THE CONSTITUTIONAL VALIDITY OF THE MANITOBA RENTALSMAN OFFICE

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I.

Curtis Investments Limited v. *The Tenancy Arbitration Bureau*[1] is a recent decision of the Manitoba Court of Appeal which examined the constitutional validity of parts of *The Landlord and Tenant Act*.[2] In that case the Director of Arbitration acted under s. 120 of the *Act* and ruled that rent charged by the landlord, Curtis Investments Limited, was excessive and was to be rolled back. The landlord moved before the Court of Queen's Bench[3] (Scollin, J.) for an order of *certiorari* to quash the ruling of the Director of Arbitration. Among other reasons advanced by the landlord in support of his motion, it was argued that the creation of the Office of Director of Arbitration was *ultra vires* the Provincial Legislature.

The argument for the landlord was essentially two-fold. The first branch of his argument rested on the decision of the Supreme Court of Canada in *Reference Re Residential Tenancies Act*,[4] which dealt with the question of the constitutional validity of similar Ontario legislation,[5] which created the Residential Tenancy Commission for that province. That office was vested with powers analogous to those exercisable in Manitoba by our Director of Arbiration, on the one hand, and by the Rentalsman, on the other. In considering the Ontario legislation, the Supreme Court ruled it *ultra vires* for reasons which will be discussed in some detail below. Counsel for Curtis Investments Limited relied on the ruling of the Supreme Court and sought to have a similar determination reached by the Court in Manitoba in respect to the Director of Arbitration.

Scollin, J., rejected that argument. He applied the first branch of the test laid down by Dickson, J. in the Supreme Court decision and examined whether the powers which were being exercised by the Director of Arbitration had historically been within the ambit of Superior Courts. Scollin, J. said:

> The review and control of rents never has been within the traditional ambit of the courts. Indeed in the above *Reference* at p. 581, the Supreme Court treats the commission's power over rent review as separate and . . . [distinct] from its "core" power of holding a judicial hearing and giving judgment.[6]

He then went on to review other powers set out in Part IV of the Manitoba statute, in particular those granted to the Rentalsman under sec. 103, and ruled that they are distinguishable from the powers granted in the Ontario legislation which was before the Supreme Court. He stated:

> In these circumstances, I have concluded that the situation in this case is quite different from that under the Ontario legislation dealt with by the Supreme Court and that Part IV of *The Landlord and Tenant Act of Manitoba*, C.C.S.M. Cap. L70, is *intra vires*.[7]

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1. Man. C.A., unreported, May 26, 1982, Suit No. 126/82.
2. *The Landlord and Tenant Act*, R.S.M. 1970, c. L-70, as am. by SM. 1970, c. 106.
3. (1982), 16 Man. R. (2d) 368 (Q.B.)
4. *Reference Re Residential Tenancies Act*, [1981] 37 N.R. 158, (1981), 123 D.L.R. (3d) 554.
5. *The Residential Tenancies Act* R.S.O. 1980, c. 452.
6. *Supra* n. 3, at 369-370.
7. *Supra* n. 3, at 371.

Before the Court of Appeal, the landlord added the second branch to his argument. Although again urging the Court to accept the notion that the office of Director of Arbitration was *ultra vires* the Province, this time his counsel attempted to bring the powers exercised clearly within the test laid down by Dickson, J. in the Supreme Court decision. This he attempted to do by urging the Court to accept the notion that the Director of Arbitration had received powers analogous to a s. 96 Court, because,

> The Director has the power to review a tenancy contract which has already been entered into by the landlord and tenant and under which payments are already being made. In effect, what the Bureau has received by way of power is powers to interpret a contract, order injunctive relief, and order payment of damages.[8]

Monnin, J.A., who gave the judgment for the Court of Appeal, adopted the reasons for judgment of Scollin, J.,

> "except as to his remarks pertaining to sec. 103(9) and (10) of the *Act*. We do not consider it necessary to express an opinion with respect to those particular subsections."[9]

On that basis the Court of Appeal rejected the constitutional argument. There is little doubt that this disposition of the matter was correct. As noted by counsel for the Attorney-General of Manitoba in his factum, the judgment of Dickson, J. in the Ontario reference case included the statement,

> The ability of the Province to administer a rent review system, of course, in no way encroached on the traditional jurisdiction of the s. 96 courts to order termination, eviction and compliance.[10]

However, the disposition of the matter by the Court of Appeal did not address itself directly to the statement of Scollin, J. that the whole of Part IV of the *Act* is intra vires. The constitutional validity of Part IV as a whole was not in issue before Scollin, J. or the Court of Appeal. The issue with which the Courts were faced was addressed by that part of the reasons of Scollin, J., which Monnin, J.A. adopted. Scollin's further comments are clearly *obiter*, and are somewhat troubling in their import. Without having the issue before him and certainly without a thorough review of the statute in the light of the authorities, he has ruled Part IV entirely *intra vires*. With respect, I submit that his conclusion may not be supportable. A careful analysis of the powers created and vested in the Rentalsman under Part IV of the *Act*, when examined in light of the judgment of Dickson, J. in the *Ontario Residential Tenancy Reference*, leads to the conclusion that there is substantial doubt as to whether the Office of the Rentalsman, as constituted in Manitoba, is constitutionally valid.

II.

At one time or another each of the common law provinces has had, or has proposed creation of, a "rentalsman office". Alberta proposed the creation of such an office, but apparently retreated after a negative ruling from their Court of Appeal on a reference.[11] They have now provided for optional creation of

8. Factum of the Appellant, at 5.

9. *Supra* n. 1, at 2.

10. *Re Residential Tenancies Act of Ontario* (1981), 37 N.R. 158 at 167 (S.C.C.).

11. *Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements* (1978), 89 D.L.R. (3d) 460 (Alta. S.C., App. Div.).

landlord and tenant advisory boards by municipal councils.[12] The boards thus created have powers to inform, advise, investigate complaints, and mediate disputes, but have no power to make orders binding on the parties. The remaining provinces all have some form of official empowered to adjudicate tenancy matters.[13]

Apart from the Alberta reference, only the British Columbia,[14] Nova Scotia,[15] and Ontario legislation has been tested in the Courts. The B.C. Court of Appeal upheld the validity of that Province's statute, while both the Nova Scotia and Ontario statutes were declared to be *ultra vires* by Courts in those provinces. Strangely, there does not appear to have been an appeal in Nova Scotia from the Trial Court decision. In the result, the Supreme Court of Canada, the Ontario Court of Appeal, the Alberta Court of Appeal (deciding in a statutory void) and the Nova Scotia Trial Court have all considered the relative legislation invalid, while the B.C. Court of Appeal alone took the view that it is valid. These decisions may be reconcilable, considering they dealt with different legislative schemes.

In this regard, it is important to note that at the end of his decision in the Ontario reference case, Dickson, J. said, referring to the decision of the British Columbia Court of Appeal, "This court need not, on this occasion, express any opinion as to the validity of the British Columbia legislation."[16] However, it is my opinion that Dickson, J. implicitly dealt with each of the distinguishing factors relied on by the B.C. Court of Appeal in supporting that Province's legislation. In so doing, he effectively overruled the British Columbia court.

To examine the effect of his judgment in Manitoba, I propose to begin by examining the British Columbia legislation and the reasons relied on by the Court of Appeal in considering that legislation. I will then exposit the statements from Mr. Justice Dickson's judgment which I submit implicitly overrule the British Columbia Court of Appeal. The analysis will then turn to a review of the provisions of the Ontario statute, and the reasons given by Dickson, J. for ruling it *ultra vires*. In particular, I will examine his enunciation of a three-fold test to be applied in the interpretation of s. 96 of the *B.N.A. Act*, and will then look at the particular provisions of the Ontario legislation, which he relied on to rule the statute *ultra vires*. Finally, I will attempt to place the similar provisions of the Manitoba legislation within the structure of Dickson's judgment and propose some conclusions as to the constitutional validity of the *Act* in this province.

The British Columbia statute grants powers to a Rentalsman[17] similar in nature and scope to those granted in Ontario. The British Columbia *Act* as a

12. *The Landlord and Tenant Act*, R.S.A. 1980, c. L-6, s. 49, S.A. 1979, c. 17, s. 49.

13. *See eg., Residential Tenancies Act*, R.S.B.C. 1979, c. 365, s. 44-57; *The Residential Tenancies Act*, N.B. Acts 1975, c. R-10.2, s. 26; and *The Landlord and Tenant Act*, S. Nfld. 1975, c. 54, s. 20; am. by S. Nfld. 1977 c. 12, ss. 2 and 4.

14. *Re Pepita* v. *Doukas* (1979), 101 D.L.R. (3d) 577 (B.C. C.A.), dealing with the constitutionality of *Residential Tenancy Act* S.B.C. 1977, c. 61.

15. *Easton and Fedora* v. *Residential Tenancies Board et al* (1980), 41 N.S.R. (2d) 44 (N.S.S.C., T.D.). The same legislation is presently being considered by the Supreme Court of Canada in *A.G. Nova Scotia* v. *Greg Burke et al.*.

16. *Supra* n. 10, at 189.

17. *Residential Tenancy Act* R.S.B.C. 1979, c. 365, s. 44.

whole deals with the rights and obligations of landlord and tenants *inter se*, and gives the Rentalsman exclusive jurisdiction to,

> [I]nvestigate, hear and make an order respecting the matter for which he is specifically given jurisdiction under this Act.[18]

Other sections vest him with jurisdiction to make compliance orders[19] grant declaratory relief,[20] order compensation for damages arising from breach of the *Act*,[21] and make eviction orders.[22] The *Act* requires the Rentalsman to act judicially in determining any matters before him, through a series of procedural provisions[23] similar in wording and scope to the powers granted in Ontario under that Province's *Act*,[24] s. 92 and 93 (discussed below.)

The British Columbia Court of Appeal dealt with the constitutionality of the legislation in the context of a specific factual situation.[25] The landlord had applied to the Rentalsman for an order to terminate a tenancy and place him, the landlord, in possession. The application was brought under what is now s. 21, and then s. 22 of their *Act*.[26] An order was granted. The tenant filed a notice of appeal, as provided for in their *Act*, alleging a lack of jurisdiction on the grounds that the power exercised by the Rentalsman was *ultra vires* the provincial legislature. The trial judge agreed and the question of constitutional validity was appealed. Lambert, J.A. for the Court of Appeal, reviewed the jurisprudence concerning s. 96 of the *B.N.A. Act*.[27] He summarized it as establishing a two-pronged test which he enunciated as,

> If the impugned function, alone or with other judicial functions of the rentalsman, is a function exercised by a Superior, District or County Court at the time of Confederation and is such a dominant or significant function ... the rentalsman is a s. 96 Court.[28]

Thus his first test is whether the Rentalsman exercised the function historically exercised by s. 96 Courts at Confederation. His second, to be considered only if the first answer is yes, is whether that function is a dominant feature of the total function of the Rentalsman's office. He found it difficult to decide the answer to the first question, calling it "both obscure and difficult".[29] He passed on to a consideration of the impugned function in its institutional context, and said:

> In the main, I do not consider that the functions of the rentalsman are the same as, or similar to, or analogous to the functions of a s. 96 Court.[30]

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18. S. 50(1).
19. *See e.g.*, ss. 7(4), 20(4)(a), 26(6).
20. *See e.g.*, s. 7(6).
21. *See e.g.*, s. 19(2).
22. *See e.g.*, ss. 20(4)(b), 21, 23(2) including 20 separate grounds for eviction.
23. Set out in s. 47.
24. *The Residential Tenancies Act*, S.O. 1979, c. 78, ss. 92 and 93.
25. *Supra* n. 14.
26. Now s. 21 of *Residential Tenancy Act*, R.S.B.C. 1979, c. 365.
27. Now *Constitution Act*, 1867.
28. *Supra* n. 14, at 584-585.
29. *Supra* n. 14, at 588.
30. *Supra* n. 14, at 591.

He found four distinguishing factors on which he based his judgment:

(a) Decisions were to be made on the merits of the case, with no requirements to follow legal precedent.

(b) The Rentalsman had no power to enforce compliance.

(c) The impugned function could be instituted not only by the parties, but by third parties or the Rentalsman on his own initiative.

(d) The rights and obligations which formed the subject matter were new statutory obligations created by the Act and not by contract between the parties.[31]

Lambert, J.A. relied on enunciations in a handful of cases to determine that each of these was a valid distinguishing characteristic.[32]

As noted above, Dickson, J. concerned himself only with the Ontario reference which was before the Supreme Court. He expressly declined to give an opinion as to the validity of the British Columbia legislation. However, his judgment includes certain telling phrases which in my opinion deal in turn with each of the four distinguishing factors relied on by Lambert. In his judgment he adopted the following statement of the Ontario Court of Appeal decision in the Ontario Rentalsman reference,

> Where judicial powers are conferred by a provincial legislature on a provincially constituted and appointed tribunal, the fact that the tribunal may not be curial in its essential functions but rather an administrative tribunal entrusted with the making of decisions that are primarily of an administrative nature will not, of itself, insulate the judicial powers from a finding that the legislation conferring them is, to that extent, invalid.[33]

It would thus appear that whether or not decisions are to be made on the merits, or whether or not the entity is to follow legal precedent is, according to Mr. Justice Dickson's doctrine, not determinative of the question of constitutional validity. He has thus impliedly dealt with the first factor relied on by the British Columbia Court of Appeal.

Dickson, J. noted that the Commission had been vested with the power to impose penalties and sanctions and grant remedies, and the disobedience of an order was a penal offence.[34] The wording of the Ontario Stature reads,

> Any person who, knowingly, fails to obey an order of the Commission, is guilty of an offence and on summary conviction is liable to a fine ....[35]

The B.C. wording is,

> A person who fails to comply with an order or summons of the rentalsman commits an offence. Where a person commits an offence under this Act, the court, in addition to imposing a fine ....[36]

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31. *Supra* n. 14, at 592.

32. Lambert, J.A., relied on dicta from previous cases to assist in formulating his distinguishing characteristics. For characteristic (a), he cited *City of Mississauga* v. *Regional Municipality of Peel* (1979), 97 D.L.R. (3d) 439 at 443 (S.C.C.), and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*, [1948] 4 D.L.R. 673 at 680 (P.C.). For characteristic (b), *Tomko* v. *Labour Relations Board (Nova Scotia)* (1975), 69 D.L.R. (3d) 250 at 256 (S.C.C.). For (c), *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd. (supra)*, and for (d), *Attorney-General for Quebec* v. *Farrah* (1978), 86 D.L.R. (3d) 161 (S.C.C.).

33. *Supra* n. 10, at 176.

34. *Supra* n. 10, at 183.

35. *The Residential Tenancies Act*, S.O. 1979, c. 78, s. 123(1)(a).

36. *Residential Tenancy Act*, R.S.B.C. 1979, c. 365, s. 77(1) and (2).

The similarity in wording and enforcement scheme set up by the two statutes leads to the irresistable conclusion that Dickson, in ruling that the Ontario statute vested that province's Commission with the power to impose penalties and sanctions, would have reached a similar conclusion in respect to the B.C. statute. This deals with the second distinguishing factor relied on Mr. Justice Lambert.

Dickson, J. states,

> [T]he hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudicator deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.[37]

He noted that the power to order compliance or eviction would always be exercised in the context of a lis between the parties, even where a third party may invoke the commission's intervention.[38]

The reference to the inclusion of third parties that could institute the function of the Rentalsman strongly undermines the third factor relied on by the B.C. Court of Appeal.

Finally, Mr. Justice Dickson deals with the fourth factor raised in the B.C. case. In discussing the Ontario statute as a whole he says among other things,

> The bulk of the Act is taken up with defining the rights and obligations of landlords and tenants and with prescribing a method for resolving disputes over these obligations. Dispute resolution is achieved through application to the Commission.[39]

That statement would appear to indicate recognition by Dickson, J. that, in the words of Mr. Justice Lambert, the subject matter of the adjudication was made up of "new statutory rights and obligations established by the *Act* itself . . . [and] are not contractual rights and obligations flowing from the tenancy agreement. . . ."[40] Impliedly rejecting the fourth distinction used by Lambert, J.A., I would suggest this is a correct result since the statutorily created rights and obligations are, as provided by the Act, part of the contract of tenancy. Jurisdiction to resolve disputes arising from a contractual relationship should not be a function of the source of the contractual provisions — whether by agreement or by legislative imposition — but rather a function of constitutional authority to adjudicate contractual disputes per se.

Before leaving this part of the discussion, I should add that although in my opinion the factors relied on by the B.C. Court of Appeal have been addressed and overruled by the Supreme Court of Canada's consideration of the Ontario statute, it is not my purpose to comment on whether the British Columbia legislation is or is not valid. It may very well be valid on other principles. However, it is my opinion that the four factors enunciated by the Court of Appeal in British Columbia cannot be raised to defend the validity of the

37. *Supra* n. 10, at 182.
38. *Supra* n. 10, at 183-184.
39. *Supra* n. 10, at 184.
40. *Supra* n. 14, at 592.

Manitoba legislation which is the ultimate focus of my paper. That being the case, the decision of the B.C. Court of Appeal is of no assistance in an analysis of the Manitoba statute, which rather, must be examined in terms of its similarity to the Ontario statute and in the light of the doctrine and decision of the Supreme Court.

III.

The *Residential Tenancies Act* of Ontario created a Residential Tenancy Commission, and gave it a wide range of powers, including,

(a) the power to arbitrate matters not within its jurisdiction, provided the parties consent. (s. 85);

(b) the power to hear and determine all matters arising under the Act (s. 84), subject to a monetary limit of $3,000.00 unless the parties consent to waive the limit (s.84(3));

(c) the power to continue hearings, and to make orders on a matter coincidentally before the courts, except for money claims (s. 84(6));

(d) 19 separate provisions which empower the commission to make an eviction order and 17 separate provisions empowering the Commission to make a compliance order.[41]

The *Act* further provided that the Commission was to:

(a) grant notice to all concerned parties and allow them to be heard (s. 92);

(b) decide each case on its real merits and justice (s. 93(1)).

In addition, the *Act* provided a number of procedural rules which in the result added up to what Dickson, J. called, "a judicial form of hearing between landlord and tenants."[42]

The heart of Mr. Justice Dickson's judgment is a three-pronged test for interpretation of s. 96 of the *B.N.A. Act*. Dickson, J. states;

> The jurisprudence since *John East* leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation ....
>
> If the historical enquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter .... If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the inquiry.
>
> Step two involves consideration of the function in its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a judicial function? ... Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to

41. The words are Dickson, J.'s. *Supra* n. 13, at 177.

42. *Supra* n. 10, at 185.

> decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial' capacity ....
>
> If, after examining the institutional context, it becomes apparent that the power is not being exercised as a "judicial power", then the inquiry need go no further, for the power within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context ... What must be considered is the 'context' in which this power is exercised. *Tomko* leads to the following result; it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96 courts. It will all depend on the context of the exercise of the power. It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to the general administrative functions assigned to the tribunal (*John East; Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating 'like a s. 96 court'.[43]

Applying this test to the Ontario statute under review, Dickson, J. decided that the powers with which he was concerned, i.e., to make eviction and compliance orders, were exercised by s. 96 Courts at Confederation.[44] This is significant, for all the courts which dealt with the matter agreed with the Alberta Court of Appeal, when they said, "the proper date to consider in interpreting s. 96 was 1867 ....", and, with Lambert, J.A. in the B.C. Court of Appeal where he said "the situation in the original confederating Provinces is more precisely relevant than the situation in other parts of what is now Canada."[45] It thus seems that the situation existing in one of the four original Provinces in 1867 is the focus for considering whether any power exerciseable in any province today is violative of s. 96. So it would seem that, Dickson, J.'s finding that the power to make eviction and compliance orders was exercised by s. 96 Courts in Ontario at Confederation applies equally to analysis of the Manitoba legislation. If any such powers are granted to the Rentalsman in Manitoba under *The Landlord and Tenant Act*, then clearly the first step set out by Dickson, J. would have been satisfied.

As noted above, Dickson, J., when turning to the second question, found that the exercise of the two powers then under consideration was a judicial function; inasmuch as it generally constituted a *lis* between the parties regardless of whether the intervention of the entity was invoked by a third party or either of the competing parties. Furthermore, he noted that the Commission had the power to impose penalties, and that disobedience of an order was a penal offence. Dickson, J. thus concluded that the function of the Commission was not only one historically associated with s. 96 Courts, but also a function which continued to be exercised judicially, thus satisfying the second step of the inquiry.[46]

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43. *Supra* n. 10, at 174-176.
44. *Supra* n. 10, at 178.
45. *Supra* n. 14, at 586.
46. *Supra* n. 10, at 184.

His three step analysis next required him to examine whether the impugned judicial powers were merely subsidiary or ancillary to the tribunal's general administrative functions, or whether they were the sole or central function of the tribunal. If the latter could be said to be true, then they would be *ultra vires* the provincial legislative power. In examining the interrelationship of the Commission's judicial powers with its other functions, he concluded that the judicial powers were central to the scheme. He said:

> The primary change introduced in 1979 was to transfer the separate and distinct functions of the Advisory Bureaux, the Rent Review Board, and the courts to The Residential Tenancy Commission ....
>
> It appears upon reading the Act as a whole that the central function of the Commission is that of resolving disputes, in the final resort by a judicial form of hearing between landlords and tenants. The bulk of the Act is taken up with defining the rights and obligations of landlords and tenants and with prescribing a method for resolving disputes over those obligations. Dispute resolution is achieved through application to the commission ....
>
> Here the chief role of the Commission is not to administer a policy or to carry out an administrative function. Its primary role is to adjudicate. The administrative features of the legislation can be characterized as ancillary to the main adjudicative function ....
>
> In the instant case the impugned powers are the nuclear core around which other powers and functions are collected .... [T]he Act imposes no particular qualifications or experience as essential to appointment to the Commission .... The provincial legislature has sought to withdraw historically entrenched and important judicial functions from the superior court and vest them in one of its own tribunals .... [I]t cannot lift wholesale from the superior courts and bestow on a tribunal of its own making the resolution of disputes heretofore handled by superior courts in respect of rights and obligations in the nature of eviction orders and orders for compliance with contractual mandates.[47]

To summarize, the Supreme Court ruled the Ontario legislations was invalid on the grounds that: 1) the Commission was vested with powers, (to make eviction orders and compliance orders) traditionally within the jurisdiction of s. 96 Courts, 2) that it exercised those powers judicially by reason of the fact that they involved a *lis* between the parties, and 3) that judicial exercise was the central role of the Commission.

IV.

To determine the effect of this decision on the validity of the Manitoba Rentalsman's office requires a brief review of the Manitoba legislation.

The specific legislation under review is contained in Part IV of *The Landlord and Tenant Act* of Manito. That part of the statute which involves matters other than review of rent increases and contains 158 subsections. Of these, 75 subsections set out substantive provisions governing the relationship of landlord and tenant. Some 23 subsections set out the creation of, and procedure to be followed by, the Rentalsman in the exercise of his statutory functions. An additional 12 subsections set out the power of the Rentalsman to make a variety of orders, and further 27 subsections set out procedures to be followed in either the County Court or Provincial Judges' Court for the resolution of certain types of disputes. The remaining subsections are concerned with the scope of Part IV of the *Act* and the penal provisions associated with the legislation.

47. *Supra* n. 10, at 184-185.

The office of Rentalsman is created by s. 85(1) which reads,

> [T]he Lieutenant Governor in Council may designate one or more persons as rentalsmen 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.

The Rentalsman is given several functions. Section 85(3) sets out four specific functions of the Rentalsman as,

> (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 practises, rights and remedies; and
> (d) to investigate complaints of conduct in contravention of legislation governing tenancies.

While the above stated functions are rather generally worded, the statute becomes more specific elsewhere. Section 103(9) sets out the general power of the Rentalsman with which I am concerned. That section reads:

> Subject to subsection (10) the rentalsman may mediate any dispute between a landlord and a tenant including
> (a) a dispute between the landlord and tenant with respect to continued possession and occupancy of the residential premises by the tenant; or
> (b) a dispute as to arrears or non-payment of rent; or
> (c) a dispute with respect to compensation claimed by the landlord for use and occupancy by the tenant of residential premises after the expiration or termination of the tenancy agreement; or
> (d) a dispute as to damages caused to residential premises by the tenant or any person allowed on the residential premises by the tenant;
> and upon completion of the mediation the rentalsman shall record the agreement reached which shall be binding on the parties to the mediation.

Section 103(10) reads,

> Notwithstanding subsection (9), the rentalsman shall not mediate a dispute between a landlord and tenant where
> (a) the rentalsman is of the opinion that the dispute is of such a serious nature that it should be resolved by a court; or
> (b) either the landlord or tenant had or has applied to a court for a resolution of the dispute and the dispute was previously resolved by the court or is currently before the court.

Although the wording of the above quoted sections does not make this particularly clear, it should be noted that the Legislature clearly intended these dispute settling powers to include the ability of the Rentalsman to effectively grant an order of possession to a landlord for section 113(1) of the *Act* reads,

> Unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds that he is entitled to possession, except under the authority of an order for eviction obtained under section 111, or *pursuant to mediation by the rentalsman under section 103(9) or arbitration under s. 121.*

In addition to these general powers, the Rentalsman is granted specific power to order compliance with specific sections of the Act. Section 84(1) of the *Act* restricts the right of a landlord to a security deposit to an amount not in excess of one-half month's rent. Section 84(1.1) empowers the Rentalsman to order a landlord who receives excessive security deposits to refund the extra, or to make such other orders as will effectively bring about a refund of the excess to the tenant. The wording of s. 84(1.1) is quite clear and positive in its effect. The three alternatives available to the Rentalsman begin with the

words, "may order", or "may direct". There can be no doubt that this section creates a power on the part of the Rentalsman to enforce compliance with a statutorily imposed contractual condition of the tenancy. A similar result is achieved through the combined effect of s. 86(1) and s. 86(2). The former subsection requires a refund of security deposits with interest within fourteen days of the expiration or termination of the tenancy. The latter vest the Rentalsman with the power to order the landlord to pay over the security deposit on the happening of certain circumstances.

The third section of interest is s. 98(7). Here, the Rentalsman is vested with the power to instruct the tenant to pay rent as it falls due, to the Rentalsman, in the event that the landlord fails or neglects to fulfil an obligation to provide heat, water, or electric power services. There is no parallel section creating such an obligation on the part of the landlord; however, the wording of this subsection provides that where the tenancy agreement makes the landlord responsible for the provision of thoses services, the Rentalsman can effectively enforce it by instructing the tenant to re-direct the rent to the Rentalsman's office. In combination with s. 98(8), the Rentalsman is empowered to use such re-directed rent to pay the suppliers of the various services an amount to ensure the supply of the services to the rented premises. In my view this vests the Rentalsman with a *de facto* power to order compliance with any contractual terms requiring the landlord to provide the various services.

Section 98(1) reads, "... a landlord is responsible for providing and maintaining the rented premises in a good state of repair ...." also provides a remedy for the tenant whose landlord refuses or neglects to carry out or make repairs. The tenant may notify the Rentalsman of the failure or refusal, and under s. 119(2) the Rentalsman shall endeavour to resolve the problem. However, should the Rentalsman be unable to persuade the landlord to carry out or make the repairs, the subsection provides that, "... 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." Section 119(5) allows the Rentalsman to estimate the cost of repairs and to hold one month's rent or twice the estimated cost of the repairs, whichever is greater, until the repairs are completed to his satisfaction. Section 119(7) allows the Rentalsman to cause the repairs to be made and pay the costs from the monies retained by him under subsection 5. Therefore, taken together, s. 119 vests the Rentalsman with the power, and the machinery, to enforce the landlord's obligation created by s. 98(1). As such it is a power to enforce compliance with contractual provisions which the *Act* creates.

In addition to the above catalogue of powers, the Rentalsman is vested with responsibility to mediate several types of issues in dispute between landlords and tenants. There are five sections of concern, of which the broadest is s. 103(9) quoted above. I will return to a discussion of that below. The other four are more specific in their focus. Section 87 gives the Rentalsman jurisdiction to settle disputes with respect to the disposition of a security deposit in cases in which the landlord and tenant agree to have him so act. Secondly, s. 94 empowers the Rentalsman to oversee the disposal by the landlord of personal property belonging to the tenant, left on premises, and to set terms and conditions for their disposal. Thirdly, s. 95(2) empowers the Rentalsman to determine issues in dispute between a landlord and tenant as to the right of the

landlord to enter the premises during the period of the tenancy. It is notable that this subsection empowers the Rentalsman to make such orders as may seem just and reasonable, violation of such orders is a punishable offence under subsection 95(3). Finally, section 97(1) empowers the Rentalsman to determine the reasonableness of a proposal by a landlord or tenant to alter the locking system on the premises. Considering that such a matter would only come before the Rentalsman normally by way of dispute, this subsection is a further creation of jurisdiction to resolve disputes between the parties.

Each of the above catalogued dispute settling powers would additionally be caught by s. 103(9), quoted above. This section is extremely broad, empowering the Rentalsman to resolve any dispute between a landlord and tenant. As noted above, it spells out four specific heads of power. However, these are only given as examples, as the preamble to the subsection clearly indicates that the power is to mediate any dispute, including those mentioned specifically. Interestingly, while at least two of the dispute resolution sections discussed above require the consent of the landlord and tenant in order to vest the Rentalsman with the power to resolve them, no such consent is required under s. 103(9). In my opinion, the broad inclusionary wording of this subsection raises the inference that the Rentalsman can entertain any dispute, including those specifically provided for elsewhere. In other words, in the event of a dispute, there are as many as three options —

(a) go to Court,

(b) agree to arbitration by the Rentalsman under a specific subsection dealing with the subject matter,

(c) place the matter before the Rentalsman under s. 103(9) with the continuing option of preempting his decision by application to Court in accordance with s. 103(10).

In the result the consent requirement set out in regard to some matters is not a substantial impediment on the power of the Rentalsman.

The Rentalsman is expressly denied jurisdiction to consider a matter where either party has applied to a Court for resolution of the dispute, whether it has been disposed of, or is pending. This differs substantially from Ontario, where the Commission was granted power to deal with non-money matters simultaneously to the conduct of Court proceedings, unless the Court ordered a stay of proceedings. The Court was not to make such an order without first hearing the Commission on the matter.

In addition, under s. 103(10(a),

> The rentalsman shall not mediate . . . where the rentalsman is of the opinion that the dispute is of such a serious nature that it should be resolved by a court . . . .

Although couched in negative terms, the effect of this is to give complete discretion to the Rentalsman to determine the bounds of his own jurisdiction.

The scheme created in Part IV of the *Act* does retain certain powers in the traditional Courts on an optional basis. Section 98(4) enables a landlord or resident in a building affected by a tenant's creation of a nuisance or disturbance, to lay an information before a Provincial Judge, who may fine the

offending tenant. Section 108 allows the landlord to apply to a judge of the County Court for an order of possession where a tenant does not leave at the termination of his tenancy. The ultimate point of such a process would be an eviction order. However, it is important to note that the section is permissive. The words of s. 108(1) reads, "The landlord *may* apply to a judge of the County Court . . . ." This would not be perhaps as crucial a form of wording were it not for s. 103(9)(a) which clearly vests the Rentalsman with the power to mediate a dispute between the landlord and tenant with respect to continued possession and occupancy of the residential premises. When read in conjunction with s. 113(1), the effect is to enable the Rentalsman to consider a dispute as to possession, and reach a conslusion, the result of which is to enable the landlord to regain possession from the tenant. In my opinion, the wording of s. 113(1) is rather euphemistic and can be summarized simply by saying that the landlord may evict his tenant pursuant to mediation by the Rentalsman under s. 103(9).

In summary, the *Act* does not purport to deny access to the traditional Courts, but it does make it optional. Under s. 103(9), it is clear that the Rentalsman now has equivalent jurisdiction to that granted to the County Court under the *Act*, and in addition, has specific powers (discussed above) to order compliance with contractual provisions whether entered into voluntarily by the parties or imposed on them by the statute.

Of the powers discussed above which are vested in the Rentalsman, five are made the subject of the general omnibus penal provision set out in s. 117(1) of the *Act*. These are s. 84 and s. 86, (powers of the Rentalsman to order the disposition of security deposits); s. 94(2), (2.1), (3), (the provisions providing for the oversight by the Rentalsman of the disposal of personal property); s. 95, (orders by the Rentalsman for access); and s. 97(1), (orders by the Rentalsman regarding locking systems). In addition, violation of s. 113(1), (the effective eviction section), is similarly created an offence by s. 117(1).

Once he has a matter before him, the Rentalsman decides, in his sole discretion, if it is beyond his jurisdiction.[48] If he decides to hear it, unless one of the parties preempts his jurisdiction by going to Court, he may make binding orders, including compliance and *de facto* eviction orders. The fact that the process is repeatedly called "mediation" in the *Act*, does not, to my mind, change its actual nature. What in effect has been created is a provincially appointed official, with power analogous to a County Court Judge, as an alternate dispute settling forum. Before applying the test enunciated by Dickson, J. as set out earlier, there is one further aspect to explore. It is instructive to see what actually happens when a real dispute arises.

If a party to a tenancy inquires as to their rights under the *Act*, the Rentalsman has the statutory duty under s. 85(3)(a) to advise them of the law. In practice, the information provided, for example in the case of a security deposit dispute, does not mention the option of Court action. I quote from the form letter sent by the Rentalsman's office to a landlord in such a case.

> *You are required* to forward the security deposit and interest you hold to the Rentalsman . . . to be held in trust until the dispute is settled. At the same time, *you must enter* your

48. Under s. 103(10)(a).

> claim, in writing, against the security deposit with the Rentalsman . . . A copy of this claim *must be provided* by you to the tenant.[49] (emphasis added)

A similar form letter, in this case meant for the tenant, reads in the second paragraph,

> Pursuant to s. 87(1.3) of The Landlord and Tenant Act, *you are required* to reply to the claim in writing to the Rentalsman . . . . Should you fail, refuse or neglect to communicate with the Rentalsman by the date specified, the Rentalsman may make disposition of the security deposit . . . .[50] (emphasis added)

Among the materials provided to the parties in such a case is included a form for the party to consent to arbitration. It includes an excerpt from s. 87(3) of the *Act*, including the words, "[T]he 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."[51] A review of the various other forms used in this type of situation reveals that not once does the Rentalsman's office advise either party of the existence of any other dispute settling mechanism other than binding arbitration under s. 87. Ironically, the final form letter used by them is a reporting letter which begins with the words,

> We believe that this dispute or problem has been satisfactorily resolved in accordance with the provisions of The Landlord and Tenant Act.[52]

What they ought to have said is that it has been resolved in accordance with *some* of the provisions of *The Landlord and Tenant Act* of Manitoba. However that may be, what is revealed is that the office of the Rentalsman advises the party of one method of resolution, and provides him with the necessary forms to have the matter heard and decided in that forum. The layout and wording of the forms is such as to create in the mind of the non-legally trained person the impression that failure to consent to arbitration will leave him remedyless, while consent will bind him. Thus the *Act*, in its practical operation, creates the appearance that there is only one forum available, the Rentalsman's Office.

V.

Having come to the conclusion that the Manitoba legislation grants the Rentalsman the power to make what amounts to eviction orders, and further grants powers to make compliance orders, one comes to the irresistable conclusion that the first step in Dickson, J.'s three-step analysis has been satisfied. All of the Courts which have discussed the matter seem to agree that the relevant criteria is the state of affairs in the original confederating provinces in 1867. Dickson, J. in the Supreme Court has ruled that Ontario Superior Courts at that time were vested with powers to make eviction and compliance orders. Accordingly, the provincial legislation which purports to vest the Manitoba Rentalsman's office with such powers may only do so if either the second or third questions posed by Dickson, J. can be answered in the negative.

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49. Form RFL-7 MG 5283.
50. Form RFL-5T.
51. Form RFL-5a MG 2602.
52. Form RFL-1.

The second question in summary is, "whether the function as exercised by the body in Manitoba is being exercised judicially."[53]

Dickson, J. says,

> Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.[54]

Clearly, the Rentalsman is faced in several situations with a private dispute between parties and is called upon to adjudicate. There is nothing in the *Act* itself to require him to apply a recognized body of rules. However, the statute frequently uses the words, "in such manner as may appear reasonable and just", discussing the manner in which the Rentalsman may arrive at decisions which he is empowered to make. In addition, several of the sections vesting the Rentalsman with particular powers, set out the procedural rules which must be followed by the parties and by the Rentalsman, himself, in considering the matter. I would submit that these are analogous to the application of a recognized body of rules, as that expression is used by Dickson, J. In my opinion therefore, the answer to the second question posed by Mr. Justice Dickson is affirmative.

This leads to the third question, which, he says, is whether, "the scheme is such that the adjudicative function is the sole or central function of the tribunal."[55] There can be little that can be added to an overall description of the scheme of Part IV other than that which Dickson, J. said in reviewing the Ontario statute,

> It appears upon reading the Act as a whole that the central function of the 'Commission' is that of resolving disputes, in the final resort by a judicial form of hearing between landlords and tenants. The bulk of the Act is taken up with defining rights and obligations of landlords and tenants and with prescribing a method for resolving disputes over those obligations. Dispute resolution is achieved through application to the Commission ....
>
> The chief role of the Commission is not to administer a policy or to carry out an administrative function. Its primary role is to adjudicate .... The impugned powers are the nuclear core around which other powers and functions are collected ....[56]

As such, there seems to be little that can be said to make a case for the validity of the Manitoba Rentalsman's Office.

It has been pointed out from time to time that the sections which grant the Rentalsman power to resolve disputes are permissive. However, a similar situation existed under the Ontario legislation. Dispute resolution by that Commission was to be based on application by the parties. Section 95(1) of the Ontario statute clearly made such application permissive, "a person may make application". In other words, the Commission was a new alternative form for dispute resolution but the *Act* did not vacate the power of s. 96 Courts to hear such matters. Notwithstanding the alternative nature of the forum, the Supreme Court has nevertheless ruled that it was *ultra vires* the provincial legislature to create such a scheme.

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53. *Supra* n. 10, at 184.
54. *Supra* n. 10, at 175.
55. *Supra* n. 10, at 176.
56. *Supra* n. 10, at 185-6.

VI.

In the result, the case for the constitutional validity of *The Landlord and Tenant Act* of Manitoba (Part IV) is very tenuous. I do not think that the distinctions relied on by Lambert, J.A. in the B.C. Court of Appeal are applicable in Manitoba by virtue of the difference in the statutes as explained above, but even if they were similar, I think they have been effectively negatived as defences by the Supreme Court's judgment. Dickson, J.'s conclusion that pre-Confederation s. 96 courts exercise the function of ordering eviction and compliance is universally applicable for all Canada. The scheme created in Manitoba allows the Rentalsman to make such orders. It is true that the parties must apply to him for resolution of their dispute, and arguably in relation to security deposits, must consent to his mediation. However, that procedure is no different from that anticipated by the statute in Ontario. It is true that the Rentalsman is merely an alternative forum, but again that is similar to the Ontario scheme.

Three arguments might be suggested to distinguish the scheme in Manitoba. First is the supposed requirement that the parties consent to the jurisdiction of the Rentalsman. For the reasons discussed above, I do not think this is even a bindng requirement, and if it is, it applies only in regard to certain specific dispute settling powers and does not apply to either eviction or compliance disputes. Furthermore, even though several of the relevant provisions of the Ontario statute required voluntary application of the parties, it was still held to be insufficient to validate the scheme in that province.

Secondly, the jurisdiction of the Rentalsman is automatically preempted if either of the parties submit the matter to the Courts. This is significantly different from Ontario where the Court, after hearing the Commission's views, would have had to issue a stay of proceedings against the Commission to divest it of power. This seems to me to be a strong point in favour of the Manitoba scheme. It reinforces the view that the Rentalsman is something perhaps less than an alternative judicial forum, or at least is not an equivalent judicial forum.

Finally, not all orders of the Rentalsman are enforceable by a penal provision. This again is a substantial distinction — indeed, it is one of the four relied on (wrongly in my opinion) by Lambert, J.A. in the B.C. case — from the Ontario scheme.

It is not clear that these two distinctions alone would suffice to make the case for the Rentalsman's office. If not, it would indeed be unfortunate. The various Courts which have heard the matter have expressed an empathetic understanding of the desire of the Province to enact this type of legislation. All freely concede that, absent s. 96, the Province would have an unrestricted hand in enacting such law under its "property and civil rights" jurisdiction. But as Dickson, J. said when summarizing his decision:

> I am neither unaware of, nor unsympathetic to, the arguments advanced in support of the view that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. Yet, however worthy the policy objectives, it must be recognized that we, as a court, are not given freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it

> has been judicially interpreted in the past. If the impugned power is violative of s. 96, it must be struck down.[57]

Earlier in his judgment he wrote,

> The contention seems to be that if the legislature sets up a social agency to meet a social problem as seen by the legislature, then that determines the validity of a conferral of s. 96 judicial power upon the agency. If the legislation is not aimed at evasion it cannot be attacked. Such a contention goes too far and is not supported on the authorities.[58]

The informality and low cost of having disputes resolved by the Rentalsman make this agency a major positive force in improving access to justice for the parties. It is wholly unreasonable to expect literally thousands of tenants each year to retain counsel to pursue their rights in the Courts, when the subject matter at issue is often worth substantially less than the cost of going to Court. A major purpose of the reform of landlord-tenant law was to improve the balance of competing interests in favour of the tenant. This purpose will be substantially thwarted if the adjudicative jurisdiction of the Rentalsman is ruled invalid.

If attempts by the provincial legislature to effect what all commentators feel is desirable social change in an area of legislative jurisdiction specifically granted to the province by s. 92, cannot survive the test imposed by s. 96 of the B.N.A. *Act*, then in my opinion, a choice must be made. As between the competing values of socially desirable change, and increased access to justice on the one hand, and preservation of historical judicial roles on the other, the roles of the judiciary ought to be made to yield. If, as now appears to be the case, this cannot be done within the context of our current Constitution, then the Constitution itself may need to be amended to provide the necessary flexibility.

57. *Supra* n. 10, at 188.

58. *Supra* n. 10, at 187.