accompanied by their parents." Elsewhere in this Report we have attempted to mitigate the effect of

such covenants by recommending that there be tenant security (thereby preventing the termination of a tenancy by a landlord on the ground that unreasonable covenants have been breached) and that all covenants between landlord and tenant, to be enforceable, must be reasonable in the circumstances. Admittedly, the collective bargaining process might also achieve the elimination of unreasonable covenants and the possibility of landlords' trying to enforce them, but once again we do not believe that it is inherently more likely to succeed.

4. *Control over rent-setting* - In the brief which was most strongly in favour of collective bargaining for tenants and which was the most specific in its proposals, it is clear that the process was thought to be most useful in giving the tenants' bargaining unit some opportunity to participate in the decision-making process by which rents are set, and thereby inhibiting landlords from imposing unjustified rent increases.

The Commission has already pointed out that in the final analysis the question whether a system of rent control should be imposed, whatever form it may take, is one of economic policy.<sup>2</sup> We have also pointed out that we are not in a position to make a properly informed judgment on such a policy. This notwithstanding, we may cite again the fact that there are other means besides the collective bargaining process by which some control over the forces of the marketplace in rented accommodation may be acquired.<sup>3</sup> Whether the collective bargaining process is likely to be more or less effective in controlling rents than any of these other means is not for this Commission to say.

We can, however, state that we do not have any evidence to show, and do not believe, that the collective bargaining process in the area of landlord and tenant relations has more to commend it than a number of other ways of attempting to reconcile opposing interests. We have recommended that disputes between landlords and tenants be solved by other means which we believe will be speedy, efficient, and fair, and do not, therefore, recommend that collective action by tenants be given further legislative endorsement.

We should point out in passing, however, that under the existing law tenants already enjoy some freedom, albeit limited, in the area of collective action which will be reinforced by the implementation of a concept of tenant security. This freedom depends largely on the purposes of the agreement among the tenants, and the means by which those purposes will be achieved.

If tenants decide that they will endeavour to force a landlord to follow a certain course of conduct by agreeing among themselves to terminate their tenancies according to law; it does not appear that they will invite criminal or civil liability.

If, however, the agreement is one involving a collective withholding of rent, the issue is not so clear. If in the circumstances the withholding of rent amounts

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2. Chapter IV, Part II.

3. See Donnison, "The Regulation of House Rents: Some Background Notes" in *Is There a Case for Rent Control? Background Papers and Proceedings of a Canadian Council on Social Development Seminar on Rent Policy* 7 (1973).

4. Criminal Code, R.S.C. 1970, c. C-34, s. 423 (2). See *Wright v. The Queen* [1964] S.C.R. 192.

5. As a civil conspiracy. See *Salmond on Torts* 505 *et seq.* (15<sup>th</sup> ed. 1969).



to a breach of contract if done by an individual, there is a possibility that this would be held by the Courts to be an unlawful purpose and that the agreement might attract criminal<sup>4</sup> or civil liability.

Finally, the *Landlord and Tenant Act* authorizes a "class action." Section 60(2) provides:

The application may be made by the applicant, or by a solicitor or agent on his behalf, and, where there are a number of persons having the same interest in the cause or matter raised in the application, one or more of such persons may make the application, or may be authorized by the judge to appear and to be heard on the application, on behalf of, or for the benefit of all persons so interested.

Although in many areas where the class action would be appropriate under the existing law the rentalsman will have jurisdiction if our other recommendations are accepted, we recommend nonetheless that the class action continue to be permitted. Naturally, we see no reason why the rentalsman himself should be confined to entertaining applications by individuals, and we do not believe it to be necessary to include in the proposed Act a provision that he may act where an application is made to him by a group of tenants or a group of landlords.

The Commission recommends that:

*The proposed Act contain a provision, comparable to section 60(2) of the present Landlord and Tenant Act, authorizing class actions in disputes arising under the Act.*

## CHAPTER XII

## OTHER PROBLEMS

### A. The Rent-Control Act

Rental regulation was introduced into Canada as a wartime measure in 1941. The federal legislation was reviewed in the *Ontario Interim Report* as follows:<sup>1</sup>

The major experience of Canadians with a system of rent control, was under wartime and post-war legislation justified by the conditions of a war-oriented economy. Order-in-Council 9029, approved on the 21<sup>st</sup> 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 the maximum amount of rental which might be charged for any particular accommodation, and any particular services supplied by the landlord to the tenant thereof, and giving to the tenant some degree of security of tenure in addition to that accorded by the ordinary common law and applicable statute law.

Section 5 of P.C. 9029 established a maximum rent for all real property in Canada which was subject to a lease on the 11<sup>th</sup> of October, 1941, and for which a maximum rental had not been previously fixed by or on behalf of the Board. The maximum rent chargeable for affected accommodation was to be rent payable under the lease in effect on the specified date. The section also fixed the maximum rent for real property not subject to a lease on such date, at the rent payable under the last lease in effect between the 2<sup>nd</sup> of January, 1940, and the 11<sup>th</sup> day of October, 1941. "Lease" was defined in section 2(l)(c) of the Order as any enforceable contract for the letting or sub-letting of all property whether oral or written and included any leave or licence or the use of real property.

Section 3 gave the Board power to fix the maximum rent at which any real property might be rented, to prescribe the grounds upon which and the manner in which leases might be terminated. Provision was made for the appointment of a Rentals Administrator, a Rentals Appraiser, a Court of Rental Appeals, and for the appointment of other officials.

The wartime regulations, by virtue of a series of federal Acts,<sup>2</sup> were continued in force in peacetime until their effect as federal law, was finally allowed to expire in 1951.<sup>3</sup>

The provincial government, apparently unwilling to see the effect of the

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1. *Ontario Interim Report* 63.

2. *National Emergency Transitional Powers Act, 1945*, S.C. 1945 c. 25; *The Continuance of Transitional Measures Act, 1947*, S.C. 1947 c. 16, as amended, S.C. 1948 c. 5; S.C. 1949 c. 3; S.C. 1950 c. 6.

3. See S.C. 1950 c. 6. The Wartime Leasehold Regulations were the subject of a reference to the Supreme Court of Canada in 1950 where it was held they were *intra vires* the Parliament of Canada.

4. S.B.C. 1951 c. 44.

wartime regulations terminated, in 1951 enacted the *Leaseholds Regulations Act*,<sup>4</sup> section 4 of which provided:

The wartime leasehold regulations shall continue in force in British Columbia as if they were enacted as part of the Act.

In section 2, the expression "wartime leasehold regulations" was defined as meaning:

- (a) The Orders in Council affecting dwelling places in British Columbia made from time to time by the Governor-General in Council; and
- (b) The orders and regulations made from time to time pursuant to authority conferred by such Orders in Council, -

that by virtue of "*The War Measures Act*" (Canada), "*The National Emergency Transitional Powers Act, 1945*" (Canada), and "*The Continuation of Transitional Measures Act, 1947*" (Canada), were in force immediately preceding the day on which such Orders in Council, orders, and regulations ceased to be in force under the authority of the Parliament of Canada.

The administration of the regulations and the powers formerly invested in the Wartime Prices and Trade Board were transferred to the Lieutenant-Governor in Council.<sup>5</sup> Moreover, the Lieutenant-Governor in Council was empowered to make regulations providing for the administration and enforcement of the war-time leasehold regulations, and to substitute, revoke, amend,<sup>6</sup> or remake any of those regulations. The Act also provided that should its provisions conflict with any other law in force in the province, its provisions should prevail.

In 1954 the *Rent-Control Act* was passed. The effect of that Act was to repeal the *Leasehold Regulations Act* and all the wartime leasehold regulations, except to the extent that those regulations might be adopted by individual municipalities. Section 3 of the *Rent-Control Act* provides:

- 3. (1) The Council or Board of Commissioners of any municipality in which the regulations are in force on the day this Act comes into force may pass bylaws: -
  - (a) Adopting such regulations as are in force in the municipality on the thirty-first of March, 1955, and declaring them in force in the municipality;
  - (b) Creating a rental authority and providing for the administration and enforcement of the regulations;
  - (c) Revoking, amending, remaking, or substituting for any of the regulations.
- (2) By-laws may be passed under this section with respect to the

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5. S. 3.

6. S. 6.

7. R.S.B.C. 1960. C. 338, s. 2.

whole municipality, or one or more defined areas thereof.

The "regulations" were defined as:<sup>7</sup>

The wartime leasehold regulations made or established under the authority of the "*Leasehold Regulations Act*."

The *Rent-Control Act* also purported to prevail over any conflicting Act. British Columbia, in enacting both the *Leasehold Regulations Act* and the *Rent-Control Act*, was following the example set by Ontario.<sup>8</sup>

The obvious question arising out of consideration of the *Rent-Control Act* is: what is the substance of the regulations and orders preserved, and to what extent, and where were, those regulations in force on the relevant date. The Ontario Commission approached this question in the following way:<sup>9</sup>

An examination of the regulations passed under the Act of 1951 indicates that such cities as Ottawa, Toronto (but not all of what is now Metropolitan Toronto), Hamilton, Fort William, Port Arthur and Kingston were "municipalities in which the regulations were in force on the day" the Act of 1953 came into force. (2<sup>nd</sup> April, 1953). There is nothing in the wording of the Act of 1953 which indicates that a failure at any point in time to adopt the existing regulations or to create a rental administration authority would disentitle a municipality from doing so later.

A similar examination in British Columbia provides little assistance. The provincial government was not active in exercising its powers under the Act of 1951 and only two regulations appear to have been promulgated,<sup>10</sup> neither of which provides any useful guidance. The substantive orders made by the federal Board are obscure and not easily ascertainable. It is, therefore, difficult to say with any precision what regulations were in force in any given municipality or part thereof, which municipalities are empowered to adopt.

On the other hand, P.C. 9029 did contain certain regulations of general application which would presumably have been in force in all municipalities. Paragraph 5(1) provided:<sup>11</sup>

5. (1) On and after December 1, 1941, the maximum rental
  - (a) for any real property for which there was a lease in effect on October 11, 1941, shall be the rental lawfully payable under that lease;
  - (b) for any real property for which there was no lease in effect on October 11, 1941, but for which there was a lease in effect at some time or times since January 1, 1940, shall be the rental lawfully payable under the latest lease in effect between January

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8. See Ontario Interim Report 65.

9. See Ontario Interim Report 66.

10. Order in Council 1099 (May 15/51); Order in Council 1434 (June 22/51).

11. P.C. 9029.

1, 1940, and October 11, 1941; and

- (c) for any other real property, shall be the maximum rental that may from time to time be fixed by or on behalf of or under authority of the Board.

It would, therefore, seem that any municipality would have authority to exercise the powers provided by section 3(1) of the *Rent-Control Act*. That Act, by giving municipalities the powers to revoke, amend, remake, or substitute the regulations and providing that such regulations prevail over conflicting legislation, appears to have given municipalities *carte blanche* to intervene, in a very substantial way, with ordinary laws of general application relating to landlord and tenant matters.

Section 34(2) of the *Landlord and Tenant Act* provides that Part II applies "notwithstanding any other Act." We are therefore faced with the existence of two distinct pieces of provincial legislation, each relating to the same subject matter, and with respect to which conflict may arise, and each claiming to prevail over the other in case of such conflict. Such a conflict has, in fact, arisen between Vancouver By-law No. 4448 and the *Landlord and Tenant Act* concerning the right of the Grievance Board established under the by-law to hear and determine landlord and tenant disputes,<sup>12</sup> and the right of the Provincial Court to carry out this function. Furthermore, there exist several areas which are covered by both Part II and the by-law, such as security deposits;<sup>13</sup> obligations to repair; and the constitution of a body to perform conciliation, mediation and advisory functions.<sup>14</sup>

The problems posed by the conflicting legislation has been considered twice by the courts: first by Judge Levey of the Provincial Court<sup>15</sup> and more recently by Mr. Justice Anderson of the Supreme Court.<sup>16</sup> In *Holst and Holst v. Wells and Tabachnick*,<sup>17</sup> the validity of several orders of the Vancouver Rental Accommodation Grievance Board were questioned. Judge Levey held the orders invalid on the ground that the Board had no judicial powers and thus any binding orders which it purported to make had no legal effect. His reasons for so deciding are as follows:<sup>18</sup>

... the Legislature of the Province of British Columbia, making laws in relation to property and civil rights, and in relation to matters of purely local concern and nature, has unequivocally established the Provincial Court of British Columbia as the sole court of original trial jurisdiction to determine issues between landlord and tenants of residential premises.

The *Landlord and Tenant Act* is later in time than the *Rent-Control Act* and Vancouver By-law

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12. See Vancouver City Bylaw 4448, paragraphs 11 and 12.

13. See ss. 37 and 38 of Part II.

14. See s. 66, as amended, S.B.C. 1973, c. 47, s. 14. This section authorized the constitution of landlord and tenant advisory bureaux.

15. *Holst and Holst v. Wells and Tabachnick* (unreported - Vancouver Provincial Court, No. 8783/71).

16. *R. v. Davidson Developments Ltd.* [1973] 5 W.W.R. 736.

17. N. 15 *supra*.

18. At p. 4 of the unreported judgment.

#4448, and clearly has repealed the By-law by implication in that it occupies the same field. By analogy to the interpretation doctrine of constitutional law, the "occupied field" concept is clearly applicable.

I am of the view and hold that Vancouver By-law #4448, establishing a tribunal to deal with these issues assigned to the Provincial Court of British Columbia, is an unlawful usurpation of the Legislature's authority to create Provincial Courts, and any civic board, by whatever name it is called, cannot determine questions of fact and law in landlord and tenant matters or analogous issues which are clearly within the scope of the courts.

The Vancouver Rental Accommodation Grievance Board is redundant in law, and has been so since the 6<sup>th</sup> of April, 1970; when Part II of the *Landlord and Tenant Act* came into force, assigning the sole original trial jurisdiction to the Provincial Court of British Columbia.

Judge Levey did indicate, however, that some aspects of the Vancouver By-law might be valid, in that special provision had been made in the landlord and tenant legislation for regulation of certain matters by the Municipalities. He said:<sup>19</sup>

By-laws may be passed by a Municipality pursuant to the *Rent-Control Act*, and in By-law #4448 of the City of Vancouver, and particularly Schedule A, Section 1(a) which provides for security deposits in the amount of \$25.00 in the case of unfurnished premises and \$50.00 in the case of furnished premises, such provisions are clearly severable from the remainder of the By-law and are valid because the *Landlord and Tenant Act* specifically provides for such a local option system.

Besides regulating the amount of security deposits for damage allowable within the municipality, the Council has clear authority<sup>20</sup> to set up a bureau exercising advisory and conciliatory functions. Insofar as the Vancouver Rental Accommodation Grievance Board exercises such functions it is operating legally.<sup>21</sup> Even after the decision of Judge Levey, the Vancouver Board believed it retained broader powers and continued to make orders and enforce the Vancouver By-law.

The validity of this authority was challenged again in the Supreme Court and the earlier approach of Judge Levey was confirmed. In *R. v. Davidson Developments Ltd.*<sup>22</sup> the Crown appealed by way of stated case from a decision of a Provincial Court Judge dismissing a charge that the respondent failed to comply with an order made by the Vancouver Rental Accommodation Grievance Board. The appeal was dismissed. In short, the authority of the Board to enforce the Vancouver By-laws and make binding orders was rejected.

The reasoning in the decision is closely related to the security deposit<sup>23</sup>

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19. *Ibid.*

20. Since 19734 every council of a city or district municipality is required to set up sch a bureau. *See* s. 66 (2), as amended, S.B.C. 1973, C. 47., S. 14.

21. S. 66.

22. N. 38 *supra*.

23. Especially ss. 37 and 38.

24. The provision reads: "Where on the coming into force of this section, a by-law of a municipality applies to security deposits, any of the provisions of this section that are inconsistent with, or repugnant to, the by-law do not apply in respect of that municipality."

provisions of Part II and the Vancouver By-laws respectively. The Crown had argued that the effect of section 38(7)<sup>24</sup> of Part II was to render the other provisions of section 38 inapplicable in respect of the City of Vancouver and to leave untouched the by-law enacted by the City together with the establishment of the Board and its power to make orders. Anderson J. answered that argument as follows:<sup>25</sup>

I cannot accept this contention. In my view, when Part II of the Act is examined as a whole, it becomes clear that the Legislature has completely occupied the field, with the exception that municipalities may provide for security deposits to be required or received by landlords by enacting appropriate by-laws.

Insofar as security deposits are concerned, Part II of the Act has superseded the *Rent-Control Act* and if there were a power to create a Board with extensive powers, already referred to, the new legislation gives no such powers to the municipalities. It would take very clear language to permit municipalities to establish courts of law or deny access to courts of law. It would, moreover, take very clear language to permit a municipality the right to fix the amount of the penalty which could be imposed by the Board.

It would see, therefore, in my view, that Section 38(7) was intended to deal with by-laws which dealt with security deposits in a limited way, as for example, by way of fixing the amount of such deposits. I do not think that Section 38(7) was intended by the Legislature to prevent the Provincial Courts from dealing with applications made to a judge pursuant to Section 38(5).

Anderson J. also supported his decision by referring to a number of absurdities and inconsistencies which would result<sup>26</sup> from the position supported by the Crown. He also added that, while the Legislature did have power to exempt municipalities from legislation which, apart from the exemption, effectively repealed by implication a by-law or part thereof, the exempting legislation had to be clear and unequivocal.<sup>27</sup> This was certainly not the case with section 38(7).

The present position is that the conflict of jurisdiction has been resolved in favour of the Provincial Courts. The City still retains the power, by which of the *Rent-Control Act*, to make by-laws governing landlord and tenant matters insofar as they are sanctioned by the *Landlord and Tenant Act*, Part II. It is understood that, since the judgment of Anderson J.,<sup>28</sup> the Vancouver Rental Accommodation Grievance Board has ceased making orders<sup>29</sup> under paragraphs 11 and 12 of By-law No. 4448 and is now exercising advisory and conciliatory functions only. It may, however, be argued that the *Holst* and *Davidson Developments* cases are confined to situations where conflict exists between the *Landlord and Tenant Act* and regulations made under the *Rent-Control Act*, and do not prevent municipalities from passing by-laws affecting aspects of the

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25. N. 16 *supra*, at 740.

26. *Ibid.*, at 741. E.g., a difference in penalties for beach between one municipality and another.

27. Citing *R. v. Canada Safeway Ltd.* (1955), 16 W.W.R. 331 (S.C., App. Div.).

28. *R. v. Davidson Developments Ltd.*, n. 16 *supra*.

29. The Surrey Landlord-Tenant Grievance Board, we understand, still purports to exercise enforcement powers.

30. See Vancouver By-law 4448; Surrey By-law 3129.



landlord and tenant relationship upon which the Act is silent, and constituting tribunals to enforce those by-laws.

The present position with regard to municipal options is unsatisfactory for three reasons:

1. Access to the substance of the orders and regulations is extremely limited and it is very difficult for the officers of any particular municipality to ascertain the precise nature and content of the regulations and orders which may have been in force in that municipality in 1955.
2. The municipal power to revoke, amend, remake, or substitute the regulations seems undesirably wide.
3. The extent to which that wide power has been limited by the decisions in the *Holst and Davidson Developments* cases is uncertain.

As a matter of policy, this Commission is of the opinion that the laws relating to landlord and tenant should be uniformly applied throughout the province. To the extent that particular local conditions might justify particular local laws, the nature and extent of municipal authority to enact legislation concerning landlord and tenant matters should appear clearly on the face of the *Landlord and Tenant Act*. This is specifically considered later in this Chapter. It seems undesirable that provincial legislation should permit municipalities to adopt, by reference, regulations and orders which may be ascertained and identified only with great difficulty. We note that in all the by-laws based on the *Rent-Control Act* which have come to our attention, the municipality has adopted and then immediately revoked the wartime regulations.<sup>30</sup> Thus it may be argued that the Legislature's intention to preserve the wartime regulations, whatever they may have been, has been thwarted and the *Rent-Control Act* has been used by municipalities as a "constitutional" vehicle which provides the basis of a general and *prima facie* unconfined power to legislate with respect to landlord and tenant matters.

We favour the repeal of the *Rent-Control Act* along with the repeal of any by-laws which may have been passed under its authority and the dissolution of any bodies constituted by its authority.

The Commission recommends that:

1. *The Rent-Control Act be repealed.*
2. *Any by-laws enacted under the authority of the Rent-Control Act be repealed.*
3. *Any bodies constituted under the authority of the Rent-Control Act be dissolved.*

One further point remains to be considered. Paragraph 2(l)(d) of P.C. 9029 defines the term "real property" widely enough to include occupancies by licensees as well as by tenants. The by-laws of both Vancouver and Surrey define "lease" so as to include a licence. The scope of the *Landlord and Tenant Act* which we propose and Part II of the existing Act is confined to tenancies. To the extent that the *Rent-Control Act* may form the basis for municipal by-laws concerning licence situations such as

lodging houses, its effect might be worth preserving. This could be done by specific amendments to the *Municipal Act*.<sup>31</sup> We have no guidelines to offer on such an amendment beyond the general observations we have made concerning the *Rent-Control Act*.

The Commission recommends that:

*Repeal of the Rent-Control Act should not affect powers of municipalities to enact by-laws regulating occupancies by licensees and the Municipal Act and Vancouver Charter be amended to the extent necessary to effect this.*

## **B. Municipal Options**

The only section of the *Landlord and Tenant Act* which specifically empowers local governments to legislate with respect to landlord and tenant matters is section 66 which provides:

66. (1) In this section, "municipality" has the meaning provided in the *Interpretation Act*, and includes an incorporated village.
- (2) Every council of a city or district municipality shall, and any other municipal council may, establish a Landlord and Tenant Advisory Bureau.
- (3) The functions of a Landlord and Tenant Advisory Bureau 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.
- (4) Two or more municipalities may, by agreement, establish jointly a Landlord and Tenant Advisory Bureau and, notwithstanding the *Municipal Act*, an agreement entered into by a municipality for this purpose may be for a term of more than one year, but not more than five years.

Other provisions seem to contemplate municipal legislation but do not necessarily authorize it. For example, section 37(1), which concerns security deposits, commences with the words "unless a municipality, by by-law, otherwise provides ..."<sup>32</sup> Section 49(1) speaks of the landlord's responsibility for complying with "health and safety standards including any housing standards required by law ... It is a general rule of municipal law that local government can possess and exercise only those powers which are expressly given by statute; those necessarily or fairly implied in, or incident to, express powers; and those essential to effect the

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31. R.S.B.C. 1960, c. 255.

32. It can be persuasively argued that s. 37 (1) does not in itself enable a municipality to legislate in respect of security deposits.

purposes of the corporation.<sup>33</sup>

We see the area of accommodation standards and the provision of services as being the one aspect of landlord and tenant law where local governments might usefully be given some latitude to enact by-laws. Section 49(1) in the present Act, and the comparable provision recommended for inclusion in the proposed Act, are phrased in very general terms which might usefully be compared with some specific provisions of the regulations contained in Schedule A to Vancouver By-law No. 4448. Those regulations include:

8. Every Landlord shall ensure that every building under his control containing premises and the site upon which the building is situated are at all times free from infestation from rodents and insects which may cause disease or unreasonable discomfort.
9. No Landlord shall offer for rent or rent any premises which are not supplied with electric power, wiring and electrical outlets capable of providing illumination in every room of the premises.
10. Where by the terms of a lease a Landlord has expressly or impliedly agreed to provide heat, the Landlord shall provide sufficient heat to maintain the temperature in the premises at a minimum of 68 degrees, between the hours of 6:00 a.m. and 12:00 o'clock midnight.
11. Every Landlord shall make available to every Tenant sanitary facilities in good working order.
12. Every Landlord shall ensure that all sanitary facilities, including toilets, bathing facilities, wash basins and sinks used by Tenants are supplied with an uninterrupted supply of water obtained from the City of Vancouver's water system.
13. Where by the terms of a lease a Landlord has expressly or impliedly agreed to provide any appliances, the Landlord shall maintain such appliances in good working order. Provided that nothing shall require the Landlord to repair appliances damaged by the Tenant or prevent the Landlord from recovering from the Tenant a sum sufficient to repair any damage for which a Tenant is responsible.

Such provisions provide useful guidance but a number of the requirements would obviously be inappropriate in municipalities where electricity, water, and sewage facilities are not widely available. The wide variety of local conditions would make any attempt to include comparable provisions in the proposed Act an awkward exercise. Thus, a strong case can be made for leaving the "specifics" of accommodation standards and provision of services to be regulated by local governments, who may be the best judges of what is appropriate in the circumstances.

The Commission recommends that:

*The proposed Act specifically empower municipalities and other local governments to set, by by-law, standards relating to accommodation and the provision of services so long as the standards established under such by-laws are not inconsistent with the Act.*

The landlord and tenant advisory bureaux established under section 66 received only a limited mandate. The functions which they now serve would, if

our recommendations with respect to the establishment of the office of rentalsman are adopted, be performed by him. The rentalsman would have at his command much greater facilities for the development and dissemination of educational information and, because he would be given certain powers to make binding decisions, would be able to act more effectively in resolving disputes. The introduction of a rentalsman would, in effect, make local bureaux redundant and we see little point in their retention.

The Commission recommends that:

1. *The proposed Act contain no provision comparable to section 66 Part II.*
2. *All by-laws enacted under the authority of section 66 be repealed.*
3. *All landlord and tenant advisory bureaux constituted under the authority of section 66 be dissolved.*

In this Chapter we have recommended the dissolution of rental boards and advisory bureaux constituted under both the *Rent-Control Act* and the *Landlord and Tenant Act*. The Commission wishes to indicate in the clearest possible terms that these recommendations should not be taken as a comment on the manner in which such bodies have carried out and are carrying out their duties. Many such boards have been active and innovative and deserve nothing but praise for the services which they have rendered their respective communities.

### **C. Mobile Homes**

In the course of this study our attention has been directed to a particular variety of landlord and tenant relationship which presents problems different from those encountered in the more usual apartment block situation. That is the relationship between the mobile home owner and the owner of the mobile park who rents the "Pad" on which a mobile home sits and who may provide utilities and other amenities. The special character of this relationship has been pointed out elsewhere:<sup>34</sup>

... although relationships between landlords and tenants frequently are not all sweetness and light, ... landlord-tenant relationships in mobilehome parks can be bitter and dark indeed. There is often no such thing as a lease; the mobile home owner usually is a "tenant at will." In most states, he and his home can be thrown out at the landlord's whim. In a few states where that whim is supposedly bridled by law, he may still be thrown out for breaking the park's rules - no matter how arbitrary those rules may be.

Such an eviction is not to be taken lightly, for the owner of a typical mobile home is hardly a footloose and fancy-free traveler. Increasingly, mobile homes are large, and not really all that mobile. They usually cost several hundred dollars to haul from one spot to another by truck (only the smaller trailers can be pulled by car). The truth is, mobile homes are bought today chiefly because they provide low-cost housing. Some 95 per cent of homes sold for less than \$15,000 last year came with wheels. But the people who bought them, according to some studies, moved no more often than the population in general.

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33. See Rogers, *The Law of Canadian Municipal Corporations* 309 (2<sup>nd</sup> ed., 1971). No express powers are found in s. 37 (1).

34. *Tyranny in Mobile-home Land*, Consumer Reports, July/73, 440.

A person evicted from a mobile-home park is actually in worse shape than someone who loses an apartment. Zoning laws may prevent him from putting his mobile home on his own land, even if he is fortunate enough to own some. Non-land" owners must resort to mobile-home parks, and in many parts of the country space in those parks (or "trailer courts," as they used to be known) is extremely scarce. Often, a park entrance fee of several hundred dollars is charged. Add to that the expenses of moving the structure and the risk of damage to the home in transit; and you can see why most mobile-home owners would prefer to stay put.

But tenants' natural reluctance to move their dwellings, coupled with landlords' sweeping power to throw tenants out, gives the landlords nearly total control. Trailer tenants often swallow conditions that might move the average apartment dweller to rebellion, such as sudden rent increases, tacked-on fees, arbitrary rules and kickback arrangements.

Those remarks are directed at conditions prevailing in the United States but, regrettably, many of them apply in British Columbia as well.

It has been pointed out earlier in this Report that mobile homes and "pads" are now within the ambit of the *Landlord and Tenant Act* and so, to the extent that "summary evictions" and frequent rental increases are now prohibited, the lot of the mobile home owner has been eased. The implementation of the recommendations contained in this Report, such as those relating to tenant security, would further improve his situation.

There are, however, a number of problems, which are not necessarily peculiar to mobile home tenancies, but which manifest themselves most severely in that context, and to which Part II of the *Landlord and Tenant Act* and our recommendations do not expressly address themselves. Most of those problems arise from the extremely acute shortage of mobile home pads, which has placed on them an intrinsic value which transcends their rental value.

In many cases operators of mobile-home parks also deal in and sell mobile homes. Because rental space is at a premium it is almost essential that, as a part of the "package," the seller of a mobile home be able to offer space to go with it. This presents a very clear incentive to operator-dealers to terminate existing tenancies so as to open up a pad for a newly sold home. Tenant security might prevent such termination directly but it would still be open to the operator to harass the tenant to the point where he leaves voluntarily.

Even when the park operator does not deal in mobile homes the situation is not significantly different. In many cases arrangements have evolved whereby dealers and park operators agree that for some "fee" the dealer gets a first option on spaces as they become (or are made) available, although we were told in one submission made by a park operator that the "fee" comes out of the dealer's profit.

When a space becomes available which is not committed to a newly sold mobile home, the park operator will frequently charge an "entry fee" to any mobile home owner who may wish to move in. This practice seems analogous to the "key money" charged in some jurisdictions where rent control keeps the price of accommodation artificially depressed.

Finally, the shortage of mobile home spaces makes it very difficult for an owner to sell his home and retain the site. Many park operators demand

a "commission" when an owner wishes to make a private sale and if that "commission" is not paid it is made clear that the prospective owner will not be accepted as a tenant by the park operator. At the hearings, we were told by an operator-dealer that he prohibited the sale of mobile-home in situ to protect his own sales and prevent an owner from undercutting his prices.

The foregoing should not be taken as a universal condemnation of all mobile home park operators. No doubt there are a large number who carry on business in a perfectly respectable and responsible manner. There seem to be, however, a sufficiently large number of operators, who abuse the power which they have gained as a result of the accommodation shortage to warrant comment in this Report.

While the problems and abuses outlined above could be the subject of specific sections in the proposed Act, in our opinion it would be desirable to have separate legislation relating to mobile home parks. This has been the pattern in other jurisdictions. While some of our recommendations and existing provisions of Part II may be applicable, others are not. For example:

- (a) There may be less justification for allowing a mobilehome park operator to take a damage deposit.
- (b) Section 44, which gives to the tenant a right to assign or sublet, might be extended to month-to-month tenants in mobile home parks and subsection (6) modified to overcome the "commission" problem.
- (c) The tenants rights with respect to privacy set out in section 46 seem difficult to apply to a "pad."
- (d) Section 48 might not extend to altering or adding a lock on the main gate to a mobile home park.
- (e) Section 49(1) which sets-out the landlord's responsibility to repair and maintain the rented premises fit for habitation seems inappropriate when applied to mobile homes.
- (f) For the purposes of section 41, in the context of mobile homes, whether or not a tenancy agreement is "frustrated" by the destruction of a mobile home owned by the tenant requires consideration.
- (g) our recommended definition of "abandonment" might require modification with respect to mobile home parks and different presumptions introduced.
- (h) Those circumstances in which we have recommended that a landlord is justified in terminating a tenancy may require modification.

Moreover, a number of existing parks provide inadequate electrical facilities, inadequate fire control facilities, and inadequate sewage facilities. These might be properly set out in provisions of an Act specifically regulating mobile home parks

which could not be properly included in a *Landlord and Tenant Act* of general application.

It is beyond the scope of this study to develop specific recommendations which address themselves to problems peculiar to mobile home tenancies. As we have recommended earlier, mobile home parks should remain within the *Landlord and Tenant Act* until specific legislation to that end is formulated. We have no specific recommendation to make with regard to the content of such legislation but merely wish to point out some of the problems which remain to be solved.

#### **D. The Overholding Tenant**

So long as a tenancy agreement has not expired or been lawfully terminated by notice or otherwise, the landlord's claim for rent is in the nature of a debt arising out of a contract. At common law, where the tenant continues in occupation after the expiration or termination of a tenancy agreement the landlord's claim for payment is of a somewhat different nature. Woodfall sets out the common law position as follows:<sup>35</sup>

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35. *Woodfall's Law of Landlord and Tenant* 437 (7<sup>th</sup> ed., Wendell and Wellings, 1968).

We have now to consider the case of a relation of landlord and tenant existing without any arrangement at all for the payment of rent properly so called, and the case in which the law implies from the conduct of the parties a promise to compensate the landlord for his loss by reason of the tenant's occupation of his premises. The action which can in such case be maintained is not to recover rent but damages due on an implied agreement to pay for the use of the landlord's property, and arises rather out of what may be called a quasi-tenancy than from the strict relation of landlord and tenant.

Thus, the landlord's claim against overholding tenants is, technically one for damages.<sup>36</sup>

That common law distinction between rent and damages is reflected in section 59 of Part II which provides:

- (1) A landlord is entitled to compensation for the use and occupation of premises after the tenancy has been terminated by notice.
- (2) The acceptance by a landlord of arrears of rent or compensation for use or occupation of the premises after notice of termination of the tenancy has been given does not operate as a waiver of the notice or as a reinstatement of the tenancy or as the creation of a new tenancy unless the parties so agree.
- (3) 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.
- (4) 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 on summary application as provided in section 60.

The purpose of section 59(1) is not clear. It might have been thought that making the residential tenancy a matter of contract would have the effect of eliminating the landlord's right at common law to compensation for use and occupation; and section 59(1) was an attempt to preserve the common law position. If that is the case, it is somewhat narrow in its terms. It provides for compensation only after the tenancy has been terminated by notice but does not purport to give a tight to compensation where a tenancy for a term has expired.<sup>37</sup> In our view, section 59(1) should clearly set out the rights of the landlord in this situation.

It is also a feature of the common law that an action for compensation for use and occupation will lay only so long as the landlord continues to treat the occupant as a tenant. When a landlord commences proceedings for possession, he is taken to have elected to treat the occupant as a trespasser and his rights are

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36. At common law, the action for use and occupation was not primarily directed against the overholding tenant, but had a much wider application. The tenancy could only be created by deed and, where parties purported to create the tenancy by less formal means, the landlord's claim was one for use and occupation. The aim of s. 10 (2) of the *Landlord and Tenant Act* is to fix the measure of damages for use and occupation at the rent purported to be reserved by the less formal arrangement.

37. S. 59 (4), which relates to the procedure of enforcing a claim for compensation, however, provides that "a landlord's claim for ... compensation for use and occupation by a tenant after the expiration or termination of the tenancy may be enforced ..." (emphasis added).



put on yet another basis. Woodfall states:<sup>38</sup>

By issuing and serving a writ in ejectment, the claimant elects to treat the defendants therein named as trespassers, on and from the day mentioned in the writ: and he cannot sue them as tenants for use and occupation subsequent to that day. But the rent which became due *before* the day mentioned in the writ of ejectment may be recovered in an action for use and occupation (where the demise was not by deed), notwithstanding the proceedings in ejectment. The remedy for the occupation on and subsequent to the date mentioned in the writ is by an action for mesne profits ...<sup>39</sup>

It seems, to us, undesirable that the old distinction between compensation for use and occupation and mesne profits should be maintained and we have concluded that the landlord's entitlement to compensation should continue so long as the tenant is in occupation, notwithstanding the fact that proceedings for possession may have been commenced.

In the submissions which we received, a number of landlords urged that they should be entitled to claim double rent against overholding tenants "just like landlords in Manitoba." That would seem to be a reference to sections 52 and 53 of *The Landlord and Tenant Act* of Manitoba,<sup>40</sup> which are comparable to sections 16 and 17 of the *British Columbia Act*. Those landlords who made such submissions were, apparently, unaware of their possible rights under sections 16 and 17.<sup>41</sup> We consider the landlord's claim for double rent to be an archaic and inappropriate remedy. We have no quarrel with the proposition that the landlord should be entitled to full compensation for any losses which he may suffer when a tenant overholds; but to fix his compensation at "double rent" is, at best, a crude attempt to do justice. To the extent that the double rent remedy acts as a penalty which will deter tenants from overholding, it seems inappropriate that it should go to the landlord. The modern tendency is that actions for penalties be pursued by public prosecutors and that proceeds go to the Crown. While the *qui tam* action still remains in existence,<sup>42</sup> the situations in which it is available have steadily

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38. N. 35 *supra*, 444.

39. See *Birch v. Wright* (1874) 1 T.R. 378; *Jones v. Carter* 1846, 15 M. & W. 718; *Franklin v. Cater*, (1845) 1 C.B. 750.

40. R.S.M., c 136, ss. 52, 53.

41. The applicability of those sections is discussed in Chapter I.

42. S. 36 of the *Interpretation Act*, R.S.B.C. 1960 c. 199, provides:

Where any pecuniary penalty or any forfeiture is imposed for any contravention of any Act, then, if no other mode is prescribed for the recovery thereof, the penalty or forfeiture is recoverable with costs by civil action or proceeding at the suit of the Crown only, or of any private party suing as well for the Crown as for himself, in any form allowed in such case by the law of the province, before any Court having jurisdiction to the amount of the penalty in cases of simple contract, upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of such penalty or forfeiture, one-half thereof belongs to the Crown, and the other half belongs to the private plaintiff (if any) and if there is none the whole belongs to the Crown.

43. But see *Partnership Act*, R.S.B.C. 1960 c. 277, s. 77.

narrowed.<sup>43</sup> We have recommended earlier that sections 16 and 17 of the *Landlord and Tenant Act* should not be preserved in the proposed Act.

An overholding tenant presents serious problems to the landlord when he has re-let the premises to a second tenant assuming that it would be available. We are told that it is not uncommon for the incoming tenant to arrive at the premises, with a van load of furniture and then find he is not able to move in because a previous tenant has not vacated. In those circumstances the incoming tenant, if alternative premises are not immediately available, faces the necessity of putting his goods in storage and arranging for sleeping facilities until the premises or alternative accommodation becomes available. The extra costs likely to be incurred are obvious. It should be pointed out that such a situation is not always the fault of the outgoing tenant. He may be at the mercy of a furniture mover who has failed to turn up. It seems to be the practice among some moving companies to "over book" to protect themselves against cancellations.<sup>44</sup>

Landlords wish to avoid their exposure to liability to the incoming tenant in these circumstances. Some have suggested that the *Landlord and Tenant Act* should provide that an outgoing tenant be obliged to vacate the premises by 6:00 p.m. on the last day of the tenancy. We fail to see how such a provision would solve the problem. Other landlords have suggested that they be given immunity from an action by the incoming tenant, and that tenant should be compelled to sue the overholding tenant directly for any damages which he may have suffered. We reject that suggestion. In many cases, the overholding tenant may be "judgment proof." In such circumstances why should the landlord, who allowed the overholding tenant into possession in the first place, and has had a continuing relationship with him, be preferred over the incoming tenant who contracted with the landlord in good faith and had no dealings whatever with the overholding tenant. Moreover, there seems to be no reason why the landlord, if sued by the incoming tenant, should not be able to join the overholding tenant as a third party. Landlords seem to be unaware of the existence of this remedy so their right to third party proceedings might usefully be set out specifically in the proposed Act.

The Commission recommends that:

1. *Section 59(1) be preserved in the proposed Act but modified as follows:*
  - (a) *The right of the landlord to compensation for use and occupation of premises after a tenancy has expired should be included;*
  - (b) *The landlord's entitlement to compensation should continue so long as the overholding tenant is in possession, notwithstanding the commencement of proceedings for possession, and should be considered to be damages.*
2. *The provision in the proposed Act comparable to section 59 be subject to those provisions relating to tenant security.*
3. *The proposed Act provide that in any action by a tenant against a landlord for failure to deliver possession of the premises, the landlord is entitled to join an overholding tenant as a third party.*

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44. See letter in *Consumer Reports*, Nov./73, p. 658.

## CHAPTER XIII

## CONCLUSION

### A. Summary of Recommendations

A wide variety of recommendations have been made in this Report and a summary is set out below. In each case, the Chapter and page at which a recommendation may be found in the body of the Report is indicated.

#### Chapter I                      The Landlord and Tenant Act

The Commission recommends that:

1. *Part II of the existing Landlord and Tenant Act be repealed and replaced by a new Landlord and Tenant Act relating only to residential tenancies (hereafter "the proposed Act").*
2. *The proposed Act contain the provisions of Part II of the Landlord and Tenant Act, as modified by the recommendations made in this Report.*
3. *The proposed Act contain a provision comparable to section 3 of Part I.*
4. *The proposed Act incorporate by reference sections 12, 12, 14, and 33.*
5. *Part I of the Landlord and Tenant Act be preserved as a separate Act to be known as the "Commercial Tenancies Act."*

#### Chapter II                      Scope of the Proposed Act

The Commission recommends that:

1. *The scope of the proposed Act be the same as the scope of Part II and its provisions should not extend to occupancies which, at common law, are treated as licences.*
2. *Assuming the presumption contained in section 35 of the Interpretation Act were reversed in accordance with earlier recommendations of this commission, the proposed Act contain no provision that the Act is not binding on the Crown.*
3. *The proposed Act contain a statutory definition of the term "caretaker's suite" and provide that it is included in the definition of "residential premises;" but the recommendations relating to tenant security should not apply to the caretaker's suite.*
4. *The definition of "residential premises" in the proposed Act continue to include mobile homes and "pads" until specific legislation is enacted with respect to tenancies in mobile home parks.*
5. *The definition of "residential premises" in the proposed Act not contain any exemption based on the amount of rent payable.*

The Commission recommends that:

1. *In the proposed Act an official known as the rentalsman be given exclusive jurisdiction over, and functions related to, the following matters involving the landlord and tenant relationship:*
  - (a) *the disposition of rent deposits;*
  - (b) *the disposition of damage deposits;*
  - (c) *a landlord's failure to provide essential services;*
  - (d) *a landlord's failure to effect repairs;*
  - (e) *the imposition of discriminatory rent increases;*
  - (f) *the determination of the nature of "hidden" rent increases;*
  - (g) *the supervision of the disposition of abandoned goods;*
  - (h) *the making of all possession orders; and*
  - (i) *certain advisory, investigatory, mediatory, arbitral and educative functions.*
2. *There should be no right of appeal from a decision of the rentalsman, and his decisions should not be reviewed in any court.*
3. *Matters arising out of:*
  - (a) *the proposed Act; and*
  - (b) *the general law of landlord and tenant;**over which the rentalsman is not allocated specific jurisdiction, should continue to be decided in the courts.*
4. *The courts should continue to have the power to decide on questions of possession of residential premises which may arise collaterally in any other action.*
5. *It should be made clear that the Provincial Court of British Columbia does not have exclusive jurisdiction over those matters arising out of the landlord and tenant relationship which would be reserved for the courts if our recommendations are accepted.*
6. *The rentalsman, in exercising his jurisdiction should attempt to observe the rules of natural justice as far as possible, but should not be bound to act in accordance with the rules of evidence.*
7. *The rentalsman, acting on the authority of an order of a Judge of a County Court, should have the powers of access to documents and to premises, subject to the same limitations as to confidentiality, set out in section 85(4) to (8) of The Landlord and Tenant Act of Manitoba.*
8. *The rentalsman should have legal qualifications.*

Mr. Paul D.K. Fraser in a dissent recommends that:

*There should be a right of appeal from a decision of the rentalsman with respect to an order for possession; the appeal should be by way of trial de novo to the Small Claims Division of the Provincial Court of British Columbia with no right of subsequent appeal.*

The Commission recommends that:

1. *Subject to the following recommendations, sections 52, 55, 56, and 57 should continue to govern the termination of periodic tenancies but with these modifications:*
  - (a) *Section 55(1) should be amended to provide that four weeks' notice is necessary to terminate a weekly tenancy; and a notice to terminate a weekly tenancy should be given on or before the last day of one week of the tenancy to be effective on the last day of the week four weeks hence.*
  - (b) *Where a landlord purports to terminate a periodic tenancy, the period of which is less than two months for any of the following reasons:*
    - (i) *The premises are in a building which is to be demolished;*
    - (ii) *The landlord bona fide requires the premises for occupancy by himself or his immediate family,*  
*he shall give the tenant not less than two months' notice.*
  - (c) *If a tenant fails to pay his rent within three days of the time agreed on the landlord may make a written demand for payment; and if the tenant fails to pay the rent within five days of that demand the landlord may:*
    - (i) *serve a notice on the tenant terminating the tenancy, effective the last day of the rental period for which the rent is unpaid; and*
    - (ii) *apply to the rentalsman for all or part of such statutory rent deposit, as may have been made by the tenant.*
  - (d) *Where the conduct of a tenant is such that a landlord would be justified in terminating a periodic tenancy and the quiet enjoyment or safety or neighbouring tenants is impaired to the extent that it would be inequitable to them to permit such conduct to continue, or the tenant is causing extraordinary damage, a landlord may with the consent of the rentalsman and after such investigation or hearing and upon such terms and conditions as the rentalsman thinks proper, terminate the tenancy upon such shorter notice, in prescribed form, as the rentalsman may allow; and that notice should not be subject to further review by the rentalsman.*
2. *When a tenant receives a notice from his landlord terminating his periodic tenancy, that notice be subject to review by the rentalsman who shall set aside the notice unless one or more of the following circumstances applies:*
  - (a) *The notice was served in accordance with the foregoing recommendation for unpaid rent;*
  - (b) *The tenant has failed to obey any court order related to his occupancy of the premises;*
  - (c) *The conduct of the tenant, or persons permitted on the premises by him is such that the quiet enjoyment of other tenants is disturbed;*
  - (d) *Occupancy by the tenant has resulted in deterioration of the premises beyond reasonable wear and tear;*
  - (e) *The landlord bona fide requires the premises for occupancy by himself or his immediate family;*
  - (f) *The premises are in a building which is to be demolished;*
  - (g) *The tenant has failed to make an agreed statutory deposit with the rentalsman within 30 days of the commencement of the tenancy;*
  - (h) *The tenant has deliberately misrepresented the premises to a potential buyer or tenant;*

- (i) *The tenancy was for an "off season" period only, of premises otherwise used as a hotel or for recreational purposes; and the tenant was aware of that fact at the time the tenancy commenced;*
  - (j) *The premises are permanently occupied by a greater number of minors than is permitted by an express limitation in the tenancy agreement.*
  - (k) *The safety, or any other legitimate interest of neighbouring tenants or of the landlord is seriously impaired by any act or omission of the tenant or persons permitted on the premises by him.*
- 3. *When a landlord delivers to a tenant a notice terminating a tenancy, the landlord shall, upon the request of the tenant and no later than 48 hours after such request is made, deliver to the tenant, in writing, his reasons for termination along with particulars of any alleged acts or omissions of the tenant.*
- 4. *The notice referred to in the previous recommendation should be in a prescribed form clearly setting out:*
  - (a) *the right of the tenant to written reasons and particulars for the termination; and*
  - (b) *the right of the tenant to apply to the rentatiman for review of the notice and the time limit governing that application.*

5. *A request to the rentalsman to review a notice terminating a tenancy should be made no later than 15 days before the date upon which the notice purports to terminate the tenancy, except where there is a bona fide dispute as to whether the tenant has allowed rent to fall into arrears, in which case the rentalsman may extend the time within which the tenant may request such review.*
6. *Upon the expiration of a tenancy agreement for a term, the parties shall be deemed to have renewed the agreement on the same terms and conditions, but as a tenancy from month-to-month, except where*
  - (a) *circumstances exist which would justify the termination of a periodic tenancy and the landlord has delivered to the tenant a written notice setting out his refusal to renew and the grounds therefor no less than one month before the end of the term;*
  - (b) *the tenant has delivered to the landlord, no less than one month before the end of the term, a written notice of his intention to vacate the premises at the end of the term;*
  - (c) *the parties have negotiated a new tenancy agreement.*
7. *A notice delivered by a landlord pursuant to the foregoing recommendation should be subject to review by the rentalsman in the same manner as if it had purported to terminate a periodic tenancy.*
8. *Where a tenancy for a term is deemed to be renewed as a month-to-month tenancy, and a rental increase would have been permissible had the original tenancy been from month-to-month, the landlord may require that the rent payable for the new tenancy be at a higher rate but subsections (2), (3), and (4) of section 51 should apply to such increases.*
9. *The proposed Act empower the rentalsman, on the complaint of a tenant that he has been discriminated against in the setting of a rent increase with the purpose of dislodging him from the premises, the burden of proving which shall be on the tenant, to declare that the increase is discriminatory and ineffective.*

## Chapter V      Security Deposits

The Commission recommends that:

1. *The landlord be permitted to require, at the commencement of a tenancy, that a tenant pay to the rentalsman a statutory rent deposit of an amount less than or equal to the first month's rent, or a statutory damage deposit of an amount less than or equal to one-half of the first month's rent, or both.*
2. *No more than one statutory rent deposit and one statutory damage deposit may be required with respect to any one dwelling unit regardless of the number of occupants.*
3. *Except for statutory deposits, all security deposits, premiums, and bonuses be prohibited.*
4. *The term "security deposit" be defined in a manner comparable to the following*

*... money or any property or legal right advanced or deposited under a rental agreement by a tenant or anyone on his behalfs to a landlord or his agent or anyone on his behalf to be held by or for the account of the landlord, the primary function of which is to secure the performance of any obligation under the tenancy agreement or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition and without limiting the generality of the foregoing, this definition shall include advance payments of the last month's rent, deposits for damage for which the tenant is responsible, deposits for failure to pay rent, collateral contracts giving the landlord a right to demand consideration if the tenant quits early, and non-refundable deposits, and requiring a rental payment early in a tenancy which is substantially larger than the others.*
5. *The rentalsman hold all statutory deposits as trustee for the tenant, subject to any rightful claim by the landlord.*
6. *The rentalsman invest all statutory deposits in securities permitted by the Trustee Act.*
7. *Interest on statutory deposits be applied by the rentalsman to the costs of operation of his office.*

8. *The statutory rent deposit be available to the landlord only with respect to claims for:*
  - (a) *arrears of rent;*
  - (b) *all or part of the final instalment of rent when a tenancy has been lawfully terminated; and*
  - (c) *reasonable loss of revenue by a landlord arising out of the unlawful termination of a tenancy by a tenant.*
9. *Upon the delivery of a notice by a tenant lawfully terminating a tenancy, the tenant may, in writing in prescribed form consent to immediate payment of the statutory rent deposit to the landlord and when such consent is delivered to the landlord he should be deemed to have received the amount of the rent deposit toward the satisfaction of such rent as may be or become payable.*
10. *Upon presentation by the landlord of the tenant's written consent given in accordance with the foregoing recommendations the rentalsman should pay to the landlord the statutory rent deposit.*
11. *The statutory damage deposit be available to the landlord only with respect to claims for losses arising out of the tenant's failure to observe the statutory duty imposed on him by section 49(2) to repair damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him; and it shall not be available with respect to the cost of cleaning or the breach of any covenant in the tenancy agreement relating to the use and maintenance of the premises which the rentalsman determines is unreasonable.*
12. *A landlord may assert a claim on a statutory deposit by delivering to the rentalsman*
  - (a) *the tenant's written consent to the claim;*
  - (b) *a notice of claim;*
  - (c) *a copy of a summons or writ for a claim relating to the statutory deposit,*  
*no later than 15 days from the termination or expiration of a tenancy.*
13. *Except where the tenant has consented in writing to the landlord's claim, the rentalsman, upon receiving a landlord's notice of claim shall, if possible, determine if the tenant disputes that claim.*
14. *If the landlord's claim is disputed the rentalsman shall determine the dispute in accordance with the recommendations relating to procedure and disburse the statutory deposit accordingly.*
15. *If the tenant cannot be found, he should be deemed to have disputed and the rentalsman may proceed to determine the rights of the landlord on that basis in the absence of the tenant.*
16. *If, after 15 days have elapsed and no notice of claim has been delivered to the rentalsman by the landlord, the rentalsman shall, upon being satisfied that the tenancy has in fact terminated or expired, pay to the tenant, upon his application, the statutory deposit held.*
17. *The rentalsman may, at any time, pay the statutory deposit to the tenant, upon receiving the written consent of the landlord.*
18. *Rights against statutory deposits should be transferable*
  - (a) *at the option of the tenant, from a previous tenant has moved and provided the previous landlord to an existing landlord when the landlord has no adverse claims;*
  - (b) *between landlords when the premises is sold.*



The Commission recommends that:

1. *The term "material" not be defined for the purposes of section 42.*
2. *The proposed Act contain a provision comparable to section 42 but with the following changes:*
  - (a) *The breach of a material covenant by a landlord should not permit the tenant to withhold rent;*
  - (b) *A breach of a material covenant or a condition by one party should entitle the other party to treat the tenancy agreement as being at an end, except where it is a breach by the tenant and is one which would not justify the termination of a periodic tenancy by the landlord.*
3. *The proposed Act provide that a written tenancy agreement may contain, and that the tenant shall obey, all reasonable obligations or restrictions, which are not inconsistent with the Act, whether denominated, by the landlord as "rules" or otherwise, concerning the tenant's use, occupation, and maintenance of his dwelling unit, appurtenances thereto, and the property of which the dwelling unit is a part.*
4. *For the purposes of the foregoing recommendation a restriction or obligation is reasonable only if:*
  - (a) *it is for the purpose of promoting the convenience, safety or welfare of the tenants of the property or the preservation of the landlord's property from abusive use, for the fair distribution of services and facilities generally;*
  - (b) *it is reasonably related to the purposes for which it is promulgated;*
  - (c) *it applies to all tenants of the property in a fair manner; and*
  - (d) *it is sufficiently explicit in its prohibition, direction or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply.*
5. *Subject to recommendations made elsewhere, the remedies available for breach of a tenancy agreement not be restricted to damages.*
6. *The proposed Act provide that the validity of tenancy agreements for residential premises shall not be affected by the Lord's Day Act.*
7. *The proposed Act contain, in place of section 43 a provision incorporating the following principles: All covenants, material or otherwise, and conditions relating to residential premises should be enforceable as between any person lawfully in possession of the premises and any person having an interest in a reversion of the premises.*
8. *The foregoing recommendation should not derogate from the rights of parties where, at common law, there exists privity of contract or privity of estate.*
9. *Any conflict between the Statute of Frauds and the proposed Act to be resolved in favour of the statute of Frauds.*
10. *Any conflict between the Land Registry Act and the proposed Act to be resolved in favour of the Land Registry Act.*
11. *Section 36(2) be clarified so as to indicate that the liability of the tenant to pay rent for his occupancy ceases until an executed copy of the tenancy agreement is delivered to him.*
12. *It be made an implied term of every tenancy agreement that, where services have been supplied by the landlord which have not been provided for in the tenancy agreement, the landlord shall continue to supply those services.*
13. *Landlords should not be permitted to contract out of the duties imposed under the foregoing recommendation.*



The Commission recommends that:

1. *The proposed Act contain a definition of the landlord's obligation to repair in the following terms:*

*"A landlord is responsible for providing and maintaining the residential premises in such a state of decoration and repair as, having regard to the age, character, and locality of the premises, would make it reasonably fit for the occupation of a reasonably minded tenant who would be likely to rent it; and for complying with health and safety standards, including any housing standards required by law, and notwithstanding that any state of non-repair existed to the knowledge of the tenant before the tenancy agreement was entered into.*
2. *The proposed Act contain a provision which continues to impose on tenants an obligation, of the kind now imposed by section 49(2) of the present Act, to maintain ordinary standards of cleanliness.*
3. *The proposed Act contain a provision which is similar to section 46(2) of the present Act, but which limits the time at which a shorter period of notice may be agreed upon to the time at which notice of termination of the tenancy is given, whether by the landlord or the tenant.*
4. *The proposed Act contain a provision which permits a landlord, within 48 hours of the giving of notice of termination of a tenancy, to enter upon the premises within three days after he has indicated his intention to exercise such right, for the purpose of inspecting the premises for damage, provided that:*
  - (a) *the landlord shall not exercise the right unless he has first notified the tenant at least eight hours before the time of entry, unless some shorter period is agreed upon; and*
  - (b) *the time of entry shall, unless otherwise agreed upon, be between eight in the forenoon and nine o'clock in the afternoon as specified in the notice.*
5. *The proposed Act contain a provision similar to section 48 in the existing Landlord and Tenant Act, with an exemption for a landlord or tenant who changes a lock in a case of emergency where there is a threat to security, this exemption not extending to lock on doors giving direct access to rented premises.*
6. *The proposed Act, in addition to containing a provision comparable to section 47 of the existing Landlord and Tenant Act, make it clear that a landlord does not have the right to restrict the access to rented premises of persons whose visits are solicited by tenants of those premises.*
7. *It be made clear in the proposed Act, that the element of mens rea must be present before an offence is committed under the Act.*
8. *The proposed Act, in the re-enactment of a provision comparable to section 49(1) and (2) of the present Act, also contain a provision which exempts failure to discharge the obligations imposed by section 49(1) and (2) from penal consequences.*

The Commission recommends that:

1. *The proposed Act contain a provision comparable to section 51(1) as it was enacted in 1970, but amended to provide that in the second and following years of a tenancy rent shall not be increased more often than once every year.*
2. *The proposed Act include, for the purposes of the section comparable to section 51, a statutory definition of "rental increase" so as to include within that term:*
  - (a) *any additional charge levied by a landlord with respect to facilities previously enjoyed by a tenant at a lesser or no charge; and*

- (b) *a withdrawal of services which results in the substantial impairment of the tenancy use and enjoyment of the rented premises and associated services and facilities except where the added charge or withdrawal of services has been consented to by the rentalsman in accordance with the following recommendations.*
- 3. *Where a landlord wishes to impose an added charge with respect to facilities enjoyed in common by a number of tenants and which had previously been enjoyed at a lesser or no charge; or when the landlord wishes to effect a withdrawal of services previously available to a number of tenants in common and that withdrawal of services would substantially impair the use and enjoyment of the premises and associated services and facilities, the landlord may apply to the rentalsman who may consent to the added charge or withdrawal of services subject to such terms and conditions as it may seem just to impose.*
- 4. *The definition of rental increase should not prejudice the right of a tenant to bring an action against the landlord for breach of contract.*
- 5. *Nothing in the provision limiting the frequency of rent increases should restrict the right of landlord and tenant to agree, at the commencement of a tenancy or at the time a rental increase is lawfully made, that if the number of permanent occupants of rented premises increases the rent may be raised by an agreed amount for each additional occupant; and a rental increase made pursuant to such an agreement should not constitute a rental increase for the purposes of that provision.*
- 6. *The rentalsman should be given jurisdiction to resolve any dispute between landlord and tenant as to whether or not an additional occupant is "permanent" for the purposes of the foregoing recommendation.*
- 7. *The existing prohibition against acceleration clauses in tenancy agreements set out in section 50 be retained in the proposed Act.*

## Chapter IX                      Abandonment

The Commission recommends that:

- 1. *The Act contain a definition of "abandonment" incorporating the following principles:*
  - (a) *A landlord is entitled to treat rented premises as abandoned by the tenant when there has been absolute relinquishment of the premises accompanied by an intention not to return;*
  - (b) *Evidence of an intention not to return may be inferred from the facts and circumstances surrounding the relinquishment of the premises or from express, oral or written notice from tenant to landlord;*
  - (c) *A failure to occupy or remain in possession of residential premises, combined with a failure to pay rent, for a period of one month shall raise a presumption of abandonment;*
  - (d) *So long as rental payments are in good standing, a presumption shall be related that the tenant has not abandoned the premises.*
- 2. *The onus of proof of abandonment should rest on the landlord, except where the tenant claims the landlord is in breach of a duty to re-rent following abandonment.*
- 3. *The remedy of distress be abolished with respect to residential tenancies.*
- 4. *The proposed Act contain a provision comparable to subsections (2), (2.1), and (3) of section 94 of The Landlord and Tenant Act of Manitoba but with the following changes:*
  - (a) *The procedure to be followed at the sale should be left to the discretion of the rentalsman;*
  - (b) *The landlord's right of set-off with respect to the proceeds of the sale should be general and include a right to set-off arrears of rent which have accrued before or after the tenant went out of possession of the premises.*
  - (c) *When goods have been abandoned the landlord should be obliged to check for encumbrances in the central registry if the*

*apparent value of any item exceeds \$50;*

- (d) if the landlord is in doubt whether an item exceeds \$50 in value the rentalsman may value the item and his valuation shall be binding on all parties;*
  - (e) If any encumbrances are registered the encumbrancer shall be notified by the landlord forthwith;*
  - (f) If the encumbrance is a security agreement, abandonment of the goods shall entitle the encumbrancer to treat the agreement as being in default.*
5. *The proposed Act provide that the ultimate purchaser of abandoned goods receives a clear title to them.*
6. *In the proposed Act, section 45 of Part II be replaced by a provision incorporating the following principles:*
- (a) Both parties to a tenancy agreement are under a duty to mitigate their damages;*
  - (b) The doctrine of surrender by implication of law be specifically abolished;*
  - (c) The landlord be under a duty to re-rent abandoned or vacated premises at an economic rent in order to mitigate loss accruing consequent upon the abandonment or vacating of the premises;*
  - (d) if there is any deficit resulting from the re-renting, the tenant be liable therefor.*

#### Chapter X                      Discrimination in Landlord and Tenant Relations

The Commission recommends that:

1. *Section 5(1) of the Human Rights Code of British Columbia Act be expanded to prohibit discrimination in the renting of premises on the basis of:*
- (a) domestic arrangements;*
  - (b) sexual orientation;*
  - (c) membership or participation in an association of tenants.*
2. *The proposed Act contain a provision, comparable to section 58 of the present Landlord and Tenant Act, requiring a landlord to post on rented premises a copy of section 5(1) of the Human Rights Code of British Columbia Act.*

#### Chapter XI                      Collective Action by Tenants

The Commission recommends that:

*The proposed Act contain a provision, comparable to section 60(2) of the present Landlord and Tenant Act, authorizing class actions in disputes arising under the Act.*

#### Chapter XII                      Other Problems

The Commission recommends that:

1. *The Rent-Control Act be repealed.*
2. *Any by-laws enacted under the authority of the Rent-Control Act be repealed.*

3. *Any bodies constituted under the authority of the Rent-Control Act be dissolved.*
4. *Repeal of the Rent-Control Act should not affect power of municipalities to enact by-laws regulating occupancies by licensees, and the Municipal Act and Vancouver Charter be amended to the extent necessary to effect this.*
5. *The proposed Act specifically empower municipalities and other local governments to set, by by-law, standards relating to accommodation and the provision of services so long as the standards established under such by-laws are not inconsistent with the Act.*
6. *The proposed Act contain no provision comparable to section 66, Part II.*
7. *All by-laws enacted under the authority of section 66 be repealed.*
8. *All landlord and tenant advisory bureaux constituted under the authority of section 66 be dissolved.*
9. *Section 59 (1) be preserved in the proposed Act, but modified as follows:*
  - (a) *The right of the landlord to compensation for use and occupation of premises after a tenancy has expired should be included;*
  - (b) *The landlord's entitlement to compensation should continue so long as the overholding tenant is in possession, and should be considered to be damages.*
10. *The provision in the proposed Act comparable to section 59 be subject to those provisions relating to tenant security.*
11. *The proposed Act provide that in any action by a tenant against a landlord for failure to deliver possession of the premises, the landlord is entitled to join an overholding tenant as a third party.*

## **B. Acknowledgments**

Throughout this study the Commission has had the benefit of the views of large numbers of people, and would like to thank those who submitted written briefs and made oral presentations at the public hearings. Those briefs and presentations brought us to an awareness of the practicalities of day-to-day landlord and tenant relations which was of great importance in helping Us to formulate our recommendations.

The Commission has also been very able assisted by a research team consisting of the Commission's legal staff and members of the Faculty of Law of the University of British Columbia and their student research assistants.

Our warmest thanks go to Arthur L. Close, the Commission's Legal Research Officer, who was responsible from the inception of the study for the coordination of all research and upon whom fell the burden of a significant portion of the research itself and of drafting a large part of this Report. It is largely through the unstinting time and skilled effort which he devoted to the study that we were able to meet our deadline.

Mr. Close's burden was considerably lightened by the efforts of Keith B. Farquhar, our new Director of Research. Mr. Farquhar was responsible for drafting a number of central chapters of the Report, and assisted in the general organization of the Project, particularly in its later stages. We are happy to acknowledge his invaluable assistance.

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R. C. BRAY  
*Chairman*

A. A. ZYSBLAT  
*Commissioner*

P. FRASER  
*Commissioner*

P. D. K. FRASER  
*Commissioner*

**December 11, 1973.**