AN EXAMINATION AND ASSESSMENT OF THE AMENDMENTS TO THE MANITOBA LANDLORD AND TENANT ACT

Experience in the administration of remedial landlord and tenant legislation, as in the case of any other legislation, will enevitably disclose deficiencies in the original conception. Ideally, the Legislature, having brought forward fundamental changes in the law, ought to remain responsive to manifest needs in any subject area which is of great importance to large numbers of its citizens. Too often the pressures of governmental business results in statutes, which call for the further attention of the Legislature, remaining in limbo while the hopes generated by their promulgation are frustrated.

While maintaining an ongoing responsiveness to the need for effecting changes, in order to preserve the integrity of a statute to its originating purposes, some means must also be developed to prevent the fragmentation of the statute so that it is no longer readily available to those who should be able to resort to it without confronting a confusing maze of amendments.

A most interesting example of a Legislature undertaking an examination of its recently enacted remedial landlord and tenant legislation applicable to residential tenancies, is provided by Bill 49 of the Manitoba Legislative Assembly being *An Act to Amend the Landlord and Tenant Act* which received Royal Assent on July 27, 1971.[2] The amendments are with respect to Part IV of the *Manitoba Landlord and Tenant Act*[3] which applies to residential tenancies and which was effective, for the most part, from September 15, 1970.

These Manitoba amendments are of particular significance to the Provinces of Ontario, British Columbia and Nova Scotia, because the remedial legislation applicable to residential tenancies, which was enacted in Manitoba and British Columbia, was much influenced by the earlier Ontario legislation, which was in turn responsive to the *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* of the Ontario Law Reform Commission. While differing somewhat, in form, the Nova Scotia amendments were also clearly influenced by the developments in Ontario.[4]

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1. S.M. 1971, c. 35 amending S.M. 1970, c. 106, now C.C.S.M., c.L70, in force September 1, 1971. (Man. Gaz. 21/8/71)
   Note: C.C.S.M. = Continuing Consolidation Statutes of Manitoba.
2. Now S. M. 1971, c. 35.
3. C.C.S.M., c. L70 as amended by S.M. 1970, c. 106, ss. 82-124—sometimes herein called the "Manitoba Act".
4. See, Ontario, R.S.O. 1970, c.236 (Part IV) sometimes herein called the "Ontario Act"; British Columbia, 1970, S.B.C. c.18; Nova Scotia, 1970, S.N.S., c.13.
   Prince Edward Island has recently amended the Landlord and Tenant Act R.S.P.E.I. 1951, c. 82 by adding Part V applicable to residential tenancies, which is based upon the Ontario, Manitoba and British Columbia statutes. The amendments which were assented to on April 14, 1972 are S.P.E.I. 1972 c. 25.

It will be most convenient to deal with some of the legislative details of the most recent Manitoba amendments[5] under a number of appropriate subject headings:

I *Security of Tenure*

The Manitoba Government has apparently undertaken to provide more complete security of tenure for residential tenants. Prior to the recent Manitoba Amendments[6] no province, except for the Province of Quebec,[7] had devised a long lived means of protecting the security of tenure of tenants whose tenancy agreements had ended by notice to quit or by effluxion of time, with the exception of retaliatory evictions in the case of tenants from period to period (e.g. month to month) terminated by a notice to quit.[8] Accordingly, upon the expiry of a notice to quit, in the case of a tenancy from period to period (in the absence of a retaliatory motive behind such notice), and at the end of a term of years (in the latter case, in the absence of an option to renew the term), a tenant was compelled to vacate the rented premises.

A realistic assessment of the average tenants' wishes would likely disclose that, in the usual residential leasing situation, and in the absence of compelling reasons to do so, a tenant who is not obliged to move because his tenancy has ended, would prefer to avoid the expense and inconvenience of regular moves. He is, however, ordinarily subject to the landlord's decision as to whether a periodic tenancy will continue or whether a tenancy for a term certain will be renewed or a new agreement to lease offered.

Even if the landlord is agreeable to continuing or renewing the tenancy or entering into a new tenancy agreement, it will usually be on terms which the landlord is able to dictate, particularly as they relate to provisions for increased rent.

It is generally accepted that true security of tenure can only exist where there is in operation a mandatory system of rent control,[9] together

5. S.M. 1971, c.35.
6. S.M. 1971, c.35.
7. For an outline of the system of rent control which applies in the Province of Quebec see the **Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies** of the Ontario Law Reform Commission, sometimes referred to as the "Interim Report" at pp. 66-68.
8. See, R.S.O. 1970, c.236, s.107(2); which was followed in Manitoba, see C.C.S.M. 1970, c. L70, s.113(2).
9. See "Rental Control in Canada", **Refresher Course Lectures**, vol. 1, Law Society of Upper Canada (1945) at page 295 and 368, where the author Wishort F. Spence, now Mr. Justice Spence of the Supreme Court of Canada, states:
"It has been alleged, however, that the Wartime Prices and Trade Board have no jurisdiction in entering the second field of regulation (that relating to security of tenure) and so long as the Board controls the maximum price at which accommodation may be rented, the problem of who is to occupy the accommodation and to pay such maximum price is not a topic with which an anti-inflation agency can be concerned . . ."
Mr. Justice Spence went on to say:
"The answer to such allegation is two-fold. Firstly, security of tenure is absolutely necessary for the enforcement of control of the price; experience has shown that as soon as security of tenure is let go, control of the price disappears.

with: (a) a statutory system imposing upon the landlord the responsibility for providing and maintaining habitable premises; and (b) a provision, that in the absence of special situations, such as when the landlord requires the premises for his personal use, or the tenant is in breach of his lease obligations, the tenancy cannot be terminated by the landlord. The cement which binds the systems of security of tenure is the inability of the landlord to impose a rent increase as the cost of continued possession by the tenant, except in accordance with the applicable rent restriction laws. As has already been noted, failure to pay rent and carry out other lease obligations can lead to termination of the tenancy, even under such a system of secure tenancies.

Manitoba has now enacted legislation with the apparent intention of creating security of tenure, however, without any direct reference to rent regulation. Provisions enacted to achieve this end are here reproduced:[10]

Term of tenancy and rental payment period defined

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.

Duration of rental payment period

103 (2) A rental payment period need not necessarily co-incide with a calendar period.

Notice to terminate tenancy less than twelve months

103(3) Where the term of a tenancy agreement is less than twelve months a notice to terminate shall be given by the landlord on or before the last day of any rental payment period to be effective on the last day of the ensuing rental payment period.

Notice where tenancy exceeds twelve months

103 (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 expiry date of the tenancy agreement.

10. C.C.S.M. 1970, c. L70, s.103, En.S.M.c.35, s.15.

Landlord to advise tenant to give notice

103 (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 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 expiry date of the tenancy agreement without notice; or

(b) continue the tenancy upon notice to the landlord as required under subsection (6).

Right to continue occupancy

103 (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, if the tenant gives notice to the landlord of his intention to renew within the time limits set out in subsection (3) or (4), as the case may be; but where a dispute arises under clause (a) or (b) the matter shall be referred to the rentalsman for determination. (Note: By its terms, this section referring as it does to tenancies for fixed terms, cannot affect a tenancy from period to period (e.g., month to month) as there is no concept of renewal inherent in such cases.[11] It is however, likely, given the wording of the amendments, that they were intended to deal with such tenancies but have confused their nature.)

Appeal

103 (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 may appeal the

11. See n. 58, infra.

decision to a court for review, but pending the appeal decision, the landlord shall not be entitled to possession of the premises in dispute and shall be required to give notice to vacate in accordance with subsection (3) or (4) if the court finds in favour of the landlord.

Section 103 (6) is the key to the scheme.

A possible flaw in the scheme which may prevent it from achieving its principal goal could arise where a landlord, for any reason, does not wish, in the case of a tenancy for a term certain (e.g., one year) as opposed to one from period to period (e.g., month to month), to renew the tenancy agreement and to prevent a renewal under Section 103 (6). imposes an exhorbitant rent increase as a condition of renewal. By imposing such a requirement the landlord could, with apparent impunity, blunt the thrust of the legislative intention to create security of tenure. In such event the tenant would not be able to rely on the provisions of Section 113 (2) which creates a defence to a proceeding for possession, based upon a retaliatory motive.[12]

Defences to proceedings for possession

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

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

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

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

It should be clear that section 113 (2), referring as it does only to a "notice to quit" would not apply to tenancies for a term certain but only to periodic tenancies. Manitoba has not given "notice to quit" other than its conventional meaning.[13]

12. C.C.S.M. c.L.70.

13. C.C.S.M., c.L.70, s.103 which refers to "notice to terminate" and could not refer to a tenancy from period to period. See n. 58 infra the words "notice to quit" are used in s.113(2), which term cannot apply to a tenancy for a term certain such as a term of years. In Section 103(1) "term" of the tenancy is defined as "... the length of time over which the tenancy agreement is to reign . . ." A periodic tenancy is a "continuing tenancy" and does not expire at the end of each period. **Hill and Redman's Law of Landlord and Tenant** (14th Edn) p. 40, para. 16. As such it does not extend for more or less than twelve months.

It would therefore be necessary to enact a provision which would make retaliatory behaviour, on the part of landlords, applicable to tenancies for a term certain in order to achieve the desired security of tenure. While this would likely further the realization of the legislative goal of achieving security of tenure, the Legislature would (perhaps without such intention) also have succeeded in introducing rent control, without debate, and without regulatory guidelines or administrative machinery to set and adjust rents and adjudicate in the case of disputes. As it now stands the legislation would not likely be capable of standing up to the measures described to circumvent it.

It is difficult to accept that this is what the Legislature intended and certainly the matter was not debated when the bill was before the Manitoba Legislature. Yet it is still submitted that the Legislature cannot effectively assure security of tenure, under Section 103(6), without further amendment to permit treating an increase in rent, in a proper case, as a retaliatory act, depriving the landlord of the right to possession. Caught on the horns of this dilemma the Manitoba Legislature has not likely achieved its purpose of achieving its proposal. In order to bring about security of tenure, the Legislature would, it will be seen, be compelled to introduce a mandatory system of rent regulation.

Another possible device of defeating the purpose of Section 103, as it now stands, would be for the landlord to notify the tenant, before the time limited for the tenant to renew under Section 103 (6), as follows: "Should this tenancy agreement be renewed pursuant to Section 103 (6) then in such case the rent will be $..... per annum payable as follows . . .".

This would be possible under Section 116 (1) and (2). In the alternative the lease could provide that: "In the event that this tenancy agreement is renewed pursuant to Section 103 (6) of *The Landlord and Tenant Act*, then the landlord reserves the right to change the rent payable upon such renewal taking place, provided notice of such change is given to the tenant in writing by the landlord more than three months before such renewal is to become effective."

Another difficulty which may arise in the operation of Section 103 could occur as a result of the Manitoba Act having imposed upon landlords the obligation to notify tenants "at least three months prior to the expiry date of the tenancy agreement of the tenant's responsibility to give notice in accordance with subsection (4) . . .". Time will disclose whether small landlords will easily adjust to the statutory requirement. Furthermore, the security of tenure provisions fail to assist the month to month or other tenant from period to period, who normally are the most needful of protection because (as has already been noted) they

probably are not covered by Section 103 (3) or (4) which deal only with tenancies for a term certain. The period to period tenant could not give notice as intended by Section 103 (6) and therefore could not comply with the renewal requirement specified under Section 103 (6).[14]

For example, in the case of a month to month tenancy, with rent payable on the first of the month: by a reading of Section 103 (6), the month to month tenant could not effect a renewal by giving the landlord notice within the period provided for in Section 103 (3) being "on or before the last day of any rental payment period." It is apparent that this formula does not fit the tenancy from period to period, (e.g. month to month) because such a term is neither for less or more than twelve months because it has no "expiry date" in the sense used in Section 103, nor can it apply to, nor does it contemplate the periodic year to year tenancy, which has no automatic "expiry date".

The term certain for less than 12 months would also create problems for the unsophisticated tenant, who would not be entitled to notice that he had a month to renew but only that the term was coming to an end.

If the Manitoba Government does not wish to use some form of rent restriction or control as a means of achieving a more extensive security of tenure, a similar result might be achieved by first making failure to renew a lease, based upon a retaliatory purpose or motive, capable of being remedied by having the lease entered into by the rentalsman on behalf of the landlord. Retaliation, as prohibited by the Act, would have to be extended to include the imposition of a rental increase, which in the circumstances would be held to be intended to dissuade the tenant from accepting a renewal of his tenancy agreement. To insure a means of enforcement (although perhaps by a claim for damages) the tenant must be entitled to know the rent reserved in the tenancy subsequent to his own. If it is less than that offered to the tenant under the terms of the renewal then the landlord would be made subject to an appropriate penalty. In such case it would not be sufficient to show that the rent reserved in a subsequent lease was less, if the landlord could demonstrate a *bona fide* attempt to first let the premises at the higher rental figure offered to previous tenants.

For example, under such a statutory system, section 103(6) of the Manitoba Act enables a tenant where he:

> "(a) is not in default of any of his obligations under this Act or his tenancy agreement; or [where]
>
> (b) the landlord or owner does not require the premises for his own occupancy . . ."

14. Ibid.

to renew subject to subsection 1 of section 116, which section now reads:

> "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 an 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.
>
> 116(2) Subsection (1) does not apply where the tenancy agreement provides for a period of notice longer than three months before the increase in rent is effective.
>
> 116(3) In this Part rent includes the amount of any consideration paid or required to be paid by a tenant for occupancy of residential premises and the cost of any ancillary service or accommodation or thing that the landlord provides for the tenant."

Inevitably landlords will reserve the right to raise the rent at least upon "any renewal", as specified in section 116(1), referred to *supra*.

By making a raise in rent capable of being considered as a form of illegal retaliation some restraint will be placed upon the actions of landlords who use a retaliatory rent increase as leverage in order to be rid of a tenant whose tenancy agreement they otherwise would have to renew.

Even if this system was employed it would often fail to achieve its purpose where the landlord insisted on an increase which the tenant rejected and where a retaliatory motive could not be demonstrated. Subsequently, the landlord would be able to negotiate a lease with a third party at a rent lower than that offered to the previous tenant, provided he was able to show he attempted to obtain the rent offered the previous tenant. Reserving for adjudication the question of retaliatory motive in such a case is somewhat unrealistic. A statutory scheme to achieve a desired objective can only be stretched so far before it may become an unintended instrument of injustice; if not by its terms, then because of the impossibility of the task set for the judge or other trier of the issues.

II. *The Damage Security Deposit*

One of the most persistent causes of complaints received from tenants arose out of the practice of many landlords to demand payment of a security deposit from prospective tenants. Such a deposit represented an amount to which the landlord had recourse in the event of breaches of lease obligations by the tenant, e.g. failure to pay rent, or with respect to damages caused to the rented premises. It will thus be seen that the security deposit served a two-fold purpose. That of a *rent* security deposit, as well as a *damage* security deposit. Problems which arose were mainly concerned with alleged landlord abuses with respect to the damage aspect of the deposit.

Criticism was not so much directed at the concept of a security deposit but of the manner in which disputes concerning their return were capable of being adjudicated, and of the amount of deposit which was sometimes insisted upon.

An examination of these procedures (usually an action in small claims court by the tenant to recover the deposit) followed a fairly common scenario. Assuming a security deposit of $100.00, the landlord's defence would relate to allegations of damage caused by the tenant or by persons for whose actions the tenant was responsible. In order to permit the court any reasonable possibility of adjudicating the dispute the tenant would have to be in a position to refute the evidence of damage and the cost of repairs presented by the landlord. Inevitably the tenant could not do so without the presentation of evidence from such persons as a carpenter or a painter and decorator. Whatever the mythology, a trial in small claims court, when properly handled, is not inexpensive. Given the issues involved, which also include who caused the damage, as well as the greater likelihood of the landlord being represented by counsel, the tenant's position, when unrepresented, was further undermined.[14(a)]

Taking into consideration the cost of securing necessary witnesses (who could rarely be obtained by a tenant in any event), the cost of a lawyer, the lost day's wages, it was not unexpected that the tenant rarely pursued his remedy. Accordingly, a minority of unscrupulous landlords were presented with minimal risk if they caused security deposits to be forfeited without cause. Even, in the case of a *bona fide* forfeiture the problem of procedural fairness was no less acute, as the merits of the case were rarely ever brought before a court.

Faced with what was a legitimate grievance the provinces of Manitoba and Ontario chose different legislative solutions.

In Ontario, the government accepted the recommendation that the damage security deposits be abolished and that landlords sue for damage caused by a tenant.[15] The reality which prompted this recommendation was the injustice of making the tenant responsible for taking action, the basis for which was an allegation by the landlord that the tenant had damaged the rented premises. An action which had little chance of success unless expenditures were made, often exceeding the value of the security deposit.

An alternative to prohibiting the taking of damage security deposits was to cause such deposits to be paid into a fund to be administered

14(a)Cf. Report prepared by the Advisory Committee on Legal Aid in Ontario, under the Chairmanship of Mr. Justice John Brooke, (1972).

15. R.S.O. 1970, c.236, s.84(1).

by some governmental authority still left open the problem of an expensive proceeding to settle the dispute.

A further alternative would be to substitute a mechanism for publicly investigating the dispute through the use of investigators attached to the tribunal having jurisdiction. Such a procedure has the advantage of permitting an impartial view of the premises and assessment of the issues raised without foreclosing the tenant from having his position examined.[16]

While landlords too incurred expense in security deposit cases, they were usually better able to bear the cost and had a much easier time of securing the attendance of witnesses with whom they usually had an ongoing relationship. Their long range interests also made the expenditure of time and money more justified than in the case of a tenant.

Manitoba chose to "civilize" the damage security deposit rather than prohibit it.

Section 84(1) of the Manitoba Act permits a landlord to "require and receive" a security deposit from a tenant, but restricts the amount to a maximum of "one half month's rent under the tenancy agreement."

Section 84(2) provides that "in determining the disposition of a security deposit, ordinary wear and tear shall not constitute damage to the premises." As by Section 98(2) of the Manitoba Act the tenant is only responsible for "ordinary cleanliness" and damage caused by "his wilful or negligent conduct or that of persons who are permitted on the premises by him," it is difficult to understand why it was thought neces-

16. See, Ison, "Small Claims" (1972), 35 Mod. L.R. 18 where the author, at p.29, presents a strong case for a court which dispenses with conventional court room trappings and procedure:

"Where a hearing is needed, and one of the parties is a worker, the hearing should be scheduled for the evening unless he specifically requests a day-time hearing. This should be done as a matter of normal routine and not treated as a privilege.

The common assumption that some interval must elapse between the presentation and the determination of a claim should be abandoned. There are many situations in which justice must be instant or be denied. Consider, for example, the case of a tenant moving out of a flat. The landlord demands ¢100 for structural damage. The tenant says that there is nothing beyond fair wear and tear. Would anyone seriously suggest that the parties should testify later about the condition of the premises, or worse still, call expert witnesses to testify later? Why should they not simply be able to phone for a judge to come and dispense justice on the spot?"

There has always been a marked disinclination to engage in changing the essential structure of courts. Even so limited a reform as that recommended in the **Interim Report** of the Select Committee on Company Law of Ontario (1967), at para. 14.1.3 thereof that ". . . the public interest would best be served if [applications in the security and corporation law field to the court for the various forms of relief made available by **The Securities Act** 1966 R.S.O. 1970, c.426 and the **Business Corporations Act** S.O. 1971, c. 26] were made to judges of the High Court designated by the Chief Justice of the High Court, so that the designated judges can accumulate expertise and familiarity in the specialized area. Furthermore the use of designated judges would enable orders to be obtained with a minimum of delay and inconvenience to the public, . . . [and that] [t]hese judges would in effect constitute a 'Companies Court'," has not been implemented except to the extent that all the judges of the High Court have been designated for such purpose.

It is recognized that attempts to create workable adjudicative machinery need not have province-wide application. The problem is most acute in highly populated urban centers.

sary to enact section 84(2), which could create confusion. Surely it was not intended to treat responsibility for damage differently where a security deposit is taken.

It is significant that the landlord is not prohibited from mixing security deposits with his own monies. Nor is he in any way restricted from using the monies for any purposes. In its *Interim Report*[17] the Ontario Law Reform Commission described the dangers of this practice to the tenant where the rented premises is sold or the landlord is declared bankrupt. In addition the use of such monies as part of the landlord's operations often creates an unfortunate disinclination to return them.

Section 86(1) provides for payment of interest on the deposit at the rate of at least four per cent per annum and for return of the deposit within seven days of the expiration or termination of the tenancy.

Section 87 obliges the landlord, in the case of a dispute between the landlord and the tenant, to "notify the rentalsman of his reasons for objecting to the return of the security deposit or any part thereof to the tenant; and at the same time, forward the amount of the security deposit with interest to the rentalsman."

This latter requirement will, no doubt, go some way towards removing the problem which results from the control over the deposit formerly being in the landlord. It will, of course, not overcome those cases where the landlord has sold the leased premises and cannot be located, or where the landlord is insolvent.

From experience gained to date the provision for payment of at least four per cent interest per annum will result in a maximum of four per cent being paid. Given the history of landlord tenant relations "at least" becomes at best a pious hope that the landlord's obligation will be increased.

Provision for mediation of disputes by the rentalsman under the provisions of Section 87(2) has apparently resulted in a number of settlements and to this extent has proved successful.

Voluntary arbitration under Section 87(3) has been rarely resorted to.[18]

Section 87(5) is of interest and is here reproduced:

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

17. op.cit. at p. 22.
18. Information based on personal interview with the Manitoba Rentalsman in July of 1971.

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.

Because it places the onus on the landlord to sue, one would expect that only serious claims will be pursued. Unfortunately the shortcomings of conventional small claims proceedings will at this stage still manifest themselves and because the rentalsman's power to arbitrate is not applicable unless by consent of the parties, a landlord can force the tenant into court where, as above described, the tenant is at a distinct disadvantage.

It should also be recognised that the amount involved will rarely warrant a tenant incurring the expense of having his position properly represented. The continuing interest of the landlord will make it far more likely that he will incur the necessary expense and inconvenience, if for no other reason than to protect his position in relation to his other tenants.

The Manitoba legislation, while it endeavors to "civilize" the security deposit, and while it has undoubtedly remedied some of the previous abuses, may leave the unscrupulous landlord largely untouched.

III. *Relief for Landlords and Other Tenants From "Nuisance or Disturbance" For Which A Tenant Is Responsible*

Many who represent landlords' interests expressed concern to the Ontario Law Reform Commission over their inability to effectively deal with what they referred to as "tenant and tenant disputes". A consideration of the implications of injecting the government into the arena of "nuisance and disturbance" claims, would require considerable courage for a government to follow through with appropriate legislative action. Much irritation and potential for discord could be diminished if a speedy and inexpensive mechanism were available to impose a peaceful solution to such "tenant and tenant" disputes. Not only the tenants concerned but the quite often helpless landlord, caught up in a dispute not of his own making, would welcome relief in such situations. However, it would not represent mere uninformed conjecture to anticipate that in creating such jurisdiction to deal with such "tenant and tenant" disputes in the courts, all the present difficulties observed in family disputes and common assault cases brought before magistrates and provincial judges, will be duplicated. From all indications, at least in Ontario, a number of

provincial judges and in one instance, a judge of the High Court of Justice of the Supreme Court of Ontario, have not responded happily to the implications of Part IV, and in particular the new jurisdiction given provincial judges. Thus, while a definite need for remedial action is clear, the preferred legislative response is unclear. Such disputes would seem best dealt with apart from the traditional trappings of courts, whether civil or criminal. A tribunal, with a specific directive to achieve consensual resolution of landlord and tenant disputes has much to recommend it.[19] Why not a specialized tribunal to deal with matters which have not lent themselves to those conventional judicial processes stressing adversarial techniques? At the same time preserving the rule of law rather than creating a body which operates primarily on the basis of its own wide discretion.

The Province of Manitoba has, in part, recognized such a need by creating the office of Rentalsman, of which more will be said.[20] For its part the Province of Ontario has created the means for municipalities to establish Landlord and Tenant Advisory Bureaux.[21]

Recent advice obtained from a number of bureaux established in Ontario, discloses a perhaps unexpected degree of success in achieving settlement of landlord and tenant disputes by mediation. Conversations with the Manitoba Rentalsman were to the same effect.[22] For those who argue that a tribunal of the kind envisaged must have "teeth", the immediate experience in Ontario and Manitoba suggests the exercise of restraint in developing alternative dispute resolution mechanisms. This does not mean that reasonable experiments should be discouraged, where existing systems have proved inadequate. Both the Manitoba and Ontario experience has demonstrated that granting across the board powers to a tribunal to enforce its findings, may be unnecessary. Experience of the past also cautions against too tight controls which seem to result in a residue of hostility and which foster evasion.

In addressing itself to the problem of providing a mechanism for resolving, so called "tenant and tenant" disputes, the Manitoba Legislature has created a quasi-criminal procedure. Hopefully, the existence

19. Reference is made to the various labour relations boards established in all provinces and the Canada Labour Relations Board, which have jurisdiction to adjudicate on a wide variety of matters arising in the cause of applications for certification including, in some cases, adjudication of unfair labour practice charges.

20. Pp. 36-43 **infra.**

21. R.S.O. 1970, c.236, s.110 (also recently provided for in the Province of Alberta, S.A. 1970, c.64, s.3, called Landlord and Tenant Advisory Boards).

22. See n. 18 **supra.**

of the remedy will lead to some salutory results. The particular amendments are here reproduced.[23]

Responsibility of Tenant

98(2) (c) The tenant shall: . . .

Take all reasonable precaution to avoid causing a nuisance or disturbance to other tenants in the building by any person resident in his rented premises or by others who are permitted on the premises by him.

Failure to Fulfil Obligation

98(3) A failure by a landlord or a tenant to fulfil any of his obligations or responsibilities under this section shall be sufficient reason for the non-offending party to terminate a tenancy agreement in accordance with sections 101 and 102.

Complaint of Tenant

98(4) Where a tenant or any person who is permitted on the premises by the tenant causes a nuisance or disturbance to other tenants in the building, the landlord upon complaint made to him by any tenant in the building shall, if he is satisfied that the complaint is justified, request the tenant or person, as the case may be, to discontinue the nuisance or disturbance; and if the offending tenant or person refuses to comply with the request of the landlord, the landlord or the complaining tenant may lay an information before a magistrate.

Offence or Penalty

98(5) Where a magistrate who hears the information laid under subsection (4) is satisfied that the person against whom the information was laid did cause a nuisance or disturbance as alleged and that he refused or neglected to comply with the request of the landlord to discontinue the nuisance or disturbance that person is guilty of an offence, and liable on summary conviction to a fine of not less than twenty-five dollars or more than two hundred dollars for any subsequent offence committed in the same premises.

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23. S.M. 1971, c.35, s.10 being C.C.S.M. c.L70, s.98(2)
Although not a usual practice, it is not unknown for landlords to insert a covenant in a lease against the tenant causing a "nuisance" to the lessor or to adjoining occupiers. Standing alone, it has been suggested that the covenant would only be broken by a nuisance in the technical sense, see Hill and Redman, **Law of Landlord and Tenant** (14th ed.), p.261, para.173, n.(b) and cases referred to.
However, where the covenant is made to cover any act which may lead to "annoyance, nuisance, or damage", it will be ". . . broken by anything which disturbs the reasonable peace of mind of an adjoining occupier. It need not amount to physical detriment to comfort, nor need the adjoining occupier be a tenant of the same lessor. See Hill and Redman, **op.cit.** p.262, n.(e).

Reference of Complaint to Rentalsman

98(6) Where an information is laid under this section, the court may, before adjudicating thereon, refer the matter to the rentalsman who shall investigate the matter and report his findings to the court.

Section 98(6) of the Manitoba Act, contains within it a scheme for accommodation and settlement. It also creates the basis for a judicial "cop-out" and the continuation of the offending behaviour, thus defeating its purpose which was the creation of a remedy which was intended to afford a "speedy" settlement of "tenant and tenant" disputes. It might have been better to reverse the procedure and start with a report to the Rentalsman who would know quickly if accommodation is possible. It should be recalled that the Criminal Code contains sections which *might* deal with landlord and tenant problems but which have never even remotely fulfilled that purpose.[24] Apart from the efficacy of sections 98(2)(c), (3), (4), (5) and (6) the possibility of constitutional restrictions upon the establishment of courts ought to be considered.

IV. *Remedies Available to the Landlord With Respect to Chattels Left on the Rented Premises Upon Abandonment by the Tenant*

A number of persons representing landlords' interests have expressed concern about the uncertainty of the landlord's responsibility with respect to chattels left upon the premises by a tenant who has abandoned the rented premises. Prior to the abolition of the remedy of distress some landlords simply sold such chattels for arrears of rent, (rarely under a proper exercise of a lawful right of distress, but nevertheless often believing that a lawful right of disposition existed) or merely converted the chattels to their own use. With the abolition of distress the former practice adverted to has not been much followed.[25] The landlord is, of course, not bound to act as a bailee of the chattels.[26] Nevertheless the Manitoba amendment provides written authority for the landlord to remove and dispose of the chattels, which authority is justified if it fairly deals with the rights of the landlord and those parties interest in the chattels:

Storage of Chattels[27]

> 94(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

24. R.S.C. 1970, c. C-34 s.s. 73 and 380(1).
25. C.C.S.M. c.L.70, s. 88.
26. **McCutcheon v. Lightfoot**, [1930] S.C.R. 108; [1930] 1 D.L.R. 995; [1929] 1 D.L.R. 971; [1929] 1 W.W.R. 694; 38 M.R. 160; rev'g [1928] 2 W.W.R. 240.
27. C.C.S.M. c.L. 70, En.S.M. 1971, c.35, s.7.
S.P.E.I. 1972 c.25, s.98, preserves the remedy of distress after abandonment of the rented premises by the tenant, which would enable the landlord to recover rent arrears in a proper case. The basis for abolishing distress was the abuse which often occurred during the tenant's occupation. See Interim Report pp. 13-20.

(a) abandoning the premises in breach of the tenancy agreement; or

(b) going out of possession of a premises upon written termination or expiration of a tenancy agreement;

the landlord may remove the chattels from the premises and place them in safe storage for a period of at least three months and at the same time provide the rentalsman with an inventory of the chattels so removed.

Sale of Chattels

94(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

(b) record details of the sale and disposition of the proceeds to the rentalsman; and

(c) 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.

It is assumed that, while section 94(3) does not specify the standards of sale by public auction, the court could resort to the law relating to the degree of fairness which must accompany mortgage sales by auction, in the event of a dispute subsequently arising. Nevertheless some guidance upon the procedure to be followed would have been helpful.

Further, because section 94(3) (c) does not refer to the rights of third parties to the chattels, being "person(s) claiming title to the chattels" upon a sale, a likely cause of difficulty and unfairness has been created. Considerations of fairness would have protected the interests of bailors, chattel mortgagees, conditional sales vendors, execution creditors, after a sale under Section 94(3). Being apparently innocent parties their interests in the purchase monies should have been recognized.

And what of the purchaser on such a sale as is contemplated by Section 94(3)? Is he free of any claim of the true owner? A mortgagee? Or conditional sales vendor? It would have been a relatively simple matter to insert an appropriate provision against impeachment of the title of a purchaser.[28]

V. *The Right to Privacy*

Section 95 of the Manitoba Act, which deals with a tenant's right to privacy, is taken from the provisions of Section 93 of the Ontario Act,[29] which latter section reads:

28. Experience gained in carrying out sale proceedings pursuant to a distress warrant discloses the large number of occasions when the goods are subject to conditional sales and other interests. It would seem that a purchaser under a sale contemplated by Section 94(3) would have no greater protection than a purchaser at a sale of property under a writ of execution. See, **Jellett v. Wilkie** (1896), 26 S.C.R. 282, at 288-9. It would seem that the purchaser in cases envisaged by Section 94(3) will rarely be in a position to satisfy himself about existing liens, charges, and equities affecting the tenant's "property" and it might have been better to provide for his protection as well as that of third parties who normally would be expected to share in the proceeds.

29. R.S.O. 1970, c. 236.

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

Section 91 of the Manitoba Act, which was based on Section 89[30] of the Ontario Act 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." It is suggested that it would, in a proper case, be open to a court to treat the tenancy as being at an end for a substantial breach of the statutory obligation relating to privacy, which is very much a statutory condition, although not called so specifically.[31] Many of the difficulties encountered in interpreting the covenant for quiet enjoyment might thereby be overcome, where the breach relates to an unlawful entry.

Section 95 was amended by the Manitoba Legislature by adding thereto at the end thereof the words, "or where a tenant voluntarily gives consent in writing for a specific purpose or occasion".[32] It would appear that this amendment was intended to take care of such situations as where elderly tenants wish to give consent to their landlord (or his agent) to look in on them regularly to see that they are not in difficulty because of a sudden illness, or where a tenant might be away for an extended period of time and wishes the landlord (or his agent) to periodically enter the rented premises to see that everything is in order.

Unfortunately, the wording of the Manitoba amendment may permit the re-introduction of one of the original abuses which led to enactment of the privacy provision, being the various short form of leases act clauses giving the lessor the right to enter and view the state of repair, which in its extended form reads in part: ". . . and that it shall be lawful for the lessor or his agents, at all reasonable times during the said term, to enter the said demised premises to examine the condition thereof." This provision, if included in a lease without the tenant's objection, would be for a "specific purpose" and an avenue might thus have been created for a return to the abuses which the section was originally enacted to prevent.[33]

What would be the likely result if, before the amendment to Section 95 of the Manitoba Act came into force, a tenant had given written

30. **Ibid.**
31. cf. 1970 S.N.S., c.13, s.6.
32. C.C.S.M. 1970, c.L. 70, En.S.M. 1971 c. 35, S. 8.
33. See **The Short Form of Leases Act**, R.S.O. 1970, c.436, para. 7 of Schedule B. Also see **The Short Forms Act** C.C.S.M. 1970, c.S.120 third schedule para.6 Part B.

consent to the landlord so as to permit the landlord's agent to enter the rented premises once a day to feed the tenant's tropical fish, or so often as was necessary to see that the tenant was well? Would a court have treated this as a breach of the statutory condition relating to the tenant's right to privacy?

An examination of Section 95 prior to its amendment, discloses an intention to limit the landlord's ability to create a contractual right enabling him to enter the rented premises for the *landlord's purposes.* That is, the landlord is treated in the section *qua* landlord. If the request or permission is given not *qua* landlord, but as relating to the landlord (or his agent) outside of his role as landlord, or in the nature of a personal request, it is difficult to see how the situation would be different from a case involving third persons, as where a friend was requested to, or permitted to, enter the rented premises for the purpose of the tenant, above referred to.

It has been stated that some landlords and their agents were unwilling to accept such invitations, for fear of breaching the statutory condition. Such reticence is somewhat difficult to comprehend. However, giving such landlords the benefit of the doubt, the purpose of the Manitoba legislature would have been more completely realized if the "purpose or occasion" was limited to those clearly for the tenant's benefit, and where such consent could not form part of the tenancy agreement. If these precautions are not taken, the old evils, as above set out, may have been inadvertently re-introduced.

Upon consideration, the amendment to section 95 of the Manitoba Act probably represents over-legislation. The major objection to the state of the previous law was the unwarranted intrusions upon the tenant's right to privacy under the authority of the short form clause above referred to.[34] By introducing the noted amendment to the Manitoba Act, admittedly to overcome an alleged deficiency, the results may not be exactly as anticipated.

Even the change in the amendment, as here suggested, opens up the question of what represents an advantage to the tenant. Surely, some reasonableness must be expected from the parties or no statute can operate successfully.

VI. *Prohibition Against the Delivery of Post-Dated Cheques*[35]

The Ontario Legislature enacted Section 84(3) to Part IV of *The Landlord and Tenant Act* to prohibit the requirement of payment of

34. Ibid.

35. The basis for the inclusion of such restriction was to prevent the creation of situations where the tenant would be deprived of a defence against a holder in due course of the cheque.

rent by post dated cheque.[36] The Province of Manitoba later enacted a substantially similar section (84(3)):

> "On, from and after the coming into force of this Part, a tenancy agreement shall not include a provision for the delivery of any post-dated cheque or other negotiable instrument to be used for payment of rent."

The Manitoba Legislature amended Section 84 by adding Section 84(4):[37] "Where a landlord or his agent coerces or attempts to coerce a tenant or offers any monetary or other consideration to a tenant to induce the tenant to deliver any post-dated cheques or other instruments to the landlord or agent, the landlord or agent, as the case may be, is guilty of an offence under this Act."

The Ontario Act had made a knowing breach of its Section 84, an offence punishable on summary conviction.

As Section 2(9) of the Manitoba Act definies tenancy agreement in the same terms as the Ontario Act,[38] it is difficult to see how section 84(4) of the Manitoba Act advances the position of tenants, except for the addition of the penalty provision. For example, where a landlord, through coercion or attempts at coercion or by offers of monetary or some other consideration, induced a tenant to deliver post-dated cheques, such kind of activity would come within the prohibited conduct set out in Section 84(3) of the Manitoba Act and would be an offence under Section 117(1). (The payment obtained in the manner described in Section 84(4) would, whether the change took place in writing or not, represent an illegal provision under Section 84(3)). It is well settled that where a lease is for less than three years and satisfies the other provisions of *The Statute of Frauds*,[39] concerning the validity of parol leases, changes need not be effected in writing.[40] The continued occupancy and payment of rent by the tenant would normally suffice in the unlikely situation of a lease not falling under the statutory exception.[41] In such case the landlord would be caught by the prohibition under section 84(3), because even where the post-dated cheques become payable by agreement made after the tenancy agreement had first been entered into, the subsequent payment, where requested by the landlord and agreed to by the tenant, would amount to an illegal covenant in the tenancy agreement

Experience gained by Student Legal Aid Societies in Ontario discloses that some landlords have found means of continuing conduct now

36. R.S.O. 1970, c.236.
37. C.C.S.M. c.L70, En. S.M. 1971, c.25, s.2.
38. R.S.O. 1970, c.236, s.81(b).
39. R.S.O. 1970, c.444, s.3 and see (1677) 29 Car, 2, c.3 s.2 in force in Manitoba.
40. **Manchester v. Dixie Cup Co.**, [1951] O.R. 636, [1952] 1 D.L.R. 19 (C.A.).
41. **Walsh v. Lonsdale**, (1882), 21 Ch. D.9, 52 L.J. Ch.2.

prohibited under the Ontario Act. It will not make it any easier to restrain prohibited conduct by creating additional amendments which require an examination of the state of mind of a party. It would be much simpler to outlaw certain objectionable conduct which is considered subject to abuse. If the taking of post-dated cheques, upon reconsideration, is thought to be necessary for the efficient management of rental property, then the rights of tenants might be better protected by insuring that they would not be restricted in raising defences to the claim of holders in due course, similar to the recent amendments to *The Bills of Exchange Act*, intended to protect purchasers under consumer finance contracts where a collateral promissory note has been given as security.[42] Because this would require federal legislative action it is suggested that the original enactment in Manitoba, coupled with appropriate penal provisions would be more effective than the present two sub-sections, which by the use of such an evocative term as "coerce" has, it is suggested, legislatively muddied the waters.[43]

VII. *Alteration of Locks*

Section 97(1) of the Manitoba Act, is derived from Section 95 of the Ontario Act.[44] Section 97(1) reads:

> Subject to subsection (2), a landlord or tenant shall not, during 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 or except where the rentalsman is of the opinion that the alteration is reasonable.

The Manitoba provision, unlike that in Ontario now permits an alteration "where the rentalsman is of the opinion that the alteration is reasonable."

By installing an independent third party into landlord and tenant disputes, the Manitoba Legislature has provided a basis for studying the effectiveness of alternative methods of intervention in specialized

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42. R.S.C. 1970, c.4 (1st Supp.) Part V, ss.188-192.

43. It is essential that tenants are not frustrated in their attempts to utilize the penal sanctions in the Act. Unless those charged with the responsibility for receiving and prosecuting complaints are willing to accept this requirement the penal sanctions will be of limited value. Penal sanctions are made necessary because of the often incomplete nature of available relief in a civil proceding. If civil relief could be assured in a speedy and inexpensive form it would be possible to consider such relief as exclusive.

In **Housing Code Enforcement in New York City**, Teitz and Rosenthal at p. 53, it is stated that the experience in New York City has shown that criminal sanctions are ineffective where the procedures are "cumbersome and lengthy" and where the fines represent little more than a minor expense. It is to be noted, however, that the code standards are enforced by the "state for the general welfare", and not by the tenant unless the breach is of a covenant in the lease. (**ibid.** at p.4). The authors also refer to tenant initiated proceedings. (**ibid.** table 3, p.10).

It is also interesting to note the disappointing record of tenant initiated remedies, which must in part be attributed to cumbersome and expensive procedures. (**ibid.** at p.45).

The authors conclude that the enforcement of housing code violations has not been well served by traditional judicial forms and suggest that alternative forms of adjudicating tribunals are necessary. (**ibid.** at p.54).

44. R.S.O. 1970, c.236.

relationships. Without doubt a myriad of special cases have arisen where the parties would have welcomed the quick and inexpensive intervention of a third party. Experience, to date, of the Manitoba Rentalsman and the Ontario Landlord and Tenant Advisory Bureaux seems to bear this out. As much as the prospect may offend some long standing and strongly held views as to the correct forum for the adjudication of disputes, neither of the traditional forums (i.e. small claims courts and the summary proceeding before county court judges) have satisfied the parties involved. In many cases the expense and time factors have discouraged use of the courts. It is not sufficient to say that people must be prepared to put up with some expense and some inconvenience to realize their rights. No one would deny this—but surely experience has demonstrated the need for a method of adjudication which is more sensitive to the needs of those who must resort to it. It is for this reason that the office and functions of the Manitoba Rentalsman must be closely examined.

The Manitoba Act, provides by Section 97(2), "Every landlord who rents residential premises to a tenant shall install or cause to be installed on the door giving entry to the premises rented by the tenant a locking device or system that cannot be opened by the use of a card or other flat object or device".

This subsection was amended to read, "Every landlord who rents residential premises to a tenant shall install or cause to be installed on the premises, including the door giving entry to the premises, devices necessary to make the premises reasonably secure from unauthorized entry".[45]

It can be argued that this is not an unreasonable requirement, especially as it applied to the "door giving entry to the premises". Because the amendment requires devices to be installed to make the premises reasonably secure from unauthorized entry, this would also require locking devices on all other means of access including windows. Failure to do so is not only an offence under section 117 but could also lead to a civil action for damages for breach of a statutory duty.[46] There must be reasonable limits to the imposition of statutory duties. Experience will disclose if such limit has been over-reached by the Section 97(2), as amended.

VIII. *The Imposition of Penalties for Breach of the Statute*

The Ontario Law Reform Commission suggested that, in some instances, the fact that a particular mode of conduct was, by legislation,

45. C.C.S.M. 1970, c.L.70, En.S.M. 1971, c.35, s.9.
46. See, generally Gorsky, "The Landlord and Tenant Amendment Act, 1968-69—Some Problems of Statutory Interpretation", Law Society of Upper Canada, Special Lectures, (1970), 439.

either prescribed or proscribed, might be insufficient to bring about compliance with its requirements.[47] Although relations between individual landlords and tenants will not likely be improved by the introduction of criminal sanctions, unless some other remedy is made available for ensuring compliance with important statutory provisions, in the absence of criminal sanctions, no other appropriate solution exists. A specialized landlord and tenant tribunal, which met regularly, with a mandate to achieve settlement of the dispute wherever possible, but with the power to adjudicate disputes, if necessary, perhaps by means of a separate panel of such tribunal, as in the case of unfair labour practices under the Manitoba and Ontario Labour Relations Acts might be worth considering as such an alternative.[48]

Experience gained under Part IV of the Ontario Act indicates that some of the provincial judges do not welcome the jurisdiction given them under Part IV, and that complainants must prosecute breaches of Sections 85, 86, 95 and 107, privately, if at all, because of the disinclination of local crown attorneys to prosecute.[49] An additional restraint upon the effectiveness of the remedies provided under Part IV arises because legal aid certificates, under the Ontario Legal Aid Plan, are rarely granted in landlord and tenant matters, and where they are granted the amount which the lawyer may become entitled to under the certificate places a considerable limitation on the legal service he is able to provide. Thus the complainant is either unrepresented or is often represented by student counsel associated with one of the student

47. See Interim Report of Ontario Law Reform Commission, n.7 **supra** at p.57.

48. C.C.S.M. 1970 c.L.10 s.8; En.S.M. 1966, c.33, s.3 and R.S.O. 1970, c.232, s.79.

49. Until such time as some alternative procedure is developed for providing civil redress in cases of breach of the Act the practice found in the case of labour relations statutes, where breaches of the statute are treated as summary conviction offences, will likely be continued.

It is suggested that the alternative referred to above (n.48 **supra**) would be more in keeping with the purposes of the remedial acts.

It is understandable that crown attorneys will not be eager to increase their already heavy burdens by readily agreeing to undertake the prosecution of such offences. The only real hope for vindicating the purposes which prompted enactment of the legislation will be settlement and adjudicative procedures which are truly available to the parties in terms of cost and time. As long as no suitable process of accommodation is available and as long as the parties, particularly tenants, must secure attendance of such witnesses as painters and decorators, the Acts will suffer from imperfect realization of their lofty goals.

On the basis of interviews and correspondence conducted by the writer with the Manitoba Rentalsman and his deputy, as well as with persons associated with the Manitoba Student Legal Aid Society, similar statements would seem to be applicable to the situation in Manitoba, although the role played by the office of rentalsman has been more aggressive and has perhaps been more supportive of the purposes of the remedial landlord and tenant legislation.

Personal interviews conducted with the Director of the Manitoba Legal Aid Plan indicate he is well aware of the problems outlined.

legal aid societies, authorized under the regulations to the Legal Aid Act.[50]

A properly conducted landlord and tenant case can easily require a large number of hours being devoted to its various aspects. Much of this time would be employed in attending upon witnesses (often other tenants of the same landlord) who may not wish to become involved (much as in the case of unfair labour practice disputes, where witnesses are often fellow employees of the aggrieved employee). In unfair labour practice cases the services of a field officer under *The Ontario Labour Relations Act*[51] has resulted in the resolution of many disputes. In the United States where comparable federal labour legislation enables the evidence obtained by the investigating field officer to be brought before a Trail Examiner, the burden of cost is, to a considerable extent removed from the complainant and his position made more equal in the deter-

50. The realities of landlord and tenant litigation are such that the mere introduction of such important tenant rights (a) to rented premises which are fit for habitation and in a good state of repair; (b) the right to possession until a court order for possession is issued; and (c) the right to have lease convenants treated as dependent, as in contract law rather than as independent, can become largely illusory in the absence of either competent legal assistance, or the intervention of some public authority such as the rentalsman, with the power to adjudicate with the assistance of trained assessors.

As long as the present adversary system is retained the very nature of landlord and tenant litigation will require the retention of competent counsel, as well as the availability of witnesses in support of claims or defences arising out of the state of repairs, which issue will usually be central in contested cases. In the absence of credible and disinterested witnesses the tenant (more often than the landlord) will be unable to establish his claim or defence.

If legal aid plans exist, and if the Ontario experience is any example, as presently constituted, Legal Aid does not provide necessary counsel to permit the poor tenant a means of resorting to the new rights created by statute. It would represent a cruel example of giving long needed rights but generally denying their being made meaningful, if the situation were to remain unremedied. In many ways the results would be as barren as the use of minimum housing standards by-laws, which are capable of being enforced only by public authority, to provide a basis for providing safe and healthy living accommodation. Even at their most effective, the use of such by-laws has been incapable of providing adequate protection for tenants. (See Interim Report of the Ontario Law Reform Commission, **supra** n. 7 at pp. 39-40; and see n.43 and n.14(a) **supra.**

It would appear that the only meaningful hope for the creation of rights and duties which can be readily enforced is to leave the decision to enforce rights and duties to the affected parties, but to overcome the deficiencies of the adversary system, in this area, by first making available advice and conciliation services, which if unsuccessful could lead to proceedings before a tribunal with resources to conduct on site examinations through its agents and the making of orders. Such tribunal must be able to sit at such times as meet the convenience of the parties.

Not only the poor but all citizens, both landlords and tenants, would benefit from such a procedure. For those who are ineligible for legal aid, the cost of properly conducting landlord and tenant litigation makes an attempt to enforce rights and duties more often than not a question of principle alone (See Interim Report, **supra.** n.7, at p.28).

Although the amount involved in landlord and tenant litigation is usually not large, the issues are of great importance. Issues ranging from the implications of being required to live in unsafe and unhealthy accommodations, to the right to privacy are of such fundamental importance as to call for urgent attention. In the past it was all too common for society to overlook the virtually total absence of rights in tenants of residential premises. This situation has assumed major importance over the past 100 years. Can a society hope to command respect for law in large numbers of its citizens who are every day reminded that they are without effective legal redress to any basic protection in relation to the rented premises which they occupy. Mere redressing of the wrongs substantively does little more than create the facade of meaningful change. The Manitoba amendments have sought to make the minimal protections, incorporated from the Ontario Legislation, meaningful. In analyzing the likely effects of the amendments I have attempted to examine the degree to which the intention motivating the legislation is likely to be interpreted in accordance with its apparent aims, and also to assess the degree to which the parties will be able to use the Act without meeting the same or similar procedural limitations which have heretofore had a tendency to thwart effective use of the substantive provisions.

51. R.S.O. 1970, c.232.

mination of the issue.[52] The examples taken from labour law precedents are only being put forward as one means of equalizing the position of litigants. Where the quality of justice is diluted by the inability of one or both of the parties, for financial reasons, to bring forward the evidence necessary to enable a fair adjudication to take place, we must be sensitive to proposals aimed at recitifying the situation.

In Manitoba the criminal sanction has been provided, *inter alia*, for: a) breach of Section 88 being the carrying out of distress proceedings which are abolished by that Section;[53] b) Breach of Section 95, being the privacy section;[54] c) Breach of Section 115, being a restriction against demanding payment or advantage for the privilege of exclusive access to residential premises for purposes of trade or delivery; d) Breach of Section 116, being the section restricting the method of obtaining an increase in rent; e) Breach of Section 113(2) the provision against retaliatory evictions;[55] f) Breach of Section 114, section prohibiting discrimination.[56]

It is interesting to note that the prohibition against discrimination contained in Section 114 of the Manitoba Act includes "refusing to rent or renew . . . because of membership or participation in an association of tenants by the prospective tenant or tenant". Such a prohibition is akin to the prohibition against employer discrimination against hiring a person or dismissing an employee because of union membership or engaging in union activities under the Labour Relations Act of Ontario and Manitoba.[57]

Unfortunately, the Manitoba section only refers to a refusal to rent to a prospective tenant, or failure to renew a lease with an existing tenant. Would such prohibitions prevent the giving of notice to quit by a landlord to a periodic tenant from month to month, because of the tenant's membership or participation in a tenants' association? It must be recalled that in the case of the periodic tenancy the law does not contemplate a new letting at the end of each period. Rather (and the point has been long settled), ". . . a periodic tenancy is not a re-letting at the commencement of every period but a springing interest which arises out of the original contract and is only determinable by a notice to quit."[58] Accordingly, in the case of a tenant whose interest is in the

52. See Murphy, "The National Labour Relations Board—an Appraisal' (1967-68), 52 Minn L.R. 819, for a description of the procedure in the United States under the **National Labour Relations Act** ch.372, 49 Stat. 449 (1935) as amended by the **Labour-Management Relations Act** (Taft-Hartley Act) 29 U.S.C. ch.153 (1964).
53. S.86 of the Ontario Act, n.4 **supra.**
54. S.93 of the Ontario Act, n.4 **supra.**
55. S.106(2) of the Ontario Act.
56. Also see **The Ontario Human Rights Code**, R.S.O. 1970, c.318.
57. R.S.M. 1970, c.132, s.4(3); C.C.S.M. c.L.10, s.4(3) R.S.O. 1970, c.232, s.58.
58. See Williams, **Canadian Law of Landlord and Tenant** (Third Edition) p.118.

nature of a periodic tenancy, the landlord might still be able to serve a valid notice to quit because the tenant belongs to a tenant association, notwithstanding the provisions of Section 114(b).

If the landlord in such case had already entered into a new lease with another tenant to commence upon the termination of the periodic tenancy, the original tenant would have no basis for claiming a breach of the landlord's obligation not to refuse to "renew" the periodic tenancy because of the tenant's membership in a tenants' organization. It would seem that a minor amendment would overcome the present defect in the section.

In addition, Section 117 of the Manitoba Act creates offences punishable on summary conviction, with provision for a fine of up to $1,000.00 for breach of Section 84, limiting the taking of security deposits and Section 86(1) imposing a requirement for the return of the security deposit within 7 days of the term having expired with interest at 4 per cent per annum.

Manitoba has also amended Section 117(1) by deleting the word "knowingly" in the first line thereof.[58(A)]

IX. *Some Further Comments Upon the Office of Rentalsman*

(a) *Access to Documents*

In Part IV to its *Landlord and Tenant Act*, the Manitoba Legislature established the office of Rentalsman: "(1) For the purposes of this Part, the 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." "(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."[59]

By section 85(3)[59(A)] the functions of the office of rentalsman include those specified in the Ontario Act for the Landlord and Tenant Advisory Bureaux under Section 110(3) of the Ontario Act.[60]

Manitoba enacted certain amending sections granting additional powers to the rentalsman:[61] "(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

58(a) C.C.S.M. c.L.70, En. S.M. 1971, c.35, s.23.
59. C.C.S.M. c.L.70, s.85(1), (2); En. S.M. 1970, c.106, s.3.
59(a) C.C.S.M. c.L.70, s.85(3), En. S.M. 1970, c.106, s.3.
60. R.S.O. 1970, c.236.

(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". "(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". "(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 (c) 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." "(7) In carrying out the power 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". "(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 the access is reasonable and necessary".

As might be anticipated, what were referred to as "snooping" provisions were roundly condemned as unwarranted incursions upon the freedom of citizens, by members of the opposition, when the measure was debated, during second reading.[62]

In addition to the functions granted by Section 85(3) of the Manitoba Act, the rentalsman has certain functions in the case of disputes

61. S.M. 1971, c.35, s.3 being C.C.S.M. c.L.70, ss.85(4), (5), (6) and (7).

62. Debates and Proceedings, Legislative Assembly of Manitoba, Vol. XVIII, No.108, p.2671(1971).

One can be sensitive to the right of citizens to be free from official harrassment and to the right to privacy. At the same time it must be appreciated that evidence vital to the enforcement of the provisions of Part IV may be peculiarly within the knowledge of one of the parties. Given the capacity for traditional proceedings to subvert the obtaining of necessary evidence the injection of the rentalsman ought to have the effect of equalizing the position of the contesting parties, provided that the office of rentalsman is ready to obtain the necessary evidence and has the resources to fulfil its statutory function.

The provision (s.85(8)) that requires application to the court ought to preclude frivolous applications.

arising over the non-return of security deposits. As amended the revelant section now reads:[63]

"Objection by Landlord to return of deposit

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; 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 theron 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."

It is noteworthy that the decision of the rentalsman only has binding authority when power to arbitrate is given with consent of both parties.[64] It is very likely that any attempt to impose a binding mandatory arbitration proceeding would have experienced constitutional difficulties. If it was desired to extend the power of the rentalsman, in such cases, it might have been possible to employ the system of references to a provincially appointed official, with the actual judgment or order being being that of the judge with the jurisdiction to decide the matter.[65]

(b) *The Rentalsman's Role in Enforcing the Landlord's Repair And Maintenance Obligation*

By the provisions of Section 119(1) and (2) of the Manitoba Act, the Rentalsman has the duty to attempt to have the landlord carry out his repair obligation, upon notification by the tenant.

Failure to succeed in having the landlord carry out "repairs that the rentalsman considers to be reasonable" results in the tenant being required to "pay the rent to the rentalsman until the repairs are carried out or made", and section 119(3) protects that tenant, in such case, from being considered to have defaulted in his obligation to pay rent.[66]

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63. S.87(1) of the Manitoba Act.

64. S.87(3) of the Manitoba Act.

65. See **The Mechanics' Lien Act**, R.S.O. 1970, c.267, s.31(2) and see **A.G. Ont. and Display Services Ltd. v. Victoria Medical Building Ltd.** [1960] S.C.R. 32, per Judson J. at page 44; affirming [1958] O.R. 759 (**sub. nom.**) **Display Services Ltd. v. Victoria Medical Bldg. Ltd.** and see **Huebert v. Sharman** [1950] 2 D.L.R. 344 (Man.), but see Macklem and Bristow, **Mechanics' Liens in Canada**, at p. 14.

66. Cf. 1970 S.N.S., c.13, ss.11(3) and (6). The Ontario Law Reform Commission in its **Report on Review of Part IV of The Landlord and Tenant Act** recommended: "Where a tenant claims to be entitled to withhold rent on the ground of an alleged breach of an express covenant or one implied under the provisions of Part IV, such rent shall be required to be paid by the tenant to the sheriff as a condition precedent to the tenant being allowed to file a dispute to the landlord's claim under the provisions of section 106."

By section 119(5) of the Manitoba Act the rentalsman upon receiving rent under subsection 119(2) is required to:

". . . 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 forwar dany excess rent received by him to the landlord within thirty days of receipt thereof."

Finally, the rentalsman "shall", where the landlord does not, (under certain circumstances) use the money deposited to effect the repairs ordered.

An appeal to a county court judge is provided for from a determination under section 119(5).

As established in section 119(3) of the Manitoba Act, the rentalsman is in the position of being both the "judge" and the person having the conduct of the matter, although the legislation has taken some pains to couch the Rentalsman's responsibility in administrative terms. Presumably the provision for appeal to a county court judge under section 119(6) will have a tempering effect upon the rentalsman's power. Apart from constitutional restraints, a hearing by the rentalsman, assisted by the reports of investigators who are independent of the rentalsman, in the presence of the parties and if they so choose, their counsel or representatives, has much to recommend it. Development of a body of expertise in landlord and tenant matters should be regarded with favour. Availability of the evidence from trained investigators would overcome the difficulties presently encountered in the course of conventional landlord and tenant litigation. Furthermore, by giving the parties the opportunity of appearing and adducing evidence, the possibilities for arbitrary conduct or apparent arbitrariness, on the part of the adjudicator, are diminished. Hopefully, this procedure would reduce the number of appeals and hence the delay in affording relief. To further reduce unfortunate delays, hearings should be capable of being obtained quickly and, if possible, at such times which meet the convenience of the parties, as in the case of evening sittings.

Some concern has been expressed over the economic feasibility of introducing such changes as have been referred to in the system of adjudicating disputes. Certainly, if the changes produced an avalanche of disputes the system might impose a very real strain on available resources. However, if needed reforms were introduced it should not take long for the courts to interpret those sections of the Act which are most

productive of conflict. With an adequate system of publicly supported advice and publicity, there is no reason why we could not anticipate a reduction in breaches of the Act, many of which are based upon ignorance or on present uncertainties as to the meaning of a number of important statutory provisions. This is not an unwarranted assumption, unless one holds to a view that the vast majority of citizens who are aware of the existence and meaning of a law, will nevertheless breach it where it suits their purpose.[67]

In Ontario the Legislature has provided for a summary proceeding before a county or district court judge to enforce the landlord's obligations for repair and the tenant's obligations for cleanliness and causing willful and negligent damage, by section 96(3)[68] of the Ontario Act: "The obligations imposed under this section may be enforced by summary application to a judge of the county or district court of the county or district in which the premises are situate and the judge may, (a) terminate the tenancy subject to such relief against forfeiture as the judge sees fit; (b) authorize any repair that has been or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off; (c) make such further or other order as the judge considers appropriate."

Under the provision in the Ontario Act, unlike that found in the Manitoba Act, in a proper case, the court may terminate the tenancy upon an application to enforce repair and maintenance obligations. In Manitoba a tenant has no alternative but to either commence an action for a declaration that the tenancy is at an end, based upon the provisions of Section 91, the matter not being capable of being dealt with otherwise. This relief might also be available under Section 124 of the Manitoba Act: "Any person may apply to the County Court for a declaratory order setting out his rights under this Act."

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67. See, Gorsky, **Working Paper on The Standard Form of Residential Property Lease in Perspective** prepared for and distributed by the Ontario Law Reform Commission, pp.13-14.
Reference is made to recent publication of explanatory brochures by the Manitoba Government and by the Law Society of Manitoba, on the rights and obligations of landlords and tenants under the Manitoba **Landlord and Tenant Act**, as amended. The language is non-technical and aimed at the uninformed. In one respect the brochures demonstrate the limitations imposed on such an enterprise. Where the statute is unclear there is nothing that can be accomplished by way of an explanatory brochure.

68. See, **Re Claydon and Quann Ltd. and two other applications**, [1972] 2 O.R. 405 where Doyle Co. ct. J. in interpreting Section 96(3) stated at page 408:
"In dealing with s.96(3) (c) of the Landlord and Tenant Act, and under the general jurisdiction being given to a Judge to make such further and other order as he considers appropriate, certainly in my opinion, this changes the common law right and extends the jurisdiction of a Judge to do what he thinks proper under the circumstances of the case which is brought before him, and I do feel that the very words of the section themselves give me the right to order an abatement of rent as I see fit."
At page 407 Doyle Co. ct. J. indicates that it might be proper to hear an application to enforce the repair provision (s.96 of the Ontario Act) and an application for possession at the same time.

This latter provision could also enable many other disputes to be determined without the need for the trial of an issue. Yet when the Ontario Act is examined it will be seen that those matters which require a declaration of rights have been provided for in the context in which they would most normally arise. For example: Section 106 enables a tenant, as well as a landlord, to make a summary application for an order declaring the tenancy agreement is terminated, and for ancillary relief. This remedy is available as part of a procedure in which the landlord claims for rent.[69]

X. *Procedure for Termination and Recovery of Possession*

As has already been suggested, the restrictions placed on the means of the landlord recovering possession, limiting them to those sanctioned by a writ of possession obtained from a court, along with those statutory provisions imposing repair and fitness obligations upon a landlord, must be viewed as the two most important changes effected by the recently enacted remedial landlord and tenant legislation.

Manitoba, while incorporating the restriction on recovering possession enacted in Ontario, adopted a summary procedure somewhat different from that enacted by the Ontario Legislature. In Manitoba the summary procedure is limited to an application by a landlord for a writ of possession, rather than, as is the case in Ontario, an application by a landlord *or* a tenant declaring the tenancy agreement terminated and for other appropriate relief including a writ of possession at the behest of the landlord and "other relief as may be equitable in the circumstances".[70]

The Ontario provisions enables the tenant's claim to be adjudicated upon where the landlord claims for arrears of rent and possession, whereas in Manitoba there is no room for making any order for payment otherwise than in favour of the landlord—although this could be reduced in a proper case by a claim for set-off by the tenant.

However, it is questionable whether the Manitoba provision would enable the tenant's counter-claim to be heard, in the landlord's proceeding, as the power to make a further remedial order is limited to "make such order as to costs as he deems proper".

Section 110(1) (c) (ii) of the Manitoba Act, provides that, upon a summary proceeding, the judge may make an order "for any damages or charges that the landlord is or may become liable to pay to a prospective tenant to whom the landlord had obligated himself to let those

69. Section 105(4) of the Ontario Act, n.4, supra.
70. R.S.O. 1970, c.236, s.106 cf. Weinrib, the Ontario Landlord and Tenant Amendment Act (1971), 21, U. of T. L.J.93 at p. 95.

premises, because of the wrongful use and occupation of the premises by the present tenant after the expiration or termination of the tenancy".

This provision enables the landlord to recover damages from a tenant by way of the summary proceeding in the special circumstances where the landlord may be sued for damages by a person to whom he has

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Since this article was written the Ontario Legislature enacted The Landlord and Tenant amendment Act 1972, S.O. 1972, c.123 in apparent response to the Ontario Law Reform Commission's, **Report on Review of Part IV of The Landlord and Tenant Act.** By section 3, section 106 of the Ontario Act was repealed and the following section substituted therefore:

106(1) A landlord may apply by originating notice of motion returnable before a judge of the county or district court of the county or district in which the premises are situate for an order for the payment of arrears of rent and compensation under section 105 and for an order declaring the tenancy terminated, or any of them.

(2) The originating notice shall be served on the tenant at least four clear days before the day for the return of the motion and it shall contain the following warning:

If you intend to dispute the claim for possession or the claim for rent or compensation due, you must appear before the County Court Clerk at the hour of ..... o'clock in the ..... noon on the ..... day of ..... at his office in the Court House at ..... or file with him before the ..... day of ..... a notice of dispute in writing, setting out briefly the grounds upon which you dispute the landlord's claim. If you do not appear or do not file a notice of dispute, the clerk of the court may sign an order directing that a writ of possession issue forthwith and judgment for the amount claimed.

(3) The tenant may dispute the landlord's claim by appearing on the return of the motion or by filing with the clerk of the court before the day for the return of the motion a statement in writing setting out briefly the grounds upon which he disputes the landlord's claim.

(4) No dispute to a claim for arrears of rent or compensation under section 105 may be made by the tenant under subsection 3 on the grounds that the landlord is in breach of an express or implied covenant unless the tenant has first paid to the clerk of the court the amount of the rent and compensation claimed to be in arrears less,

(a) amounts paid by the tenant for which he alleges he is entitled to set-off under clause b of subsection 3 of section 96, as substantiated by receipts filed; and
(b) amounts of rent and compensation alleged by the tenant by his dispute to have been paid.

(5) Where the claim of the landlord is not disputed, the clerk of the court may sign an order directing that a writ of possession issue or may give judgment for the amount claimed, or both, in accordance with the claim.

(6) Where the clerk of the court signs an order or judgment under subsection 5, the tenant may, within four days after the service thereof, by motion, ex parte, apply to the judge to have the order or judgment set aside and the judge may so order upon being satisfied that reasonable grounds for dispute exist.

(7) The judge may extend the time for bringing a motion under subsection 6 upon being satisfied that a proper case has been made for so doing.

(8) Where the claim of the landlord is disputed, the case may be set down for a hearing forthwith or at such time and place as the judge may appoint.

(9) After a hearing, the judge shall determine the landlord's claim and may make an order for a writ of possession, and give judgment for the arrears of rent and compensation under section 105 found due, or any of them.

(10) The judge may order that the enforcement of the writ of possession be postponed for a period not exceeding one week and such other relief as may be equitable in the circumstances.

While the main purpose of the substituted section was to make such proceedings for possession less prolix and to provide for a default judgment, it had the unfortunate effect of foreclosing an application by a tenant for termination. It is understood that this represented an oversight and that legislation will be introduced to restore the right of a tenant to make such application.

This is suggested in order to insure that all matters in dispute between a landlord and tenant, arising out of their relationship, ought to be capable of being adjudicated upon at such a hearing. There is no excuse for the maintenance of the previous rule that precluded a tenant from raising a breach of an express or implied covenant by the landlord as going to the extent of his obligation to the landlord. If such right is not recognized the discredited rule as to the independence of lease covenants will have been re-introduced along with the unfortunate need for a multiplicity of proceedings. Such possibility might have been prevented by more specific reference to such a right in the legislation.

It may be that the Manitoba legislature considered the amendment necessary because section 84(3) of the Manitoba Act did not provide, as the Ontario section did, that "a landlord . . . shall not require the delivery of any post-dated cheque . . ."

rented the premises in expectation of the first tenant giving up possession, after the first tenant's right of occupation had come to an end. Perhaps it would have been better to have clearly made the summary proceeding applicable to proceedings by either landlords or tenants to have the tenancy declared to be at an end (and not only the landlord's right to do so), as well as to provide for the adjudication of tenant's claims against landlord for breach of landlord's lease obligations (and not only to landlord's right to do so). One of the purposes of the summary proceeding was to avoid a multiplicity of proceedings. Under the circumstances,. and on principle, why should a claim by the tenant, whether by way of set-off or counterclaim, not be entertained? If this procedure is limited (as it appears to be in Manitoba), the landlord can recover a judgment for rent arrears, as well as obtain a writ of possession, while the tenant, who has a claim against the landlord, in the nature of a counterclaim, could not raise it except in a separate action. In Ontario, under Section 106(4), it is arguable that the power of the court to grant "such other relief as may be equitable in the circumstances", would enable the court to deal with the counterclaim. This result would be even more likely where the tenants' claim was based upon Section 96(3),[71] for breach of the landlord's repair obligation, which may be adjudicated, as well, by a judge of the appropriate county or district court, upon a summary application. For this reason there would seem to be no reason, in Ontario, why the landlord's application under section 106 and the tenant's application under section 96(3) could not be disposed of at the same time.[72]

As a county court judge, in Manitoba, has the power to adjudicate upon the landlord's claim for rent, why should there be a restriction against adjudicating upon a tenant's claims arising out of the lease? recognizing that the power of the court in Ontario to entertain expanded powers under Section 96(3) is discretionary. This would enable a judge of the court to require certain claims, clearly inappropriate for him to hear on a summary application, to be tried in a separate action. But what of the small claim which, if it were required to be separately litigated, would result in unnecessary costs and inconvenience? It should be recalled that the Ontario Act permits a landlord to resort to the summary proceeding to enforce the tenant's responsibility for ordinary

71. It is possible that in interpreting s.89 of the Ontario Act, (s.91 of the Manitoba Act): "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," may permit the set-off by a tenant to a claim for rent, in a proper case, and not only the lease being terminated. See the leading case of **Mondel v. Steel** 8 M. and W. 858, 151 E.R. 1289, for the common law rule in case of contracts for: (a) sale of goods, (b) provision of services and (c) to furnish chattels, where a breach of warranty (e.g. as to fitness) which results in a claim for unliquidated damages might be used as a **defence** to reduce the award on a claim for payment arising under the contract, and not only as a **counterclaim.** The common law rule has in the case of sale of goods been codified. R.S.O. 1970, c.108, s.51, R.S.M. 1970, c.233, s.54.

72. See n.68 **supra.**

cleanliness of the rented premises and for the repair of damage caused by his wilful or negligent conduct or that of persons who are permitted on the premises by him.[73] It would therefore seem that the tenant's claim for damage, caused by the landlord's breach of his repair obligation, should similarly be encompassed under the wording of Section 96(3)(c), which permits a judge to: "make such further other order as the judge considers appropriate". A claim, based on a breach of Section 96(1) of the Ontario Act, (e.g. for damages for the lessened rental value of the leased premises or other claim for damages) would now be open to a tenant in an action for enforcement of a breach of the statutory condition, and it is arguable that the court is not restricted to granting relief in the manner specifically provided for under Section 96(3)(a) and (b) of the Ontario Act.[74]

Whatever the result, there is reason for re-examining the advisability of providing a single forum for disposing of all claims between landlord and the tenant in the case of residential tenants. There does not appear to be any reason for maintaining a system which fosters an unncessary multiplicity of proceedings.

Manitoba has, with some justification, amended section 113 of its *Landlord and Tenant Act* so that the summary proceedings for possession provided for under Part III (similar to Part III of the Ontario Act but with a separation of proceedings for a writ of possession in the case of failure to rent) can no longer be used.[75] Section 113(1) of the Manitoba Act, as originally enacted, was taken from section 107 of the Ontario Act, which retained the proceedings for obtaining possession under Act III as an alternative to the summary proceedings under Part IV of the Ontario Act.[76]

Section 111(1) of the Manitoba Act, enables a judge, hearing the application for possession under section 110, to postpone the date by which possession must be given up by the tenant.[77] As much as one may sympathize with the unfortunate tenant and his family who find

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73. R.S.O. 1970, c.236, s.96(3).
74. See n.68 **supra** and see Weinrib, **op.cit.** at p.95.
75. C.C.S.M., c.L.70, En. S.M.1971, c.35, s.2.
76. However, see judgment of Mr. Justice Gale in **Re Ontario Housing Corporation and Carson** [1971] 1 O.R. 478 (C.A.).
Also see, **Breglia Investments Ltd. v. Rock et.al.**, [1972] 1 O.R. 728.
77. See, Kane v. Helston, (1946), 54 M.R.279, (C.A.) where it was held that there was no authority for a County Court Judge to impose a stay upon the execution of a writ of possession solely on the ground that enforcement would impose a hardship on the tenant. Dennistoun, J.A., dealing with an application made under Part III of the Manitoba Act stated with his customary forthrightness, although it is suggested with a certain lack of appreciation of the relative position of landlords and tenants: "The unfortunate situation now existing with regard to housing accommodation due to post-war conditions bears with equal severity on both landlords and tenants. The Court has no power to deny legal rights to a litigant on benevolent or charitable grounds": (at p. 280).

themselves without a place to live, one must also consider the position of a private landlord who has been deprived of part of his "stock-in-trade". Why should he alone bear the economic cost of a tragic social situation? What of the landlord who relies on the rent payments to meet urgent personal needs? Experience gained since the enactment of Part IV of the Ontario Act, discloses the extent of the frustration experienced by landlords, who not only have had a large number of new responsibilities imposed upon them by statute, but may also have to suffer an extended period when they are prevented from regaining possession and re-letting rental premises. In the *Interim Report of the Ontario Law Reform Commission*, it is stated: "(I)t must be emphasized again that the private landlord must not be expected to furnish accommodation because of tenants' economic hardship. If landlords are to be treated more like other creditors, then in recognition of their changed circumstances, they should not be expected to act differently. The landlord is entitled to his rent and the performance of the tenant's covenants. Failure by a tenant to carry out his obligations under the lease entitled the landlord to possession and an immediate right to sue for arrears of rent and for damages. Whatever the source of the tenant's failure to observe his obligations, apart from any wrongful act of the landlord, the responsibility for the social welfare of the economically oppressed or destitute tenant lies with welfare authorities, not the landlord. No doubt for reasons of insufficient income, injury, sickness, marital problems, as well as behaviour which is not accounted for, a significant minority of the population cannot be serviced adequately by the private rental sector. If the private sector is forced to do so, then the private landlord has a claim for special protective measures.[78]

Section 111(1) of the Manitoba Act, because it does not limit the discretion of the judge to specify a date by which possession must be given up, may impose an additional burden upon landlords which arguably does not belong with them. When a legislature sets out to effect a balance between competing economic and social interests, it must consider the impact of each of its decisions. Legislation, in order to realize its principal objectives, must eventually be accepted by the parties governed by its terms. If the complaints of landlords, arising out of difficulties encountered in regaining possession are given credence, and if their expressions of frustration are any indication of the true state of events, then the legislatures ought to accept the burden of insuring to landlords a means of obtaining possession quickly, where their

78. Interim Report, op.cit. at p.23. In recognition of this need for a fair balance between the interests of landlords and tenants, the Ontario Law Reform Commission has, in its **Report on Review of Part IV of the Landlord and Tenant Act**, recommended a new code of procedure for governing recovery of possession of the rented premises, at pp.9-22.

legal right to possession has been established.[79] If it is decided that private landlords are to be obliged, without compensation, to house persons who are unable, for any reason, to make their rental payments or fulfill their other lease obligations, then it would be only fair for the government to recompence the landlord for assuming the obligation of the state.

Section 111(4) of the amended Manitoba Act provides: "Where a tenant, before the execution of an order for possession pays the rent in arrears, together with any amount awarded as compensation or damages under section 110 and all costs, the proceedings shall be stayed and the tenant may continue in possession as of his former tenancy." This section follows closely section 77(5) of Part III of the Manitoba Act. It is once again stated that, where the tenant has an arguable counterclaim, the right to make such claim in the landlord's action should be provided, so as to clearly demonstrate the existence of jurisdiction to stay Part IV proceedings for possession, in an otherwise proper case, where monies are paid into court, representing rent claimed, pending determination of the tenants claim, which when realized could be set-off against the landlord's claim for rent.[80] Alternatively, if the tenant's claim should fail the monies paid into court could be paid out to the landlord and, in a proper case, the court could relieve the tenant from any forfeiture of the term.

Section 113(3) of the Manitoba Act states: "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."

This section, in part, incorporates the powers of a county court judge, under section 96(3)(a), of the Ontario Act. What the Manitoba provision fails to clearly allow for is any alternative forms of relief which would be open to a judge under section 96(3) of the Ontario Act, such as: a) a reduction in rent to the tenant; b) an order that the landlord pay the tenant the increased cost incurred as a result of having to move

79. Ibid.
80. See **Report on Review of Part IV of the Landlord and Tenant Act** n.78 **supra** at p.37.

into alternative accommodations while repairs are being effected. The Manitoba section could be used as a sword to intimidate a tenant who must move from one substandard premises to another. Knowing that the landlord has section 113(3) to rely on, how many tenants will persist in endeavouring to enforce the repair obligation of the landlord? In a case where repairs are "too costly" the court should have the power to order demolition and award damages to the tenant for breach of the landlord's repair obligations, but it is suggested that such right ought to be more clearly defined. Without some penalty a landlord of unsafe and unhealthy premises would have a convenient escape from liability. One of the purposes of imposing an obligation on landlords was, after all, to place restraints on renters of premises not suitable for human habitation. No summary procedure to enforce a breach of the statutory duty exists in Manitoba, save for the right to obtain a declaratory order as to rights given under the Manitoba Act and save for proceedings before the rentalsman. In effect section 113(3) may provide an excuse for a landlord, who has rented premises which do not meet or subsequently fail to meet the statutory standard under section 98(1).

Manitoba has added section 113(3.1) which goes some way to meeting the above objections: "Where under subsection (3) a court grants an order for possession or an order for eviction as a result of the allegation of the landlord either under clause (a) or (b) of that subsection and the landlord does not demolish the premises or carry out the repairs or rectification of any condition complained of by the tenant but subsequently rents the premises to another tenant, the landlord is guilty of an offence and on summary conviction is liable to a penalty of not less than five hundred dollars or more than one thousand dollars".

Section 113(3.1) does not, however, provide for compensation for a tenant who has suffered damage because of the request that the landlord carry out his repair obligations. It will very likely be the very tenant, who should most benefit from the repair obligation, who will "find himself in the street" if he attempts to enforce his rights. It does not seem likely that he will pursue the criminal prosecution under 113(3.1). If municipal enforcement of minimum housing standard by-laws provides any basis for judgment, section 113(3.1) will not be much resorted to. A tenant should be entitled to a viable remedy for breach of the landlord's repair obligation. It is very likely that the Manitoba enforcement provisions have substantially depreciated the value of the statutory obligation.

Although of no great importance, one wonders why it was necessary, in sections 113(3) and 113(3.1) of the Manitoba Act, to bifurcate the order for possession into "an order for possession or eviction". They

amount to the same thing and as the proceedings are for possession throughout all the other relevant sections, the single reference to an order for possession might have been better maintained throughout the Manitoba Act.

Conclusion

What is most important about the Manitoba amendments to *The Landlord and Tenant Act* is the willingness of the Legislature to experiment to find new solutions to old problems. What must cause some concern, however, is the apparent failure to consider the implications of many of the amendments, in part, because basic landlord and tenant principles of law have been overlooked.[81] Also, many well intentioned changes appear to have built in "loop-holes" which could result in their failing to achieve their intended purpose.

In addition, the functions of the office of rentalsman, as provided for in the Manitoba Act, while it represents an exciting and potentially useful departure from the conventional settlement process, may in many difficult cases be incapable of achieving the goals of speedy redress at minimal cost.

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81. The Manitoba "Standard Residential Tenancy Agreement" which came into operation on June 1, 1971, (pursuant to regulation 15/71, filed May 5, 1971, published in the Manitoba Gazette, May 15, 1971, Vol. 100, no.20, p.163) pursuant to C.C.S.M. s.118(1) En.S.M.1970, c.106, s.3 contains numerous examples, e.g. the failure to distinguish the difference between an assignment and a subletting in Part 12 of the standard form and the ignoring of the possible impact on the running of lease covenants in the forms provided.

Part 12 of the Manitoba Standard Form represents the provisions of Sections 93(1) and (3) of the Manitoba Act. Sections 93(1) and (3) read:

"93(1) Subject to subsection (3), a tenant has the right to assign, sublet or otherwise part with possession of the rented premises." "93(3) A tenancy agreement may provide that the right of a tenant to assign, sublet or otherwise part with possession of the rented premises is subject to the consent of the landlord, and where it is so provided, the consent shall not be arbitrarily or unreasonably withheld."
If the statute (Section 93(3)) **merely permits** the inclusion of a restriction on assignment, subletting and parting with possession, why has the Standard Form (as printed) included this restriction, thus representing an extension of the statutory power?

Part 12 of the Manitoba Standard Form reads:

"The Tenant has the right to sublet, assign or otherwise part with possession of the rented premises, subject to the consent of the Landlord. Consent will not be arbitrarily or unreasonably withheld on proper application, and provided the form of assignment is completed." (See form following this note).

It is difficult to understand why the form included and made a mandatory part of the Manitoba Form is restricted to assignments of lease, when the provision is concerned, as well, with subletting and other partings with possession. By imposing this limitation. where the form is required to be used, the form of words prescribed (which could only apply to an assignment) effectively prevents a sub-letting or other parting with possession, in a lease of residential property in Manitoba.

It also appears from the forms employed that the draftsman has made the assignee (inaccurately referred to as "sub-tenant" in the marginal note) responsible for all the original tenant's obligations. While making the burden of all the tenant's covenants run with the land, whether they touch and concern the land or not, may be a salutary step in the law, it has the effect of extending the assignee's obligations to the **personal** obligations of the assignor, something that has not yet been established by statute. This represents a fundamental change which would hardly be anticipated in the form of a regulation let alone in the guise of a standard form of lease.

Having compelled the assignee to enter into such an agreement, when insisted upon by the landlord, as a condition of giving his consent, (no other means being available), no similar obligation has been imposed on the landlord, whose obligations to the assignee to carry out his undertakings under lease covenants, apart from those imposed by statute, would be limited to those that run with the land and would not

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extend to personal obligations. It is not the extension of the normal assignee's obligation which is faulted, for there is ample argument to justify such a change in the law provided it also extends to the landlord and the assignees of the landlord. Rather, the lack of equal treatment between landlord and assignee seems unjust and unwarranted, quite apart from whether it is possible to achieve this purpose validly within the limited powers given by Section 118.

One might suggest that substantial changes in the law relating to the extremely complex and specialized subject of running of lease covenants would have been better achieved by a direct legislative response rather than by the questionable use of a mandatory standard form of tenancy agreement.

While it is open to a tenant to produce a form of assignment or subletting not provided for by statute, the wording of the Manitoba Standard Form permits the landlord to require the use of the prescribed form, being a condition precedent to the landlord not arbitrarily withholding his consent.

A final comment, with respect to Part 12 of the Manitoba Standard Form, is that it confuses the very real differences, both in concept and legal result, between an assignment of lease, a sub-letting and a parting with possession. As it stands, the provision in the Manitoba Standard Form related to assignments, sub-letting and parting with possession can only lead to confusion, because, as has already been mentioned, the form of mandatory assignment contained in the Manitoba Standard Form may effectively foreclose a sub-letting, or other parting with possession, notwithstanding that the form of consent, anticipates the possibility of future sub-letting and parting with possession. This, of course, would be impossible given the mandatory nature of the required forms. They clearly deal only with assignments being for the ". . . . remainder of the term unexpired".

The confusion in terms is to be noted throughout the "Assignment and Acceptance" and "Consent to Assignments" forms where the words "assignment" and "sub-tenant" occur in a context which indicates that they apply to the creation of quite different legal relationships. The designation of a proposed assignee as a sub-tenant does not affect the assignee's real legal designation, this being a result of the assignment of the **entire** term, which is provided for in the form of "Assignment and Acceptance" (and see The Ontario Law Reform Commission **Working Paper on the Standard Form of Residential Property Lease in Perspective**, appendix K, thereto, being "The Manitoba Residential Tenancy Agreement" —An Examination of an Experiment", pp.134-154, n.67 **supra.**)

The statutory form above referred to is here reproduced:

ASSIGNMENT AND ACCEPTANCE

FOR VALUE RECEIVED I (We) hereby assign all my (our) right, title and interest in and to the within Tenancy Agreement and the remainder of the term unexpired thereunder to .....

..... heirs and assigns and do also hereby guarantee, and remain liable for the prompt payment of the rent and the performance of the agreements on the part of the Tenant as therein mentioned, in the event of default by the sub-tenant.

Tenant

WITNESS .....

WITNESS .....

IN CONSIDERATION of the above assignment and the consent thereto of the Landlord, I (we) .....

..... hereby assume and agree to make all payments and perform all agreements and conditions of the within Tenancy Agreement by the tenant therein named to be made and performed from the .....

day of ..... A.D. 19..... and I (we) agree that all rights and remedies of the Landlord against the tenant under said Tenancy Agreement be available against me (us) to all intents and purposes as if I (we) had been named tenant therein and as such had executed same.

Sub-Tenant

WITNESS this ..... day of

..... A.D. 19.....

WITNESS .....

WITNESS .....