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Landlord-Tenant Relationships:

Time for Another Look

LANDLORD-TENANT RELATIONSHIPS:

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This Bulletin in Brief—

On January 1, 1970, *The Landlord and Tenant Amendment Act, 1968-69* came into effect throughout Ontario. In it the Legislature attempted to revise and modernize the legal principles and rules which governed residential tenancies, many since medieval times. Whether these amendments have successfully adjusted the rights and responsibilities of landlords and tenants to the realities of the contemporary rental market remains to be seen.

In this issue of *Civic Affairs* the Bureau suggests that many of the real stresses and problems in the landlord-tenant relationship have been overlooked. Implicit in the Legislation is the notion that the relationship, and the problems which arise, are legal and that legal remedies will either deter any abuses or quickly and effectively correct them in a legal proceeding.

These assumptions do not sit well in today's context. Because of the nature of the landlord-tenant relationship and the legal system many of the problems which arise do not lend themselves to solution by the legal remedies provided. In many cases, social, political, or economic solutions may be the most appropriate. Yet, even where a legal remedy is appropriate, access to the system is not evenly distributed either between or among landlords and tenants. Those who can afford the time and money to take legal action need not do so. For the low-income, frequently those most in need of a remedy, however, the present legal alternatives may not be effective.

In introducing Bill 234 to the Legislature, the Attorney General commented:

> Let us bring the bill into effect and let us see how it works for perhaps six months and then if we find that it is working hardship on landlords or tenants, then reconsider it.

The Bureau suggests that in many instances the provisions of this new Act have, in fact, worked hardship on both parties and that it is time to reconsider the amendments in order to effect a more realistic balancing of the interests concerned.

Landlord-Tenant Relationships: Time for Another Look

During the past three decades the process of industrial development has marked Canada's growth. The requirements of our industrial society, in particular a concentrated labour force, have profoundly influenced the nature of our lifestyles. Today, the majority of Canada's population is located in a handful of sprawling metropolitan areas and population projections indicate that the proportion will increase. The continued escalation in land values in the major centres has placed private residential property for single family home ownership beyond the reach of many. The commercial value of property, land speculation, and concern for the tax base have encouraged a shift toward multiple residential dwelling units as the most feasible and economical use of land space.

Residential tenancies are becoming the normal circumstance for an increasing percentage of our population. In Metropolitan Toronto alone there are some 650,000 tenants in approximately 260,000 rental units. Completely tenant communities are no longer uncommon. For many of these tenants, rental living has become a way of life rather than an interim period prior to the purchase of a private home. Tenants today are undertaking a rigorous study of their rights and responsibilities. No longer are abuses overlooked which were tolerated as part of a temporary condition. Individually and in groups, tenants are seeking new social, political, and legal status as well as acceptable accommodation. At the same time, individual and corporate landlords are in the business of leasing accommodation for the highest return possible and the lowest output necessary. This is the crux of the conflict which has traditionally characterized "the second most passionate human relationship".[1]

The landlord-tenant relationship developed in a society which was exclusively rural and agrarian. Tenants were essentially serfs or farmers renting realty rather than accommodation. Leases were regarded as conveyances of land rather than contracts. Given this property-oriented interpretation of the relationship, it is not surprising that until very recently landlord-tenant law perpetuated doctrines abandoned in other fields:

1) The Doctrine of "Caveat Emptor" – At common law, the landlord guaranteed that the premises were reasonably fit for habitation only if they were rented as furnished. Otherwise, the doctrine of *caveat emptor* governed, whereby the tenant, absent fraud, must take the premises "as is".

2) The Doctrine of Independent Covenants – Since the lease was viewed by the common law as primarily a conveyance of property rather than a contract, there was not provision for the interdependence of covenants. A breach of part of the agreement by one party does not authorize the failure to perform by the other. This led to the shocking rule that the destruction of the premises does not abate the obligation to pay rent.

3) The Doctrine of Mitigation of Damages – In contract law, if one party breaches the agreement the other cannot sit by and allow the damages to accumulate. The damages must be

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[1] Asch, J., in *Fairchild Investors Inc.* v. *Cohen,* 43 Misc. 2d 39, 40, 250 N.Y.S. 2d 446, 447 (Civ. Ct., N.Y.C. 1964).

mitigated. The common law of landlord and tenant recognized no such obligation.

For an urban society the presumptions of an agrarian landlord-tenant law are singularly inappropriate and incapable of dealing with the problems of private housing. The concentration on land in landlord and tenant law (which must be curious to the apartment dweller of the 20th floor) resulted in an unfortunate legal status for tenants. The application of feudal principles had placed an unreasonable burden on the tenant who had little bargaining power with which to improve his position.

Recognizing that the law governing landlord-tenant relations had failed to meet the demands of an urban setting, the Ontario Law Reform Commission undertook a study of the legal problems respecting residential tenancies.[2] Subsequent to the tabling of this Report in December, 1968, amendments were made to *The Landlord and Tenant Act*[3] in an attempt to better meet the needs of residential tenants. The lease which sets out the responsibilities and privileges of both landlords and tenants has been the centre of attention.

In Ontario, when the lease is written rather than verbal, the landlord must give to the tenant a copy within 21 days of its signing or renewal.[4] Otherwise the obligations of the tenant under the lease, including the obligation to pay rent, cease until the duplicate is received.[5]

While the Act requires that each tenant be given a copy of the lease, there is no provision to ensure, or even encourage, an adequate understanding of the lease terms. Unfamiliar and incomprehensible lease provisions have been a common tenant complaint for some time. The Law Reform Commission found in their *Tenant Study*[6] a far greater number of tenants had received a copy of their lease than had understood it. Yet, the Legislature saw fit to provide for delivery rather than comprehension.

Written leases[7] are usually drawn up by, and favour, the landlord. Prospective tenants rarely arrive with a lease proposal. The lease signing is an automatic ceremony with the bargaining power heavily weighted toward the landlord. Leases are rarely negotiated, especially in times of low vacancy rates and spiralling rents. Onerous terms are unknowingly accepted in the tenant's desire for immediate accommodation. Although the tenant cannot contract out of the rights protected by the statute[8], too few tenants are aware of their rights or the protection of the Act. Tenant vulnerability in lease bargaining and signing has led to various proposals to strengthen the tenants' position. One suggestion is a standard form lease, to be used throughout the Province.[9]

Those advocating the standard form lease see it as performing two primary functions: standardizing terms and informing and educating individuals as to their rights and obligations. Presumably, the standard form would eliminate onerous lease terms and prevent a prospective tenant from unknowingly waiving statutory rights or consenting to prohibited liabilities. Since the standard

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2 Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies*, Toronto, 1968.

3 S.O. 1968-9, c.58. Except where noted, the provisions of the Act apply to tenancies of residential premises, including public housing and leases entered into before 1970 (S.81). Commercial tenancies or combined commercial-residential tenancies are clearly excluded. Since the Act applies only to tenancy agreements, pure contractual relationships such as licensees (i.e., lodgers, boarders and roomers) are not to be affected.

4 S.82(1).

5 S.82(2).

6 Report p.18.

7 Monthly tenancies – most common for the low-income – rarely use written leases, a verbal agreement being the norm. The requirement that a duplicate of the written lease be delivered to the tenant (presumably so the tenant can see what has been agreed to) does nothing to assist those operating under a verbal agreement.

8 S.81(1). It should be noted, however, that any covenant considered to be sufficiently important to include in a standard form lease presumably could be enacted in statutory form, thus eliminating the need for such a lease.

9 see *The Short Form of Leases Act*, R.S.O. 1960, c.373.

form lease should be easy to publicize, both the landlord and tenant would be familiar with the terms of the lease and both would recognize their obligations and insist upon their rights.

The major problem with the standard form lease is the setting of the uniform contents. Is it desirable, for example, to have a uniform agreement regarding the provision of services (plumbing, heating, water, electricity, and so on), maintenance, repairs, control of canvassers and deliverymen, for all forms of residential tenancies? Should a monthly tenancy have the same arrangements provided in a ten year lease? Are the provisions suitable for a one-bedroom apartment in a high rise also suitable for a single family detached house on its own plot of land? The use of a standard form lease presupposes the existence of a common set of lease provisions to cover all residential tenancies. The Bureau considers it doubtful that any such common set could be found that would adequately address the problems of the various types. Providing for additional clauses to cover peculiarities of particular situations would re-expose the tenant – especially the low-income tenant – to the very pressures the standard form lease was designed to avoid.

A partial remedy to the problem of adjusting the standard form lease to special circumstances might be to ensure that tenants are adequately informed of their rights in the legislation. A felt need in this direction has given rise to various tenant information groups and suggestions for public tenant information bureaus. But these suggestions rest on the assumption that information will balance the landlord-tenant relationship. They will assist a balance but they require that the individual tenant be prepared to seek the information and act on it. The latter is the thorny area, especially with low-income, generally disadvantaged tenants. What is needed to enable the tenant to act on the information is additional power or leverage for the tenant, a leverage that is far more likely to result from the non-statutory milieu of strong tenant associations and collective lease bargaining than from over reliance on statutory standard forms and legalistic remedies.

Instead of abolishing deposits, the Legislature accepted the essential recommendations of the Report and instituted certain conditions upon their retention. Landlords are no longer permitted to collect a security deposit to protect against damage,[10] but a rent deposit up to the amount of one month's rent may be retained and held solely against the last month's rent. An interest rate of 6% annually must be paid on the deposited funds.[11]

A new procedure for the recovery of deposits is also provided. A landlord is now required to repay the deposit (together with the accrued interest) within 15 days of the termination or renewal of the tenancy.[12] A landlord wishing to retain any portion of the deposit must notify the tenant concerned and state the reasons for the retention,[13] usually damage and unusual wear. Since written notice is not required, the landlord may presumably notify a tenant orally. After serving notice, the landlord either obtains the written consent of the tenant[14] or a court order for retention.[15] If a landlord fails to comply with the Act, the tenant may seek an appropriate order from a provincial judge[16] or utilize the conventional remedy of suing the defaulting landlord for repayment.

The issue of deposits has not been settled satisfactorily in the eyes of either landlords or tenants. Many tenants are finding the U.D.I. prediction of loss-shifting to be correct. A recent brief of the East York Tenants' Association stated that rents have been raised $20 – $40 per month as a result of the abolition of security deposits. Asking all tenants to insure the landlord's premises from the activities of a few will work inordinate hardship on most tenants, but particularly on such groups as low income families, students and the aged. In the absence of rent control or review, the abolition of security deposits and its

[10] S.83(1).
[11] S.84(2).
[12] S.84(3).
[13] S.84(4).
[14] S.84(4) (a).
[15] S.84(5), (6).
[16] S.107(2).

reflection in rent scales should be further investigated. Both Nova Scotia[17] and Manitoba[18] have decided against abolishing deposits but have limited them and made them subject to government arbitration.

RENT DEPOSITS

The payment of "security deposits" has long been a common and disputed feature of leasing arrangements in Ontario. Landlords have traditionally justified the deposit as a means of curbing damage to premises and recovering unpaid rent. The Urban Development Institute, in its brief to the Law Reform Commission, defended the retention of the deposits as follows:

> The U.D.I. regards provisions for security deposits as an absolute necessity in a standard lease. They provide the owner with his sole protection against the unscrupulous tenant who vacates damaged premises or fails to pay rent owing. It is important to consider that if the costs of such actions are not born by offending tenants, they will be passed on to other tenants in the form of higher costs, and therefore, higher rents.

Tenants, in addressing the Commission, presented several counter arguments:

1) The deposit does not operate effectively as a deterrent against breach of covenants.
2) The landlord is in the business of renting space. The risk of non-payment is a risk all parties who extend credit must face. In any case the legal remedies of contract law are always available.
3) The collection of deposits provides the landlord with interest-free capital which in the past has often been abused or commingled with other funds.
4) The commencement of a term is a time of financial straits for most tenants. To impose a deposit over and above relocation costs and rent is to impose an unreasonable burden.

The fixed rate of interest is another problem area. In a tight money market, with mortgage interest rates at 10% – 11%, the landlord can reinvest with a return in excess of costs. Since the stated purpose of the deposit is to break even on costs, it would seem far more appropriate to utilize a floating interest rate that includes a flat fee for administrative costs to the landlord.

Finally, restrictions should be applied to deposits retained to prevent abuses. Hopefully, since rent deposits must now be repaid by the landlord's assignee, the disturbing result of *Re Dollar Land Corporation and Solomon*[19] will not recur. The tenant should, however, be secure that his money is safely invested and that his claim shall be prior to that of any creditor, including a trustee in bankruptcy. The Act should be amended to provide that the deposit have quasi-trust status and be subject to the provisions of the *Trustee Act.*

PRIVACY

The right to privacy – reasonable and peaceful use of one's own home – goes beyond the traditionally narrow issue of landlord entry. The rules and regulations that govern the use of a rental unit touch directly on the tenant's decision as to lifestyle and reasonable and private use of the unit. The rules are presumably established to guard against tenant actions that impinge on the right of other tenants to

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17 *Residential Tenancies Act, 1970,* S.N.S. 1970, c.13, S.9.
18 *Landlord and Tenant Amendment Act,* 1970 S.M., 1970 c.10 S.84, 86.
19 (1963) 2 O.R. 269, 39 D.L.R. (2d) 221. The Court held that the obligation to return a deposit did not pass from the owner to whom it was paid, to a new owner of the apartment building.

enjoy their home (as well as to protect the landlord's investment). This is an area full of value judgments and discretionary decisions as to what constitutes an infringement on someone else's reasonable right to privacy; it is an area with high potential for abuse. Because of the variations in appropriateness of a particular rule or regulation, it is not an area that lends itself to statutory control. For precisely that reason, however, the development of an appropriate set of rules and regulations is uniquely suited to tenant management decision-making. The structure for that decision-making could range from adversary (collective tenant bargaining) with a fixed term of application for rules, to cooperative (joint tenant-management committees) with an ongoing review.

Where statutory control is appropriate is in the area of landlord entry and tenant access to trade delivery services.

Except for emergencies or where a right to show the premises to prospective tenants has been reserved, neither the landlord nor superintendent has the privilege of access of an occupied unit unless there has been at least 24 hours written notice or the specific consent of the tenant has been obtained.[20] Curiously, although the legislation sets out the procedure to be followed, it does not include any penalty for an invasion of the tenant's privacy. Presumably, a landlord who abused his enumerated rights of access would be trespassing; a section specifically setting forth a statutory remedy would be in order.

The new Act provides for free access to multiple-unit dwellings for the political canvassers of federal, provincial and municipal candidates at reasonable times.[21] Though acknowledging the right of tenants to be politically informed, the Legislature has ignored the issue of trade delivery services. It is common practice in many apartment buildings for the landlord to restrict the number of tradesmen servicing the building. To do otherwise would presumably result in increases in security problems and costs of cleaning and repair. Such considerations in limiting access are necessary to the smooth and economical functioning of a building. Unnecessary and indeed illegitimate is the practice of providing a monopoly to a tradesman in return for payment to the landlord or superintendent. To date, Manitoba is the only province which has expressly prohibited the practice of accepting payments from tradesmen in return for exclusive access. The Ontario Law Reform Commission has noted this problem and has recommended that such practice be made illegal. The Bureau agrees and recommends that the Act be amended accordingly.

ASSIGNMENT AND SUBLETTING

The new Act provides that all tenants, except those in public housing, have a right to assign or sublet.[22] This right may be subject to the landlord's consent which, where so provided, cannot be unreasonably or arbitrarily withheld.[23] While subletting fees are abolished, a landlord may collect administrative expenses that result from processing a sublet.[24] Disputes regarding the reasonableness of the expenses claimed by the landlord are referred to the local County or District Court.[25] Perhaps a schedule of reasonable fees and reasonable grounds for rejecting a proposed subtenant would encourage the resolution of disputes short of an already over-crowded courtroom. Substantial case law already exists on the subject and should facilitate the development of such a schedule.

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[20] S.92.
[21] S.93.
[22] S.90(1), (2).
[23] S.90(3).
[24] S.90(4).
[25] S.90(5).

SUBSTANDARD ACCOMMODATION

Based on agrarian premises, the common law viewed the granting of a lease as a demise of the estate of property and little else. Provided the estate was delivered and thereafter continued to exist the tenant was assumed to have received all that had been bargained for. Consequently, the landlord guaranteed that the premises were reasonably fit for habitation only if they were furnished, otherwise the doctrine of *caveat emptor* governed. Aside from certain structures which remained under his control (roofs, halls, etc.), the landlord was not obliged to repair unless there was an express agreement to that effect.[26] Given the weighty bargaining position which the landlord usually enjoyed such convenants were not common.

This situation was brought under a degree of control by the Ontario *Public Health Act,* and certain municipal housing standards by-laws.[27] The by-laws deal essentially with the installation and maintenance of minimum facilities, minimum sanitation standards, and the prevention of overcrowding. From the city's point of view such a code is an inexpensive method of responding to those demanding improvements in slum conditions. It shifts the blame for such conditions, and the burden for improving them from the tenant to the landlord. Unfortunately, the codes have too frequently proven to be unenforceable and ineffective as an affirmative remedy.

In setting code standards the municipality must strike a balance of fair rents and fair returns. Landlords contend, rightly or wrongly, that strict enforcement of these by-laws would put strong pressure upon their already modest incomes and reduce the possibility of a voluntary improvement program. In the long run, these pressures would presumably be relieved either through higher rents or the conversion of the premises to some other purpose. Without a variety of safeguards and supportive actions, the result of strict enforcement for the low-income tenant (most likely to be in substandard accommodation) is the loss of a place to live, substandard or otherwise.

The agencies responsible for enforcing these codes are commonly hampered by financial and personnel limitations. (Only about 50 inspectors are employed for all of Metropolitan Toronto.) Complaints made to the welfare department usually initiate an inspection of the premises. Because inspection is not automatic, it relies on the initiative of the tenant. Past practice has demonstrated that many tenants are often either unaware that complaints may be made to the welfare department or else fearful of possible retaliation. This is particularly true of low-income tenants likely to be in greater need of this kind of assistance. Door-to-door inspection on an area basis was introduced in Toronto in 1955 to overcome these problems. The limited number of inspectors, however, has restricted the effectiveness of this technique.

As a variation on automatic area inspection, Iowa, Michigan, and New York State have instituted systems that require all premises to be licensed before renting.[28] In order to merit a license the building must meet the specifications of the housing code. Under a licensing system, landlords would be obliged to obtain a certificate of occupancy prior to renting and upon renewal. Fees collected from the issuing of licenses would be used to offset administration costs of the program.

A private action brought by a tenant is frequently suggested to supplement regular inspections or action by a public agency. Some of the advantages are obvious. As tenants enforce the by-law on their own premises, there would be an overall improvement in rental accommodation. Improvements for which tenants themselves are responsible would presumably result in good group morale that would encourage reliable

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26 *Cockburn* v. *Smith,* 1924 2 K.B. 119, *Victor* v. *Lynch,* 1944 3 D.L.R. 94.

27 see *City of Toronto Act,* S.O. 1967, c.131 as amended by Housing By-Law no. 73-68, March 14, 1968.

28 Iowa Code § 413.106; Mich. Comp. Law § 125.500 (1948); N.Y. Mult. Dwell. Law. § 302 (McKinney 1966).

tenants to take pride in maintaining the premises and unreliable tenants to act more responsibly. There are, however, some disadvantages to private enforcement. An individual tenant may be prevented from exercising a right of action through ignorance of the regulation or fear of landlord retaliation. Continued living under substandard conditions may result in social alienation – a loss of faith in the system to effect any improvements. Some tenants may actively oppose enforcement if their lifestyle has actively contributed to the deterioration of the premises. In some cases, tenants may use private action to harass landlords. While provision for private action is important, housing standards remain a matter of public concern and private action should not be relied upon for enforcement.

After January 1, 1970, rented premises must be provided and maintained in a "good state of repair" and "fit for habilitation".[29] Presumably this is not an objective standard but is related to the age, character and locality of the premises. According to the terms of the new legislation the landlord must also comply with all health and safety standards. At the same time the tenant is responsible for the ordinary cleanliness of the premises as well as for the repair of any wilful or negligent damage.

By clearly setting out the obligations for repair which each party must bear the Legislature has moved the law in a contemporary direction. Responsibility for repair has been allocated to the party in the best position to assume it. Prior to the new amendments it was patently unfair to oblige a tenant to pay for a repair merely because it became necessary during his term. Now the law has assumed that the landlord is better able to pay the costs or at least is in a position to distribute his expenses. While this arrangement is clearly suitable to short term tenancies, it may not be as desirable in long-term tenancies. In the latter case, the parties may prefer to negotiate lease terms that anticipate tenant responsibility for general repairs in return for some consideration from the landlord (a rent reduction, a longer term, and so on). Consideration should be given to exempting long term leases from the blanket coverage of this section of the Act.

[29] S.95(1).

To enforce the responsibilities imposed in section 95 either party may make summary application to the local County or District Court. The judge adjudicating the application is given broad and discretionary powers. Under section 95 (3) (a) tenancy may be terminated subject to such relief against forfeiture as the judge sees fit. It is likely that such an order would only be made in extreme circumstances. Section 95(3) (b) provides a complex, but probably more satisfying statutory remedy. The judge may authorize the repair that has been made, or is yet to be made, and can order the cost to be paid by the party responsible or recovered by a "set-off" against the rent when the tenant pays for the repair on the landlord's behalf. In addition, the judge may make any further order he deems necessary. Presumably such an order may deal with the extent of repairs, time of repairs, and possibly a rent abatement during the period of disrepair.

Whatever the method for bringing a landlord to task, the system relies on a willingness to apply effective penalties (and the existence of effective penalties to apply). For example, although the maximum fine for a housing code violation is $300, the usual sanction is a nominal $50. Certainly, a large fine in some situations may preclude landlord compliance or encourage abandonment of the building. Frequent use of a token penalty, however, has little if any deterrent effect, and may instead be treated as a license to continue the practice of violation.

The ambiguity of the enforcement section in the present legislation and the paucity of cases interpreting it place both parties in an uncertain position. To protect the landlord, who may be willing to make any required repairs but is unadvised of the need, specific provision for the giving of notice should be included. To eliminate the possibility of an unreasonable or excessive price for the repair when the tenant is overseeing it, the section should also require the tenant to submit bids for the proposed work to the landlord. The tenant who is paying for repairs believed to be the landlord's responsibility, however, is placed in the hazardous position of speculating on what is either permitted or required regarding repair and payment of their costs. An incorrect guess may result in

the tenant either paying for the repairs directly or being evicted for non-payment of rent if the cost of the repair has been inappropriately deducted from the rent. Such issues as whether there is a limit on the costs which are recoverable or, whether a tenant will be compensated a reasonable amount for labour if the repair work is done directly rather than hired out, remain unsettled.

In an effort to ensure that the health, safety, and comfort of tenants is not substantially impaired or endangered, several jurisdictions have provided for rent withholding under prescribed circumstances. This method of economic retaliation – illegal in the common law view of landlord-tenant relationships – has been authorized in several different forms.

In New York the Spiegel Law[30] applies to the special situation where a recipient of public assistance is eligible for aid in the form of payment for or toward rental housing. In the case of substandard accommodation, the welfare department (which generally makes payments directly to the landlord) may retain the rent. Prior to withholding, the welfare agency must have received a report of each violation from the appropriate department. If the violations occurred as a result of the tenant's misuse, the Spiegel Law does not deprive the owner of his right to collect rents.

Repair and deductions by tenants have been authorized in five American states. [31] These statutes allow a tenant to apply his rent toward the repair of the premises when the landlord is recalcitrant. In all the statutes, the landlord is given a reasonable period to perform the required repairs. The legislation in California limits the expenses to one month's rent. An outstanding defect in these statutes as drafted is that they apply only "in the absence of an agreement to the contrary". Since leases are generally prepared for and by landlords, it is not surprising that the statutory right is often waived.

Both New York and Massachusetts have passed legislation which authorizes rent-withholding under a court sponsored receivership arrangement.[32] The tenant, after obtaining a written order, may make rent payments to the court with appropriate jurisdiction, provided any arrears at the time of the action have been paid to the court. Once such payments are made the tenant is granted a stay of dispossession proceedings. An administrator is then appointed to manage the building and make the necessary repairs. To meet the cost of repairs, the receiver can issue debt certificates which take precedence over all private interests. Upon the completion of the repairs the landlord regains full right to the accumulated rent.

In practice, the receivership procedure has not been an entirely satisfactory remedy. Before the remedy can be initiated, the violation must be recorded as such by municipal authorities. Accordingly, the whole bureaucratic process is brought into play. In addition, for the violation to be recorded it must be a gross failure to comply with minimum standards of health and safety. To effect the major repair, the collection of a number of rents is usually necessary – a requirement that assumes a closely knit, effective tenant action.

Certain states have provided that where a public official certifies a dwelling as unfit for human habitation, the duty to pay rent and the right to collect it are suspended.[33] The tenant may withhold his rent and deposit it into an escrow account at a bank or trust company. If after six months the building has not been rectified as habitable, the money in the fund is returned to the

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[30] N.Y. Soc. Welfare Law § 143.b(2) (McKinney 1966).

[31] N.D. Cent. Code § 47-16-12-13(1960);
S.D. Comp. Laws. Ann. § 43-32-8-9(1967);
Mont. Rev. Codes Ann. § 42-201-202(1961);
Okla. Stat. Ann. tit. 41, § 31-32(1954);
Col. Civil Code § § 1941, 1942 (West 1954).

[32] Mass Gen. Laws Ann. ch. 111 § 127F (Supp. 1969);
N.Y. Real Prop. Actions Law § 955 (McKinney 1963).

[33] Pa. Stat. Ann. tit. 35, § 1700.1 (Supp. 1970);
Mich. Gen. Laws Ann. § § 125.530.534 (Supp. 1970);
Mass. Comp. Laws Ann. ch.111, § 1275 (Supp. 1970) No. 728, [1969] Conn. Pub. Acts

depositor. In the interim the tenant must suffer the gross abuse.

A slightly different remedy is available to tenants of substandard dwellings in New York City.[34] The New York Rent and Rehabilitation Administration is empowered to decrease the permissible rent for a decline in services. In theory, rent is abated in proportion to the gravity of the decline. This program is, however, limited to rent-controlled dwellings. The major drawback with this rental abatement program is that as rents are decreased the funds necessary for repairs are reduced.

As a self-help remedy, withholding rent provides the tenant with an effective means of obtaining clean, safe, and sanitary dwellings as defined by the housing by-laws. In theory, the payment of rent is appreciated as something more than the transfer of possession, it is recognized as a reciprocal covenant with an obligation on the landlord to provide adequate services and repairs. In practice it brings direct and immediate pressure to bear upon the landlord. Only the most prosperous landlords and real estate companies could afford to make payments on mortgages, pay property taxes, and meet other non-deferrable expenses from sources other than rent. Under such financial pressure, the landlord will be more receptive to the legitimate demands which tenants may make for the repair and maintenance of the premises. Despite these arguments, the only Canadian jurisdiction to adopt a statutory rent withholding remedy is Manitoba. In that province, a public official – a rentalsman – may retain rent payments until the unhealthy or unsafe conditions are corrected.[35] Ontario law has not recognized non-payment of rent as legitimate tenant action when the state of the premises violates a reasonable standard of health and safety. Certainly any illegal activities of tenants which would not otherwise be tolerated should not be protected. But the failure of a landlord to comply with housing regulations should be a defence to the non-payment of rent. The Bureau recommends that a mechanism be established to permit rent withholding when a landlord fails to undertake outstanding repairs in violation of the housing code.

DISTRESS AND EVICTION

The provisions of the new Act with regard to the right of distress are most welcome and far-reaching. This archaic right of a landlord to enter the premises and seize enough furniture and goods to provide reasonable security for rent arrears and expenses has now been abolished with the unfortunate exception of tenants who entered into their leases prior to January 1, 1970.[36] At the same time the alteration of any exterior locking system by either landlord or tenant, without mutual consent, is now prohibited.[37]

Further, as of January 1, 1970, a landlord is not permitted to evict a tenant or in any way take possession of the rented premises without a writ of possession.[38] To obtain such an order, the landlord must serve the tenant notice of termination. If the tenant refuses to leave, the landlord must then serve him with 15 days notice of the Court hearing.[39] If, at the hearing, the tenant can convince the judge that the notice was based on a retaliatory intent the court may refuse the order for possession and declare the notice invalid.[40] This protection includes within its ambit either a report to a minimum standards enforcement agency or the attempt to secure or enforce his legal rights.

This retaliatory eviction rule represents an effort to secure tenants' rights by restricting

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[34] N.Y. City, N.Y., Admin. Code Y51-5.0(h) Supp. (1969); 1 City of New York, Rules and Regulations of New York City Agencies, § 34.2(1967).

[35] *Landlord and Tenant Amendment Act*, R.S.M. 1970, c.120, S.98, 119.

[36] S.85 (1) (2).

[37] S.94.

[38] S.106(1).

[39] S.105(3).

[40] S.106(2).

landlord interference. As an expression of public policy this section is commendable. However, like the very few other statutory attempts to restrain retaliation, tenants will probably have difficulty in exploiting its protection.[41] First, section 106 applies only when a formal notice to quit is served. It does not apply to other potentially retaliatory measures such as an unconscionable rent-hike or a reduction of services to which a tenant is entitled. These retributive tactics may, in effect, operate as a forced eviction. Secondly, at the hearing the judge must face the problem of intention before deciding whether to grant an injunction phrased in terms of the landlord's motive. The tenant apparently has the burden of proof and must convince the judge on a balance of probabilities. To avoid factual problems and questions of intent, an eviction or rent increase within a given time period (for example 6 months) following the exercise by the tenant of any protected activity should be "prima facie" retaliatory. This would require the landlord to show affirmatively that his actions were not for the purpose of retribution or reprisal.

TERMINATION

It is a common practice for leases to provide that either the landlord or the tenant must give notice to terminate or else the tenancy will be continued. Consequently many tenancies have been continued because of an improper understanding of the process of termination. To clear up the proper means of termination the Legislature has set out clear requirements for the form of the notice to quit, the length of the notice period and the service of the notice.

Provision is made for the length of the notice period required. For a weekly tenancy one week's notice must be given; for a monthly tenancy one month's notice must be given; and for a yearly tenancy sixty days notice are required.[42] The amendment is unclear in its attempt to define the starting date a year to year tenancy shall be deemed to run.

Notice may be given either orally or in writing, unless a landlord intends to apply for writ of possession under section 105 in which case it must be in writing.[43] A written notice must be signed by the person serving it and must identify the premises.[44] The notice must also specify the d te of termination or simply state that the tenancy will terminate "on the last day of the period of the tenancy next following the giving of the notice".[45] This provision has alleviated misunderstandings on the length of the term.

Provision is made for the landlord to serve his tenant personally except where the tenant is absent or evading service.[46] In this case the notice may be served by (a) giving it to an adult residing with the tenant, (b) posting it conspicuously upon the premises or (c) sending it by registered mail to the tenant's address.

A tenant may serve notice on the landlord personally or send it by ordinary mail to the landlord's address.[47] To facilitate this each landlord is required to post, in a conspicuous place, his name, address and the sections of the law dealing with termination procedures. There is no enforcement clause included in this provision and, consequently, few landlords have complied with the order.

The procedures governing the termination of tenancies are generally simple and straightforward and as such they are satisfactory. However, because of the discretion vested in the landlord the tenant has virtually no security of tenure. Unless the tenant can prove that the termination and eviction are motivated by discriminatory or retaliatory motives he can be forced to relocate without cause at the termination of the lease. The non-availability of suitable

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41 Note. Landlord and Tenant – Retaliatory Evictions, (1967), 3 Harv. Civil Rights L.Rev. 193.
42 S.100, 101, 102.
43 S.98(1).
44 S.98(2).
45 S.98(3).
46 S.99(1) (2).
47 S.108(1) (a).

alternative housing and the expenses of moving now require the modernization or suspension of this rule. For protection, the landlord should be free to evict a tenant who is illegally in arrears of rent or who has committed criminal or destructive acts on the premises. Otherwise, just cause should be required. As a corollary, arbitrary or excessive rent increases aimed at a tenant to procure a termination should also be restricted.

A tenant who, for any reason, abandons the premises, may still remain liable for all the rent for the entire term of the lease. Prior to 1970 the landlord could accept the repudiation of the lease and sue for the accelerated rent owing. Now, provided the right to rent is held by the courts to be a right to damages,[48] losses must be mitigated. The landlord must take all reasonable steps to re-rent the premises.[49] This introduction of the contractual principle of mitigation encourages the productive use of housing accommodation without undermining the landlord's investment. There seems to be no reason to expect any increase in the frequency of abandonment as the tenant remains primarily liable. In addition the landlord is only expected to take reasonable steps and not make all possible efforts to re-rent.

A tenant who, rather than abandoning the premises, refuses to vacate after giving notice, owes to the landlord compensation for use and occupation. The landlord's claim is presumably set by reference to the previous rent charged. This claim can be included in an application for an order of termination under section 105.[50] Finally, a new tenancy is not created unless the parties so agree.[51]

LANDLORD AND TENANT ADVISORY BUREAU

As a final major reform the new amendments provide that any municipality may establish a Landlord and Tenant Advisory Bureau.[52] Should a Bureau be established it is allocated the following powers:[53]

a) to advise landlords and tenants,
b) to mediate disputes between landlords and tenants,
c) to disseminate information for the purpose of educating and advising landlords and tenants,
d) to investigate complaints of conduct contravening legislation governing tenancies.

This allocation of powers ensures that each Bureau will be concerned primarily with the provision of information, advisory and conciliation services.

In the past, the effectiveness of progressive reforms has often been undermined by ignorance or uncertainty on the part of those persons the legislation was designed to benefit. In the case of the landlord and tenant amendments the advisory bureaus have been designed to advise landlords and tenants and to refer them to legal assistance before their rights are lost. Since many people, especially individual tenants, may hesitate to consult a lawyer and are often intimidated by the legal process, the provision of an accessible government agency is a useful corollary to the legislation. It is not surprising then that within a year most urban municipalities had exercised their option and established a local board. To date their workloads have been substantial. The Metropolitan Toronto Bureau, for example, reported a total of 29,439 enquiries between its origin in October 1970 and May, 1971.[54] Approximately 83% of these enquiries were by tenants.

Aside from their role as information agencies, Bureau authority is limited. They

[48] Lamont, pp.17-18.
[49] S.91.
[50] S.104(4).
[51] S.104(2).
[52] S.109(1), (2).
[53] S.109(3).
[54] Metro Department of Housing Report, June 15, 1971, p.3.

have no legal powers or sanctions. No power of enforcement is provided, the attendance of the parties cannot be compelled, nor can the boards subpoena documents; the bureaus can only mediate where both landlord and tenant are willing parties. And this is not always the case:[55]

> These cases (in the "No Redress" category) have revealed that a segment of landlords and tenants alike do not wish to co-operate with each other or with the Landlord and Tenant Advisory Bureau. Unanswered telephone messages and unacknowledged correspondence are not unusual to Bureau staff.
>
> If it is desired the Bureau possess the authority to demand the attendance of parties to a complaint received, appropriate recommendations might be made to the Province of Ontario.

In spite of their limited powers the bureaus have managed to successfully conciliate more than 50% of the complaints received.

Manitoba uses the office of rentalsman as a device to resolve landlord-tenant conflicts. The rentalsmen are appointed by the Lieutenant-Governor in Council. While the Act acknowledges that the success of the rentalsmen may well depend upon their full-time accessibility and familiarity with the local area, it does not set forth the qualifications of the appointee nor does it address itself to the need for a sizeable, qualified and well-financed staff to assist the rentalsman.

The office of rentalsman has been designed to function like the Landlord Tenant Advisory Bureau in Ontario. In addition to the powers of the Ontario bureau, rentalsmen have general powers of mediation and arbitration of any dispute between a landlord and a tenant. Further specific powers are given with respect to security deposits, repairs, and possibly rent review.

Where a landlord wishes to retain a security deposit he must forward it, with a statement of his reasons, to the rentalsman who in turn will endeavour to mediate or (with the consent of both parties) arbitrate the disposition of the deposit. The onus is, as it should be, on the landlord first to forward the deposit and, if mediation or arbitration fails, to commence an action for its recovery. This may well prove to be a more desirable solution to the problem of security deposits than the Ontario approach. It will retain the deterrent effect, if any, of the security deposit, facilitate tenant recovery where legitimate, and eliminate loss shifting and the consequent higher rents which have resulted in practice in Ontario.

With respect to repairs, the rentalsman scheme combines mediation with a form of rent withholding. If mediation of a repair problem fails and the rentalsman deems the repair a reasonable one, the tenant is entitled (subject to the landlord's appeal to a judge of the County Court) to pay his rent to the rentalsman until the repair is completed by the landlord or, on his default, by the rentalsman.

This source of immediate relief does away with the expense, delay, and uncertainty involved in obtaining a remedial order of the court (as is required under section 95 of the Ontario Act). In addition, since discretion is vested immediately in the rentalsman, the bureaucratic process of inspection and certification which is required in other rent withholding schemes is short-circuited. While the discretion of the rentalsman will presumably be guided by the statutory definition of a good state of repair, he is only obliged to find the repair "reasonable" before a tenant may be permitted to withhold his rent. Thus a series of individually minor defects may be deemed sufficient in the totality of the circumstances to warrant rent withholding. Conversely, discretion could also be exercised to tolerate a more serious defect where it is reasonable to expect that the required repair may result in an unbearable rent increase or the total conversion of the premises with the resultant special dislocation. Again the onus is placed squarely and fairly on the landlord who is given a right of appeal to the courts.

There are, however, limitations and difficulties with the scheme. Triggered by tenant notification, the remedy is not self-executing, a recurrent problem evidenced in several procedures developed to resolve tenant-landlord disputes. A partial

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[55] Metro Department of Housing Report, April 28, 1971, p.3.

correction might be to permit notification by any interested party, especially building or housing inspectors or officials of special agencies. The process is set up on an individual rather than a collective basis; no provision is made for a collective complaint by a group of tenants. Interestingly, the premises complained about must be "occupied" by the tenant, raising the question of whether common areas are included. The lack of a provision for collective action may inhibit the scheme's effectiveness. The withholding of only one tenant's rent may not be sufficient incentive to the landlord to undertake the repairs especially where the term of the tenancy has almost expired. Collecting the rent for only one unit may not provide the rentalsman with sufficient funds to commission the repair. Withholding all the rents from an entire building where one of the units is in need of repair and the establishment of a sizeable revolving fund at the disposal of the rentalsman may remedy these shortcomings.

Undoubtedly the overall appeal of the rentalsman approach to landlord-tenant relations derives from its reliance on mediation and arbitration. At present, the arbitration is voluntary and requires the written consent of both parties. The value of a binding, out of court settlement may warrant consideration of a statutory provision for a compulsory arbitration clause in all leases. In addition to the ability to compel participation in arbitration proceedings, the rentalsman should have clear powers to subpoena documents and witnesses, and his award should be enforced as an order of the court.

The real strength of mediation and arbitration in landlord-tenant disputes is the finessing of the court system upon which the present Ontario legislation relies. Arbitration is a means of solving a dispute by molding a system of adjudication to accommodate all the problems which may arise and to provide for their expeditious solution in a manner which generally accords with the variant needs and desires of the parties. The rentalsman-arbitrator can perform functions which are not normal to the courts, and the considerations which help him fashion judgments may indeed be foreign to the competence of the courts. Often the dispute is such that courts would be unwilling to entertain it; yet, in the context of landlord-tenant relations, the problem may assume considerable proportions. The rentalsman would deal with "any dispute", not merely those that a court would deem meritorious. Even the processing of apparently frivolous claims on a localized and informal basis may have theraputic values. One result of the mediation-arbitration process should be a more stable landlord-tenant relationship in which exploitation or confrontation would be discouraged and hopefully avoided.

RENT CONTROL

Rent control has long been a complex and controversial issue. Landlords vehemently oppose it, while tenants' groups push for its implementation or extension. Spokesmen for landlords contend that a rent control program would increase the rate of deterioration of existing housing as repairs and maintenance must be deferred. Developers, it is argued, would tend to build luxury dwellings, feeling they could not compete with controlled buildings which dominate the lower rent markets. Or, new investment and construction in rental housing might be stifled altogether, thereby aggravating the housing shortage. Tenant groups minimize these effects and insist that some form of regulation is essential for the tenants who are victims of frequent and/or excessive rent increases. The groups contend that the collection of unconscionable rents, particularly in the absence of a free rental market, must be restricted.

Ontario has not regarded rent control as an element suitable for inclusion in landlord-tenant legislation and the Bureau agrees with this position. Rent control is properly part of a broad pricing policy. A mechanism to review a proposed increase objected to by

the tenant through a mediation and arbitration function, however, would seem to be appropriate and might be part of a general expansion in the authority and jurisdiction of the landlord-tenant advisory bureau.

TENANT ORGANIZATION

This discussion of landlord-tenant relations has repeatedly highlighted the need for strong, sophisticated, well-organized tenant associations. They are a necessary element of the redistribution of power between landlords and tenants that cannot be entirely effected by legislative change.

Increasingly, individual tenants are grouping together to call attention to themselves as a social entity, to educate themselves, and to equip each other with the knowledge and confidence necessary to pursue their substantive rights.

Despite the important role such groups are beginning to assume, they have not been recognized in law and they must be. Tenant unions must be guaranteed the right to organize. Harassment of tenant organizers is similar to the retaliation taken by owners against tenants who report health law violations to the local enforcing agency. Just as harassment of tenants who report health law violations to the local enforcing agency is prohibited, harassment of tenant organizers should be prohibited.

Supplementing the right to organize, the right to inform must also be protected. Canvassing and handbilling are essential tools for tenants to employ in organizing. Statutory clarification is needed in this area to guide landlords, tenants, and the courts more precisely. Tenant organizers should have access to multiple unit buildings without threat of prosecution for trespass, invasion of privacy, disturbing the peace, or any other criminal offence. It is doubtful that the existing legislation which guarantees a right of access for the representatives of candidates for municipal office gives tenant organizers such immunity. Specific provision should be made for the protection of organizers, both residents of the building or strangers to it, provided their activities are peaceful and they enter no individual unit without first obtaining permission.

An approach to tenant organization which has proven effective in Chicago is based on a collective bargaining model. Once a tenant union is organized, a grievance committee may be formed under a collective agreement between the landlord and the union. Any grievance which cannot be settled by the parties is submitted to a tripartite arbitration board composed of landlord and tenant representatives who mutually select a chairman. The recognition and responsibility awarded the tenant unions have encouraged them to supervise the premises, an action which has resulted in a reduction of vandalism, overdue rents, and vacancies. The success of the Chicago experiment merits testing in Canada's urban centres.

Summary and Conclusions

The amendments to the legislation have eliminated a number of centuries old anachronisms in the judge-made law which were inconsistent with the rights and obligations of the parties to a tenancy arrangement in the 1970's. Under the revisions tenants must be given a copy of the lease, if it is in writing; the tenant is protected against entry by the landlord without notice; consents to assignment or subletting cannot be unreasonably withheld; the landlord is obligated to keep the

premises in repair; distress, the seizure of furniture and goods for failure to pay rent is abolished; locking out of tenants in breach of their lease is also prohibited; tenants are protected against retaliatory termination of leases; landlords are prevented from contracting out of these statutory changes.

These changes go a long way toward recognizing that the tenant, as well as the landlord has a proprietary interest in the rented unit that the building is the landlord's business but the tenant's home.

Some of the changes may even have gone too far. Security deposits against damage, as a deterrent to tenant neglect or wilful damage, have been abolished. But most tenants objected to their inability to regain the deposit, rather than having to give it in the first place. Rents have been raised as a self-insurance scheme by the landlords. It might be fairer to allow such deposits, but to provide that their retention depends on the decision of an impartial observer, not the landlord.

Similarly, while it makes sense to require the landlords of multiple buildings to make repairs, there should be an obligation on the tenant to notify the landlord of the need. In some cases, it may be more desirable to allow the obligation to be bargained out by the parties, particularly for long term leases or leases of detached middle class houses.

On balance, however, the Bureau feels that the changes still have not gone far enough in protecting the tenant. The changes redress some of the major effects of the uneven bargaining power of landlords. Once such effects are admitted, why correct some and let others stand? Among the further changes which would be desirable are: abolition of the power to require the last month's rent in advance, in exchange for a revised damage security deposit; spelling out of the grounds on which consent to an assignment can reasonably be withheld; the adoption of municipal housing by-laws as the minimum (though not necessarily full) standard of the landlord's obligation to repair; the clarification of the tenant's right to do necessary repairs when the landlord fails to do so and deduct the cost from the tenant's rent; the protection of the tenant's right to privacy by providing penalties for breach of it; the clear recognition of the tenant's right to organize and form associations to deal collectively with landlords.

There remain, however, a number of economic and social problems which are outside the ambit of the legislation. With the changes made and those recommended above, lawyers and lawmakers will have gone as far as they can in adjusting legal rights within the framework of the existing concepts of landlord and tenant legislation. Two major issues remain: price and security of tenure. The Law Reform Commission, despite urging from tenants, could not deal with the question of rent control. Instead, they recommended "jawboning" bodies – advisory bureaus – and further study. They were right in so doing. The issue of rent control is an inextricable part of larger policy issues, the development of comprehensive national and provincial housing policies and prices and incomes policies. Rents alone can be controlled directly by regulation, by contract or by overall supply policies. They can be controlled as part of an overall prices policy. Or they can be left alone and incomes supplemented. Direction is not forthcoming from any level of government.

Similarly, there has been no move to give tenants security of tenure. The landlord can still decide not to renew a lease or to terminate a monthly tenancy (although not for reasons of retaliation). Are our legislators prepared to allow a tenant to stay on as long as he wishes and to be removed only for cause? And at what rental?

Finally, granted the numerous new legal rights given to tenants, will they be willing and able to enforce them? Will middle income tenants be prepared for the inconvenience of pressing for their rights in court? Will low income tenants, particularly those who do not even have a lease, know of their rights and trust lawyers and the legal system to protect them?

It may well be that the answer to these questions demands not only changes in the legal relationship governing landlords and tenants, but changes in the character of the parties to the relationship. The Bureau contends that an extremely important element in encouraging the change is the introduction of collective bargaining in landlord-tenant relations.

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