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Paul Stuart Rapsey

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CASE COMMENTARY: Reference re Residential Tenancies Act, 1992, Nova Scotia: Throwing Residential Tenants to the Political Winds

PAUL STUART RAPSEY, B.A., LL.B.*

RéSUMÉ
L'auteur analyse une récente décision de la Cour suprême du Canada en ce qui a trait à la Loi de 1992 sur la location de locaux d'habitation (Nouvelle-Écosse). La Cour a réexaminé les questions de juridiction ayant trait aux litiges d'occupation résidentielle et au transfert de l'autorité sur cette question d'une cour supérieure dont les membres sont nommés par le gouvernement fédéral à des tribunaux administratifs qui sont constitués par les gouvernements provinciaux. L'auteur conclut qu'il s'agit d'une décision politique plutôt que motivée par une analyse juridique. Cela a réduit les droits des locataires à un simple droit au maintien du locataire dans les lieux. L'auteur étudie plus profondément la rapide réaction du gouvernement de l'Ontario suite à une décision concernant la Loi 96, soit la Loi de 1996 codifiant et révisant le droit de la location à usage d'habitation. L'auteur est d'avis que cette loi prive les locataires des droits les plus fondamentaux malgré les protestations contraires du gouvernement.

INTRODUCTION
This paper examines the recent decision of the Supreme Court of Canada in the Reference re the Residential Tenancies Act, 1992, Nova Scotia decision. The decision appears to be one of politics and convenience rather than of carefully developed law. The court reached a unanimous decision but in three separate ratios. The decision has opened the gateway for the provincial governments of

* The author is presently working as a research lawyer for the Ontario Legal Aid Plan, Clinic Resource Office. He graduated from the University of Toronto law school in 1985. He was a clerk to the Chief Justice of the Supreme Court of Ontario and has been in private practice and has practised as a lawyer in the Ontario legal aid clinic system. The views expressed in this paper are those of the author in his personal capacity.

the day to tinker with what has historically been, at least in the province of Ontario, the domain of the federally constituted superior courts: i.e., the power to evict residential tenants from their homes. Since this decision was rendered, the Ontario government has moved quickly to revamp the overall scheme and to reverse the direction of residential tenancy law in that province. This paper will also examine some of the highlights of this significant legislative reform.

BACKGROUND
In the mid-1970's, after less than a decade of special residential tenancy law, the province of Ontario completed a series of careful and comprehensive law reform commission studies which had begun in the mid-1960s. The *Interim Report* led to the introduction of Part IV of the *Landlord and Tenant Act* (the LTA) in 1969 under the continued common law jurisdiction of the provincial superior courts.

The second report of 1972 led to significant amendments to Part IV procedure and scope. At the same time a system of rent review was introduced by the *Residential Premises Rent Review Act, 1975*. Jurisdiction for rent review was given to an administrative body.

The law reform commission studies culminated in a government initiative to transfer jurisdiction over all matters pertaining to residential tenancies from a divided system of courts and tribunals to one comprehensive administrative body having exclusive jurisdiction over contractual landlord and tenant issues and over administrative rent review issues. This body was the Residential Tenancy Commission under the Ontario *Residential Tenancies Act, 1979* (the RTA). This Act purported to revoke Part IV of the LTA and incorporated an enhanced version of that enactment. However, only the parts of the Act dealing

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7. The Residential Premises Rent Review Board.
with rent review and the constitution of the tribunal were ever proclaimed into force. The *vires* of the matter of the transfer of jurisdiction from the courts to the administrative tribunal was referred by the Lieutenant Governor in Council to the Ontario Court of Appeal\(^9\) and ultimately to the Supreme Court of Canada.\(^10\) The right of the province to transfer two judicial powers of the superior courts was at issue in this reference:

1. the legislative authority of the Legislative Assembly of Ontario to empower the Residential Tenancy Commission to make an order evicting a tenant as provided in *The Residential Tenancies Act, 1979*, and

2. the legislative authority of the Legislative Assembly of Ontario as provided in *The Residential Tenancies Act, 1979* to empower the Residential Tenancy Commission to make orders requiring landlords and tenants to comply with obligations imposed under that Act.

It was argued that these two powers were within the exclusive jurisdiction of the superior courts under s.96 of the *Constitution Act, 1867*.\(^11\) As such it was a federal head of power under the Constitution. Therefore, the province would have no jurisdiction to interfere in that matter. The Court of Appeal delivered a unanimous judgment. It held that the attempted transfer of jurisdiction in both cases was not valid.\(^12\) The matter was then appealed to the Supreme Court of Canada.

In deciding the issue, the Supreme Court of Canada examined in detail the history of the superior and lower courts’ jurisdiction over these two particular matters in the provinces at the time of and prior to Confederation in 1867. If the lower courts under the common law had either exclusive or shared jurisdiction over a particular matter prior to Confederation, then they continued to have that jurisdiction afterwards. *The Constitution Act, 1867* gave the provinces the power to constitute and regulate the lower courts. This includes the power to constitute judicial and quasi-judicial tribunals concerning the governance of any matter under the provincial sphere of power.

The Supreme Court of Canada, *per* Dickson, J.,\(^13\) held that an administrative tribunal may be clothed with power formerly exercised by s.96 courts, so long

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11. Then known as the *British North America Act, 1867*, 30–31 Vict., c.3 (UK). The name of the statute was amended in the Schedule to the *Constitution Act, 1982*: “Modernization of the Constitution”.
as that power was merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If the impugned power formed a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting "like a court", then the conferral of power in question would be *ultra vires*. The Supreme Court applied a three-step test for determining whether a conferral of power was *ultra vires*:

1. Is the power one that was historically exercised by section 96 courts?
2. If yes, can the power still be considered to be "judicial" within its institutional setting?
3. If yes, is the power merely subsidiary or ancillary to general administrative functions assigned to the tribunal?

With respect to the historical enquiry, the Supreme Court held that the eviction and compliance powers were broadly conformable to the historical s.96 court jurisdiction to eject and to award damages or specific performance. Provinces cannot avoid the limitations of s.96 simply by taking a traditional s. 96 function, simplifying procedural matters, and then transferring the jurisdiction to a non-s.96 tribunal.

In examining the "judicial" context of the second step, the Court held that the hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole. The Residential Tenancy Commission's powers under the impugned statute to order eviction or compliance were, in all cases, to be exercised in the context of a *lis* between parties. In substance, the Commission was exercising judicial powers roughly in the same way as they were exercised by the courts. The impugned powers, therefore, when viewed in their institutional setting, remained essentially "judicial powers".

In examining the third branch of the test, it appeared to the Supreme Court, upon reading the legislation as a whole, that the central function of the Commission was that of resolving disputes, ultimately by a judicial form of hearing between landlords and tenants. The chief role of the Commission was to adjudicate, not to administer a policy or to carry out an administrative function. The administrative features of the legislation could be characterized as ancillary to the main adjudicative function. The impugned powers were the nuclear core around which other powers and functions were collected. Although the Legislature may contract court jurisdiction, it cannot lift judicial functions wholesale from the superior courts and vest them in a tribunal of its own. The impugned powers,
therefore, failed each branch of the three-step test and were held to be *ultra vires*. In the end, although the entire *Residential Tenancies Act* appeared in the Revised Statutes of Ontario for 1980, the parts dealing with *Landlord and Tenant Act* issues were never proclaimed. Part IV of the *LTA* was not revoked. Many amendments that were positive in scope were never incorporated into future amendments of Part IV.

**THE NOVA SCOTIA REFERENCE**

The Nova Scotia House of Assembly proposed amendments to the provincial *Residential Tenancies Act* which would permit the Director of Residential Tenancies to investigate and attempt to mediate landlord and tenant matters, and ultimately to make orders for compliance, termination, compensation etc. The amendments also provided for an appeal from decisions or orders of the Director to the Residential Tenancies Board, with a further possibility of reconsideration by the Residential Tenancies Board. Finally, there was to be an appeal to the Nova Scotia Court of Appeal with leave on a question of law or jurisdiction.

The issue of the province's jurisdiction to enact such provisions was referred to the Nova Scotia Court of Appeal. There were two questions posed to the Court:

1. were the powers purported to be granted to the Director *intra vires*, and
2. were the powers purported to be granted to the Residential Tenancies Board *intra vires*?

The Court of Appeal held "yes" to the former and "no" to the latter. The Court of Appeal stated that the appropriate analysis to deal with these issues was a three-step analysis set out by Dickson, J. in the Ontario *Reference* case.

The Court of Appeal concluded that the legislation in question proposed a broad and far reaching transfer of jurisdiction from the superior court of the Province to a provincial appointee for the final adjudication of issues involving residential tenancies. After an examination of the history, the Court of Appeal concluded that jurisdiction over landlord and tenancy matters was vested in s. 96 courts in three of the confederating provinces (Ontario, Nova Scotia and New Brunswick) and was a concurrent or shared jurisdiction between the inferior and superior

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17. *Supra*, note 10. The three steps have been outlined earlier in this paper.
courts in Quebec. Therefore, the second step in the Dickson analysis in the Ontario *Reference* was engaged.

With respect to the powers of the Director, the Court of Appeal held that mediation and investigation were the first two steps in the role of the Director. Adjudication was the third step. The "order" issued at the end of the Director's process was akin to the opinion of the Director with respect to settlement. While adjudication was a feature of the powers of the Director, it was difficult to conclude that at the first level of the dispute the judicial function predominated or that it was central to the jurisdiction the Director was authorized to perform. The Court of Appeal concluded that the Director's function under the proposed amendments was administrative in nature rather than judicial, and therefore the provincial appointment process of the Director and the Director's delegation to residential tenancies officers were both *intra vires*.

By contrast, the power of adjudication was the principal and dominant function of the Residential Tenancies Board. The Court of Appeal therefore determined it had to move to the third step in the analysis and examine the Board in its institutional setting. The Court of Appeal held that the grant of a judicial power to provincial appointees was valid when the judicial powers were merely subsidiary or ancillary to general administrative functions or where they might be necessarily incidental to the achievement of a broader legislative policy goal. In adjudicating on the matters described in the amendments, the Board was not exercising administrative functions. Judicial adjudication was the core and central function of the Board. The Board's purpose was not to implement or advance any broad regime of social policy. The amendments with respect to the Board were, therefore, found to be *ultra vires*.

The province had the authority to confer the powers of mediation and investigation upon persons of its appointment other than judges appointed pursuant to s.96 of the *Constitution Act, 1867*. The powers proposed to be conferred on the Board failed only because in the exercise of those adjudicative functions the Board would be operating like a s.96 court. This was not saved by the right of an appeal to the superior courts. The Board, presided over by provincial appointees, was competent to exercise those functions provided there was a supervisory jurisdiction exercised by a s.96 court of first instance.\(^\text{18}\) Limiting the powers of appeal to questions of law or jurisdiction was inadequate in the context of the s.96 mandate.

In dissent, Freeman, J.A. found that residential tenancies jurisdiction was not included in the core of superior court jurisdiction protected under s.96, and that

\(^{18}\) This supervisory role of the courts is currently in place in several provinces: e.g., Manitoba, and Saskatchewan.
it was not necessary to go on to the second and third steps in the Dickson analysis. The Nova Scotia Court of Appeal decision was then appealed to the Supreme Court of Canada.\textsuperscript{19} The Supreme Court of Canada offered three separate \textit{ratios}\textsuperscript{20} but in the result unanimously concluded that the Ontario \textit{Reference} decision was too constrained in its scope. Without expressly overruling it, it distinguished it out of existence. In short, the Supreme Court held that the constitutional question posed of it in the Ontario case was far too narrow for a full examination of the issues.\textsuperscript{21}

The minority judgment of the Supreme Court of Canada in the Nova Scotia \textit{Reference} attempted to characterize residential tenancy law as a "novel" matter that was not in existence at the time of Confederation and which, therefore, could not have been within any branch of government's exclusive jurisdiction. It did not fail even the first branch of the three step test. Therefore, that was the end of the matter in the minority's view.\textsuperscript{22}

In addition, Lamer, C.J., for the minority, held that the impugned jurisdiction in the Nova Scotia case could not be adequately described by the characterization set out in the Ontario case. He held the impugned jurisdiction in the Ontario case was not defined in terms of the subject matter of the dispute but, instead, was narrowly characterized as jurisdiction over remedies of compliance and eviction. The Nova Scotia case, in the minority opinion, marked the first time the Supreme Court had been asked to characterize jurisdiction under residential tenancy legislation in its entirety.\textsuperscript{23}

McLachlin, J., for the majority, soundly rebuked the notion that residential tenancy law was novel.\textsuperscript{24} Courts had been performing this function since before

\begin{enumerate}
\item[(19)] (1996), 193 NR 1 (SCC).
\item[(20)] McLachlin, Iacobucci, La Forest, L'Heureux-Dubé and Major JJ.; Gonthier, J. concurring in separate reasons with majority; and concurring in result but not in reasons Lamer, C.J., Cory and Sopinka, JJ.
\item[(21)] A reading of the Ontario case simply does not justify such a rationale. The examination of the issues in the earlier decision was detailed and comprehensive on each of the three branches of the test. The entire context of the scheme was examined by the Court in the earlier decision even if, technically, the question posed was narrower: i.e., limited to specific remedies.
\item[(22)] It is Lamer, C.J. for the minority who sets out the historical details.
\item[(23)] Supra, note 19. It is implicit in the majority decision that this was also the view of the majority. In the writer's opinion, even a cursory examination of the Ontario decision renders this conclusion incorrect.
\item[(24)] Gonthier, J., who concurred in the result and with the majority reasons, issued separate reasons.
\end{enumerate}
Confederation. However, she held that the examination of whether the power was or was not exclusively conferred upon superior courts must not focus on a technical analysis of remedies. Rather the focus must be on the type of dispute involved. The reviewing court must look at the subject matter rather than the apparatus of adjudication.

McLachlin, J. held if the concern of s.96 is to ensure the integrity of a unified system of federal courts, then the ambit of the enquiry must not be restricted to determining the extent of inferior court involvement within artificially circumscribed boundaries. A rule which would permit a transfer of powers in one province and deny it in another would undercut the unifying force of the s.96 courts. One should look at the general historical conditions prevailing in the confederating provinces rather than fix obdurately on what powers existed in what tribunals at the exact date of Confederation. The historical inquiry mandated by the first step of the test should be realistic and not arbitrarily swayed by the caprice of history.

The majority concluded that the inferior courts in the founding provinces exercised jurisdiction over residential tenancy disputes to varying degrees, but that all played a meaningful role in their adjudication. McLachlin, J., held that the test for concurrency of jurisdiction between superior and inferior courts does not demand perfect jurisdictional reciprocity. It only requires that the role of the inferior court has been "broadly co-extensive" with that of the superior courts. Without minimizing the importance of the ejectment remedy, she stated that it should not be used to make a principled distinction between the provinces.

The majority also concluded that the Nova Scotia Court of Appeal had erred in feeling it was bound by the conclusions in the Ontario Reference. The powers under consideration in that case were too narrowly defined. Under this new

25. Subsequent to the Ontario Reference case, supra, note 10, the Supreme Court of Canada had upheld a similar residential tenancy law in the Province of Québec: Re Attorney General of Québec and Grondin (1983), 4 DLR (4th) 605 (SCC).

26. Therefore, the fact that New Brunswick had removed the jurisdiction of the inferior courts some 14 days prior to Confederation was irrelevant.

27. However, the Court held that since no common law power was immune from removal, there would be nothing left of s.96 if a legislative recognition of "capacity" of inferior tribunals before Confederation was sufficient to sanction the present day removal of jurisdiction of an inferior court or administrative tribunal. As such, the Court rejected such broad arguments by the intervening Provinces.

28. I.e., Ontario and Québec.

29. It was limited to an examination of two specific remedies: i.e., ejectment and compli-
approach, the powers conferred by the impugned legislation were not within the exclusive jurisdiction of the superior courts at the time of Confederation.\(^{30}\)

I suggest that it is not so much that the question in the Ontario Reference was too narrow, but that subsequently the Supreme Court of Canada has so broadened the concept of *vires*\(^{31}\) that if the provinces cloak a federal matter in sufficient frills and lace that will be sufficient to validate the adoption of federal jurisdiction by the provinces. The first branch of the three-fold test under s.96 of the *Constitution Act, 1867* has been so diluted that there is almost nothing left for an examination under the second two steps.

The reason for the change in approach, I suggest, can be seen in the general climate of devolution of federal powers to the provinces. Imposed on this political gesture was the artificial rationale in the perceived need for consistency among provinces. Not only had the Supreme Court upheld the residential tenancy scheme in Québec,\(^{32}\) but also provinces that confederated after 1867 are wearing a different historical cloak than those that joined in 1867. Moreover, in the context of s.96 of the *Constitution Act, 1867*, the courts, faced with reduced budgets and increased case loads, see the desirability of casting off many of their less glamourous responsibilities. Judges have advocated long and hard for the removal of residential tenancy matters from their dockets.\(^{33}\)

**ONTARIO'S RESPONSE: BILL 96**

The Ontario Government, which had intervened in the 1992 Nova Scotia Reference,\(^{34}\) has been quick to step away from the constraints of the 1982 decision. Comprehensive residential tenancy legislation was hastily drafted in

\[^{30}\] None of the judges needed to look beyond the first of the three questions since, for different reasons, they all answered "No".


\[^{32}\] i.e., in *Grondin, supra*, note 26.


\[^{34}\] British Columbia, Manitoba and Québec also intervened. While the present Bill is that of the Ontario Conservative Government, the initial court intervention was by the then N.D.P. Government which was motivated by a desire to create a unified residential tenancy scheme under one administrative tribunal.
the summer and fall of 1996 following province-wide hearings on a vaguely worded government discussion paper.

Despite government assertions to the contrary, I will suggest that tenant rights have been seriously curtailed in this Bill. Rent control has been effectively eliminated and the protection of a rental housing stock from wholesale conversions is eliminated. Jurisdiction over residential tenancy matters is transferred from the courts and, together with the administrative review process for rent control issues, given to a new administrative tribunal, the Ontario Rental Housing Tribunal. The guarantee of due process for residential tenants is no longer on sure footings in the Province of Ontario.

Tenants in Ontario are obviously concerned. The vast majority of tenant presentations at the hearings of the Standing Committee on General Government into the Ontario Government’s initial proposal for residential tenancy reform were very suspicious of the intention of the government to move landlord and tenant matters out of the courts. This was perceived to be a lessening of the status of residential tenancy interests. In part, this was a concern that provincial cost cutting and expediency concerns would eliminate procedural and substantive safeguards and undermine the notion of security of tenure for residential tenants.

35. Bill 96, An Act to Consolidate and Revise the Law with respect to Residential Tenancies to be known as the Tenant Protection Act.


37. I.e., with respect to matters that are presently under Part IV of the Landlord and Tenant Act.

38. The author was involved with the hearings, and reviewed the majority of briefs presented to the Committee by tenants and tenant organizations. Public hearings took place in August and early September 1996 in Kitchener, London, Ottawa, Peterborough, Sault Ste. Marie, Thunder Bay, Toronto and Windsor. These hearings were unusual as they were based on a vague discussion paper rather than draft legislation. One of the principle components of the government’s proposal was the transfer of jurisdiction for residential landlord and tenant matters to an administrative body. This is now contained in Bill 96.

39. e.g., there is no similar move afoot to transfer commercial tenancy issues from the courts or to similarly transfer other commercial contract issues.

40. In large part, this was the result of long experience both with the incompetency of administrative tribunals comprised of short term political appointees; and also with the inadequate resourcing of these administrative bodies resulting in long delays, poor enforcement and generally lax standards.
In the following pages, I will attempt a brief analysis of this new legislation, only highlighting the areas of major concern for tenants. Most of these are procedural concerns. Without adequate procedural safeguards, the substantive rights of tenants are empty promises. The government's title for the Bill, "Tenant Protection Act", is misleading.\(^1\) The legislation, with a few exceptions, largely restricts most statutory rights that tenants acquired after 1969 as well as several longstanding tenant common law rights.\(^2\) Whereas Part IV was introduced after an impartial and cautious study of residential landlord and tenant interests undertaken over a period of years, Bill 96 has been the result of hastily prepared and partisan reports to government by developer and landlord interest groups.\(^3\)

In the Government's discussion paper,\(^4\) the proposed legislation was described as being primarily a "clarification" of existing landlord and tenant rights and obligations under Part IV of the LTA. This has proved not to be the case. It is true that a landlord may still only evict, in principle, for certain specified grounds, most of which are the same grounds listed in Part IV of the LTA, however the scope of these grounds has been significantly widened by other amendments. Co-extensively, tenant rights have been abridged.

**The New Tribunal**

The new tribunal's procedure is to be governed in part by the *Statutory Powers Procedure Act*\(^5\), (the SPPA). Some procedures are set out in the Bill itself but many important procedural issues are left for the future development of Rules of Procedure by the Tribunal. This makes an informed discussion of procedure before the tribunal almost impossible at this time. Similar to proceedings under Part IV, proceedings are to be summary.\(^6\) Some procedural issues found in the Bill are discussed later in this paper.

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41. The Bill received first reading on November 21, 1996.
42. e.g., notably, the right to sublet and assign a tenancy.
43. e.g., report by Greg Lampert, a noted consultant for developers and landlord's interests. From the author's involvement with the Legal Clinics Housing Issues Committee, it is clear that tenants were consulted, but only notionally and only after the fact.
44. Supra, note 36.
45. R.S.O. 1990, c. S-22, as amended. Most Ontario legal aid clinic caseworkers will have had to become familiar with this important legislation in the context of work before other tribunals.
46. The Bill does not use that term. It states, at s.161, that procedures are to be adopted that offer "the most expeditious method of determining the questions arising in a proceeding that afford to all the persons affected by the proceeding an adequate opportunity to know the issues and be heard on the matter". 
The discretionary power to grant adjournments is found in the *SPPA*.\(^{47}\) The *SPPA* takes precedence over the legislation under which proceedings are brought unless that other legislation expressly states that that Act takes precedence.\(^{48}\) With the consent of the tribunal the parties may agree to waive any procedural requirements.\(^{49}\) This is a concern where parties, particularly harassed tenants, are unrepresented. This would override any of the Bill’s limited procedural safeguards for tenants. The Tribunal will now have the power to amend the application at any time.\(^{50}\) Under Part IV of the *LTA*, this was not possible. To have allowed such a thing was considered by the courts to be procedurally unfair.\(^{51}\)

Under Part IV, a wrongfully evicted tenant or a tenant who feared an imminent wrongful eviction had the independent remedy of applying to court for relief against forfeiture under the *LTA*.\(^{52}\) There is no express similar remedy under Bill 96. Relief can be granted by the tribunal where the circumstances warrant but only against a landlord’s eviction application. It remains unclear what practical remedy a tenant in such a situation will have in the future. Given the fact that landlords will have an incentive to get rid of tenants by any means with the demise of blanket rent controls,\(^{53}\) this absent jurisdiction appears to be a glaring omission. Unlike a court, the tribunal has no common law equitable jurisdiction.\(^{54}\) Its jurisdiction must be found in the legislation.\(^{55}\)

Tribunal members will be appointed by the Lieutenant Governor in Council.\(^{56}\) It seems to be contemplated that there will be a transfer of public servants from

\(^{47}\) Section 21.

\(^{48}\) e.g., While Bill 96 requires the tribunal to hear the merits of the case immediately upon setting aside various default or other orders, the Bill does not expressly override the *SPPA* power to grant an adjournment in an appropriate case.

\(^{49}\) *SPPA*, s.4.

\(^{50}\) Bill 96, s.176.

\(^{51}\) i.e., it would be trial by ambush.

\(^{52}\) *LTA*, s.113(1)(g).

\(^{53}\) Discussed below.

\(^{54}\) It may be that when one reads s.30(1) (paragraphs 3–7) setting out a tenant’s remedy for certain breaches and s.33(1)(e) [catch-all power of tribunal to make any other order], the power of a tenant (including former tenant) to be put back into possession is implicit. One would certainly hope that this would be the interpretation the tribunal and courts would take in such circumstances.

\(^{55}\) *Ibid.*

\(^{56}\) i.e., by Cabinet. See Bill 96, s.148(1).
Rent Control or other government bureaucracies to the new tribunal. There is no guarantee that these will be people qualified to deal with disputes that were formerly the domain of the courts. There is no guarantee that they will understand contractual principles that are applicable to much of what were formerly Part IV of the LTA issues.

Rent Control
One of the prime purposes of Bill 96 is to de-control rents over a period of time. Rent controls will not apply to units as they become vacant. Landlords will have a free rein at converting rental properties to condominiums or other uses. In the case of conversions, extended notice of termination periods are in place for tenants who own their own mobile home or land lease home and certain provisions exist to require landlords to find suitable alternate accommodation for residents in care homes.

If a tenant does not challenge an illegal notice of rent increase within one year, the illegal increase will be deemed to be legal. This is particularly reprehensible. Many tenants do not challenge illegal notices because they are unaware of the illegality for a period of time. In other scenarios, the tenant does not pay the illegal increase and the landlord, knowing the notice to be invalid, does not take action against the tenant. It is one thing to say the tenant may not recover monies already paid when the tenant has delayed enforcing his or her rights, but it is quite another thing to say the landlord’s illegality becomes retroactively legal where the landlord has gotten away with its illegality.

The new legislation will allow tenants and landlords to reach agreements concerning increased rent for agreed upon capital expenditures or increased services and facilities. The fear of tenants is that landlords, who already have the obligation to maintain the premises at existing rents, will be quick to

57. See Bill 96, s.148(3).
58. Once a new tenant moves in at market rent, rent controls will again apply to that new tenancy.
59. Conversion of residential rental property is discussed further later in this paper.
60. This recognizes how difficult it is for tenants to move these structures. Unfortunately, despite extended notice periods, most of these tenants cannot, in financial or practical terms, move these units even if alternate sites were available to them.
61. Bill 96, s.131. The section says rents “charged” shall be deemed lawful. It is unclear whether this means actually “paid” or simply means “claimed” in a notice of rent increase.
62. Ibid.
characterize regular maintenance or repair due to normal wear and tear as a capital expenditure. By delaying normal repairs, a landlord will be able to manipulate a frustrated tenant into paying an additional amount for what should already be included in his or her existing tenancy.63

**Landlord Harassment of Tenants**

In recognition of the new incentive for landlords to have vacant units, the government has included in the Bill new anti-harassment provisions. There are also “anti-harassment” provisions under the *Rent Control Act*. These and other general enforcement powers were not enforced and had little impact. Tenants will be able to bring applications to the Tribunal and the Tribunal may make a variety of orders against offending landlords. Unfortunately, landlords may simply consider the cost of committing harassment to be an unavoidable cost of doing business. After all, any expenses would be a tax write-off.

**Repairs & Maintenance**

The central focus of Part IV had been the tenant’s right to well-maintained premises and the right to enjoy the premises without arbitrary interference from the landlord. Because landlords had an ongoing duty to maintain premises, there was no statutory requirement that a tenant notify a landlord of defects. Frequently, minor defects went unreported until the cumulative effect made it worthwhile or necessary for a tenant to either go to court or to the rent control tribunal for a remedy. In the meantime, the tenant had been receiving and paying for less than had been bargained for. At common law and under Part

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63. Such an agreement will be void if the tenant was coerced into signing it or the agreement was the result of false or misleading representations by the landlord: s.125, Bill 96. It is unclear whether a landlord’s delaying tactics would amount to coercion or whether a misrepresentation to the tenant concerning the law, (i.e., that the landlord did not have to do what in law was required), would meet the criteria of this section. If this is “tenant protection” legislation, then I suggest it should be interpreted in this manner.

64. i.e., so that they may increase rents without statutory controls.

65. S.O. 1992, c.11, s.49(3).

66. Due to lack of resources more than lack of political will.

67. The maximum fine the tribunal can impose on a landlord is $10,000. It is very unlikely this maximum would be imposed in most cases. While landlords could notionally be prosecuted with the possibility of larger fines being imposed, tenant prosecutions of landlords have not proven effective to date and the courts have not taken such provincial offences seriously.

68. Even where landlords were notified to no avail, it was often not to the tenant’s benefit to go immediately to one of these two tribunals. The cost, time and energy were not warranted.
IV, the tenant had six years to bring his or her claim for an accounting to court. The new legislation will now require a tenant to take legal proceedings within a one year time frame if the tenant hopes to be compensated for the landlord’s breach of its statutory obligation.\textsuperscript{70} Moreover, the legislation expressly requires the tribunal to consider whether a tenant gave the landlord notice of any defect. This diminishes the landlord’s formerly stringent obligation to maintain premises and puts the onus for policing maintenance onto tenants. In addition, there is no longer to be a provincial minimum standard for maintenance of residential premises. Municipalities may develop their own standards, and may enforce them. The emphasis is on “may”. There is no obligation that standards be enforced and no extra resources are given to overburdened municipalities in order that they might be able to enforce them.

On paper, the same remedies are available to tenants as existed under s.94 of the \textit{LTA} regarding repair and maintenance issues. Given these other significant restrictions, however, that statutory right is greatly diminished. Moreover, because the right to municipal supervision of conversion of rental residential premises is to be eradicated\textsuperscript{71}, landlords will now have an added incentive to allow premises to deteriorate so that conversion or substantial renovation becomes necessary.\textsuperscript{72}

\noindent \textbf{Notice Periods}

The government’s pre-Bill 96 discussion paper promised that notice periods for termination of tenancies would not be altered. For the most part this is true. However, there is one notable exception: formerly a monthly or longer term tenant\textsuperscript{73} had to be given 20 days’ notice of termination. Bill 96 reduces the notice

\begin{footnotesize}
\begin{enumerate}
\item This new limitation period effectively insulates landlords from being financially responsible for their breach of contract. It will also mean that tenants will have to be vigilant at every step and with every minor defect. This means that unless tenants wish to wave good-bye to their rights, they will have to be prepared to bring multiple minor applications to the new administrative tribunal. It is doubtful that the tribunal would give serious consideration to these minor grievances or understand why tenants will feel compelled to bring them.

\item The \textit{Rental Housing Protection Act} R.S.O. 1990 c. R-24, as amended, is repealed by Bill 96. That legislation was introduced in 1986 to prevent the wholesale conversion of rental residential property without municipal supervision and it provided significant procedural safeguards for tenants.

\item Although Bill 96 provides tenants with a right of first refusal to purchase converted units, this is an empty benefit for most tenants who will be unable to afford such an expense.

\item i.e., most tenants.
\end{enumerate}
\end{footnotesize}
of termination period for tenancies which are longer than weekly tenancies from 20 days to 14 days. Because of this abridgement, landlords will potentially be able to evict defaulting tenants more quickly.

The Legislation will now enable a landlord to bring most applications forthwith rather than waiting until the termination date specified in a notice of termination. Previously early applications were considered to be premature and therefore void. The aim of this amendment is to expedite a landlord's ability to evict a tenant and to thereby lessen a tenant's ability to remain in the premises on default.

Notice periods for service of a notice of application in relation to the hearing date are left to be set by still to be formulated rules of procedure. Unlike under Part IV, these are not set out in the legislation. Under Part IV, parties were able to dispute a s.113 application either in person at the first return date before the local registrar, or by filing a written dispute any time before the return date. Bill 96 mandates that the dispute be in writing. Moreover, with some exceptions, it must be filed within 5 days of receiving the notice of application. It is unclear how it must be filed.

**Default Orders**

If a party did not appear in response to an application under Part IV of the LTA, the registrar could issue a default judgment. Bill 96 now limits this power to landlord eviction and arrears applications and to limited tenant applications concerning the collection of illegal monies and a refusal to consent to an

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74. Under the LTA, s.106, notice of termination periods for daily and weekly tenancies corresponded with the time frames given to tenants to pay arrears and thereby render the notice void: i.e., 7 days for both. However, for longer term tenancies the notice period was 20 days while the time to pay arrears and render the notice void was only 14 days: i.e., these tenants had an extra six days after the expiry of the time for rendering the notice void.

75. s.71, Bill 96. An exception is where the tenant has a period of time in which to remedy a breach: e.g., the seven day period for remedying substantial interference or the impairment of safety of other tenants: e.g., see s.70, Bill 96.

76. These are largely landlord applications for termination of the tenancy.

77. Requirements for disputes in most tenant applications and some of the less common landlord applications are to be established by rules: Bill 96, s.167.

78. i.e., in person, by fax, by mail, by agent etc. The five day limitation period for disputes, combined with the five day deemed service by mail provision, means that a tenant will never be able to file a dispute by mail. A tenant would have to know about the application at least a day (and more realistically, several days) before it is actually served! This is assuming a tenant would be able to get a written dispute in the mail the same day as he or she learned of the pending service of the application.
assignment or sublet. In other words, the power to issue a default judgment is primarily a benefit to landlords. Moreover, formerly, such orders could be set aside on an *ex parte* motion\(^{79}\) within seven days of the order and the court had the power to extend the time for such a motion in extenuating circumstances. Bill 96 extends the seven day period for set asides to ten days; however, there is no general power to extend that time. Grounds for set aside now require only that the respondent was "not reasonably able to participate".\(^{80}\) The Bill expressly contemplates an extension of time periods in two situations.\(^{81}\) Both of these are for the benefit of landlords. The Bill also contemplates that Rules will be made concerning extension of time in other situations but these are not contained in the Bill.\(^{82}\)

**Service of Documents**

Part IV provides that where documents are served by mail, service is deemed to be effected after three days.\(^{83}\) The *RCA* on the other hand deems such service to be effective after five days. The new legislation adopts the five day period. When Part IV was introduced in 1969, three days was likely not unrealistic. The five day period was introduced in 1975 for rent review matters and has been transferred without change to each successive piece of rent review legislation since that time.\(^{84}\) When the five day period was first introduced, it was also likely a reasonable period in most cases. However, given the efficacy of our mail service today, the five day limit is quite unrealistic. Anyone living outside of major mail centres is quite unlikely to receive mail within that period of time. Because this is a deeming provision, a tenant has no legal defence by asserting that no actual notice was received by the tenant.\(^{85}\)

\(^{79}\) This will now become a motion on notice under Bill 96 so that the Tribunal will be able to hear the merits immediately if the default order is set aside.

\(^{80}\) Bill 96, s.181(4).

\(^{81}\) i.e., applications for above guideline rent increases and appeals of work orders: s.166(1).

\(^{82}\) i.e., s.166(2). The Bill states that the time for making "applications" may not be extended. Presumably, therefore, Rules may be made for extending the ten day time period for "motions" to set aside a default order. Whether such rules will in fact be made remains to be seen.

\(^{83}\) *LTA*, s.123(2).

\(^{84}\) *Residential Premises Rent Review Act*, S.O. 1975, c.12, s. 16(2); *Residential Tenancies Act*, R.S.O. 1980, c.452, s.99(2); *Residential Rent Review Act*, S.O. 1986, c.63, s.21(2); *Rent Control Act*, S.O. 1992, c.11, s.49(3).

\(^{85}\) Given the restricted powers to set aside default orders evicting a tenant, discussed later in this paper, this deeming provision can now have very serious consequences for a ten-
Landlords are no longer able to “post” documents. It had been hoped that the service provisions would be made balanced; however, it is still only a landlord who may serve a document on an “apparently adult person” at the other party’s home. The Bill does now require a landlord to give a tenant an address for service of documents. This is an improvement over the parallel but poorly drafted Part IV provisions; however, there is no sanction imposed by way of alternate service means if the landlord fails to comply with this legislation. The new legislation still leaves many gaps regarding service and although the legislation contemplates that Rules may be promulgated for other methods of service, there is no general power in the statute itself to allow for other means of service in appropriate cases.

One major concern in the Bill is that even if a tenant did not receive notice in the form or in the time that the statute contemplates, “actual notice” within a “reasonable period” prior to the hearing is now to be sufficient notice. Unless the “reasonable period” is restricted to a period equal to or greater than the statutory period set out in the statute, this provision effectively overrides the more express substantive and procedural requirements and undermines the notion of certainty in the quasi-judicial process. Notice periods were applied strictly under Part IV.

86. The right of a landlord to post notices of termination was offensive. It was frequently used as a method of harassing and embarrassing a tenant. It violated a tenant’s privacy. Moreover, in multiple dwelling complexes, such notices were frequently removed by vandals or pranksters and never came to the timely attention of the tenant.

87. This presumably means that landlords may stick documents through mail slots in doors etc.

88. The service provisions seem to be based on the wrong premise that landlords are always corporations rather than individuals. There is no equitable reason why tenants should not be entitled to the parallel right.

89. Bill 96, s.8. However, the legislation does not indicate what a tenant is to do in terms of service if the landlord fails to abide by this new statutory requirement.

90. LTA, s.111.

91. The Bill does specify that the obligation to pay rent is “suspended” until the landlord complies, but in most cases this is inadequate as the tenant will not know that this limited right exists. Bill 96 does not require a landlord to post a summary of the tenant’s rights and obligations as was required, but frequently ignored, under Part IV.

92. Frequently tenants defeated landlord applications on the procedural basis of an improper notice.
Content of Notice of Termination
I have already commented on notice periods and the impact of the new “actual notice” provision. The main change with respect to the content of notice is that formerly notices had to provide a tenant with both the substantive reason for the termination and also with the details of the facts upon which the reason was based. As with notice periods, tenants frequently defeated applications on procedural grounds where notices gave inadequate or no particulars. The reason particulars were required was so that the procedure would be consistent with one of the most fundamental principles of natural justice: i.e., the right of a person to know the case he or she has to meet. Bill 96 no longer requires a landlord to give particulars in notices of termination. A tenant will have to prepare a defence on only the barest knowledge of what a landlord is alleging.

Location of Hearings
A central aspect of Part IV has been that applications are to be brought and heard in the locality where the premises are situated. This is principally an access to justice concern. Most tenants cannot afford to travel far to access their legal rights. The new Bill has removed this proximity requirement. Most localities had court houses within a reasonable distance. The new Bill is silent about how many and where the new tribunal offices will be located. However, it is highly doubtful that the government has the intention of creating such offices in every Ontario judicial centre.

93. i.e., the legal grounds for the termination notice.
94. i.e., particulars were required in addition to general grounds for the notice of termination.
95. There are two exceptions. The notice alleging damages by the tenant must specify what the repairs required are. While this falls short of full particulars, it does import the requirement of greater details in damage termination cases. Further, where the alleged reason for the notice of termination is overcrowding, s.62(2)(b) requires that the notice specify “the details of the grounds for termination”. This is the same as requiring “particulars”. In the case of other “for cause” terminations, only “the grounds for termination” are required: s.61(3)(b). The use of the terms “reasons” (s.41(2)), and “grounds” (s.61 & 62); and of the terms “details of the grounds” (s.62), and “particulars” (s.145(2)(b)) creates confusion as to the meanings of these words in Bill 96.
96. i.e., on the basis of substantive grounds.
97. with the exception of areas in northern Ontario. Rural tenants in other parts of Ontario sometimes had difficulty getting to judicial centres too.
98. Neither the Bill nor the Discussion Paper offers any insight into the extent to which the new tribunal will be resourced. Given government cutbacks with respect to other administrative tribunals, it is doubtful that the new tribunal will be a “Cadillac” of quasi-judicial service delivery.
*Parties*

Under Part IV of the *LTA*, only landlords and tenants were parties. While some courts interpreted the scope of these definitions more broadly than others, not all occupants were considered to be parties in all cases. Most notably, children of tenants did not automatically have standing.\(^9\) Bill 96 now states expressly that "the landlord and any tenants or other persons directly affected by the application" are parties and the tribunal has the power to add or remove parties.\(^{100}\) This means that mortgagees, insurers, purchasers, children of tenants, spouses of either landlords or tenants, other occupants and even the government in some situations may be considered to be proper parties. "Persons affected" by an order of the tribunal may also appeal to the Divisional Court.\(^{101}\) However, unless these "affected" people are also "landlords" or "tenants"\(^{102}\) it is questionable what actual remedies those persons have. Only landlords or tenants may bring applications. A right without a remedy would indeed be empty.\(^{103}\)

*Privacy Rights of Tenants*

The government has expanded a landlord's right of entry and thereby limited tenants' privacy rights in this Bill. This was despite expressed and repeated promises to the contrary. The Government's preliminary discussion paper indicated only that such rights would be clarified. Privacy rights are central to the notion of security of tenure and the acceptance of the fact that rented residential premises are tenants' homes. Previously a landlord could enter without notice only in cases of emergency, or enter without notice only at reasonable times for the purpose of showing the premises to prospective tenants after the tenant had given notice of termination. Apart from those two reasons, unless the tenant consented at the time of entry a landlord only had a right of entry if the lease gave the landlord such a right and then only on 24 hours written notice during

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99. i.e., they were only given standing if they were held for the purpose of the application to be tenants in their own right.

100. Bill 96, s.164.

101. Bill 96, s.184. Presumably this is whether or not the "affected person" was a party to the tribunal proceedings as otherwise the Bill would refer to "parties" in this section as it does elsewhere in the legislation. The tribunal itself may be heard on an appeal to the Divisional Court and may appeal a decision of the Divisional Court as if it were a party: s.184(3) and s.185 respectively.

102. i.e., the definitions of both terms are still inclusive and may include those who at common law could be considered a landlord or a tenant.

103. An axiom of the common law is that there is no right without a parallel remedy. However, whether this notion can survive the transference of residential tenancy jurisdiction out of the domain of the superior courts is questionable.
daylight hours. Bill 96 now allows a landlord to show the premises to a prospective tenant if either the landlord or the tenant has given notice of termination. There is no constraint on this and no requirement that the notice be uncontested by the tenant. In addition, a landlord now also will have an express right of entry to show premises to prospective purchasers, mortgagees and insurers or to carry out repairs. Special provisions governing the right of entry of premises in a care home are now to be expressly contained in the legislation. These rights are for the purpose of giving care services which have been contracted for. A tenant in a care home will have the right to unilaterally revoke such an agreement.

Incidental to the right to privacy, and the right to personal security is the issue of alteration of locks. Under Part IV, neither a landlord nor a tenant could alter locks without consent of the other. Under the Bill, a landlord may unilaterally change the locks provided he or she gives the tenant a replacement key. However, the tenant does not have the reciprocal right. A tenant may only alter the locks with the landlord’s consent. This is often not given because a landlord does not take the tenant’s concern seriously. Frequently tenants change or reinforce their locking system because of legitimate security concerns. One would have hoped that legislation entitled “tenant protection” would have accepted the validity of such concerns, and provided the landlord was given a set of keys, allowed the tenant to make the premises more secure. This is another

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104. There was also an express right to enter for the purposes of cleaning the premises if the tenant and landlord had contracted for this service. That right continues in Bill 96. The provision was added to Part IV of the LTA when rooming and boarding houses were brought under the Act in 1987.

105. Landlords frequently serve notices of termination on tenants which are never intended to be acted upon. Often this is because they are mere warnings or in many cases because they are intended to be a form of harassment. The right of a landlord to enter will simply lead to further harassment in many instances.

106. Admittedly this will only be on 24 hour written notice for entry between 8:00 a.m and 8:00 p.m.

107. These are clearly new rights of entry.

108. Arguably, this right was incidental to the landlord’s obligation to maintain the premises and already included in a landlord’s right of entry under Part IV of the LTA.

109. This right of entry is no more than a clarification of existing rights contained in Part IV of the LTA. Like the right of entry for the purpose of undertaking repairs, it was also contemplated by Part IV which provides for agreements concerning the delivery of care services.

110. Landlords do not normally change locks upon a new tenancy and so there may be several pirated keys floating about.
indication that this legislation falls squarely on the side of landlord rights and interests.

**Sublet and Assignment Rights**

At common law, a tenant’s right to sublet or assign the tenancy was unrestrained. A landlord could restrict this right by contract. Part IV of the LTA made the landlord’s ability to restrict this subject to the requirement that a landlord’s consent to an assignment or sublet could not be withheld unreasonably or arbitrarily. The courts further restricted this tenant right to contractual tenancies and held it did not apply to statutory month to month tenancies. The right of assignment and sublet are two distinct rights. An assignment passes the tenant’s rights to a new tenant for the balance of the tenancy term. A sublet is a temporary transfer of the tenancy with the tenant reoccupying the premises before the end of the term.

With the Bill’s intention to de-control rents upon vacancy until the establishment of a new tenancy, landlords did not want to lose the window of opportunity to increase rents without constraint. For this reason they wanted special restrictions to apply to assigned or sublet tenancies. A landlord no longer need consent to an assignment of the tenancy. However, if the landlord refuses to allow a tenant to assign the tenancy, the tenant is entitled to terminate the tenancy early. As is evident, the emphasis is on vacancy because the landlord stands to gain from the ability to increase the rent. Because of concerns expressed by tenants at the initial Standing Committee hearings, the government seems to have accepted that given the current economic climate, tenants will have to

111. *Lifshitz v Forest Square Apartments Ltd.* (1982) 36 OR (2d) 175 (Div. Ct.). This decision has been criticized as ignoring the plain wording of the statute and limiting by judicial decree the common law and statutory rights of tenants.

112. *Ibid.* A “statutory tenant”, a term created by the courts, is a tenant whose tenancy has been renewed by virtue of s.104 of the LTA. That section deems a tenancy to be renewed on the same terms and conditions at the expiry of the term if the tenant remains in legal possession and if no new tenancy agreement has been entered into.

113. The Government’s Discussion Paper ignored that important distinction. The Bill has corrected that mistake and treats the two issues in a slightly different manner.

114. Bill 96, s.17.

115. Bill 96, s.46. Regardless of the duration of the outstanding term, a tenant who is refused the right to assign may vacate on the lesser of 30 days’ notice or the notice required to terminate the tenancy: i.e., 28 days’ notice for daily or weekly tenancies.

116. *i.e.*, the province-wide hearings relating to the content of the government’s Discussion Paper in August 1996.
temporarily vacate their units and move for a period of time for employment or personal reasons.\textsuperscript{117} The right to sublet will now always require the landlord's consent;\textsuperscript{118} however, in this case, the consent may not be withheld arbitrarily or unreasonably. The legislation will now make it clear that a subtenant has no right to occupy the tenancy after the period of the subtenancy.\textsuperscript{119} Either the landlord or the tenant may apply to evict the overholding sub-tenant.\textsuperscript{120} What is not clear is whether this new sublet provision applies to monthly tenancies.\textsuperscript{121} Most tenancies are monthly with the springing interest created by the deemed renewal provision. If the right to sublet is only until the last day of the monthly term, this would be a meaningless benefit for most tenants.\textsuperscript{122}

\textbf{New Provisions}

\textbf{Death of Tenant}

Tenants advocated that upon the death of a tenant the estate should have \textit{the option} to terminate a tenancy early. Bill 96 has adopted this recommendation in a modified form. The new legislation will deem the tenancy terminated after thirty days from the date of death if there is no other tenant of the premises.\textsuperscript{123} In many cases this will not give the executor or estate administrators time to adequately deal with the property and affairs of the deceased.\textsuperscript{124} The right of an

\begin{itemize}
\item \textsuperscript{117} e.g., to care for an ill parent etc.
\item \textsuperscript{118} Previously, the tenant's right to sublet was unrestrained unless the contract (lease/tenancy agreement) contained a provision requiring the landlord's consent. Bill 96 now makes this a statutory covenant in all tenancy agreements. Many landlords in the past have not had provisions restricting a tenant's sublet rights; so this is a blatant gift to landlords.
\item \textsuperscript{119} Bill 96, s.18(5).
\item \textsuperscript{120} Bill 96, s.77. The subtenant will become a "trespasser" after the expiry of the subtenancy. However, the "trespasser" must still be evicted under Bill 96.
\item \textsuperscript{121} Whether contractual in nature or statutory.
\item \textsuperscript{122} There is no reason to treat a continuing monthly tenancy any differently than a longer term tenancy. Given the fact that the Bill seems to have incorporated tenant expressions that a rented residential unit was a tenant's "home" and that a tenant should be able to return after a temporary absence of short or long duration to that home, an argument can be made that this "tenant protection" legislation is an amendment to previous jurisprudence restricting sublet rights of monthly tenants.
\item \textsuperscript{123} Bill 96, s.47. See also s.105 regarding special provisions where the tenant is a mobile home owner.
\item \textsuperscript{124} Arguably, as "tenant" now expressly includes "heir", an heir could go into possession and thereby limit the effect of this provision. This would, however, also preclude the benefit of an early termination of the tenancy. The provision may be interpreted as requiring the heir to already be in possession at the date of death. Even where a spouse or child was not considered a "tenant" \textit{per se}, if, at the time of death, he or she was
option to terminate the tenancy early would have been a benefit to tenants. However, once again the emphasis is on vacancy of units to allow landlords to increase the rent without constraint.

Disposal of Abandoned Property

The problem of rights and responsibilities concerning the treatment of a tenant’s abandoned property has been a problem of uncertainty with respect to the scope, if any, of those rights and obligations. The complicated, antiquated and uncertain common law of bailment has by and large prevailed.\textsuperscript{125}

One of the disappointments that followed the Ontario Reference case of 1982 was that the abandoned property provisions of the \textit{Residential Tenancy Act, 1979} were never adopted.\textsuperscript{126} Bill 96 now provides for a less than perfect incorporation of an abandoned property scheme. The \textit{RTA} required the supervision of the \textit{Residential Tenancy Commission}. Moreover, excess monies derived from the sale or disposition of goods did not fall to the benefit of the landlord as they will under Bill 96. These passed after a one year period to the Crown if the former tenant did not come forward to claim them within that period. Under Bill 96, there is no meaningful supervision by the tribunal. The \textit{RTA} requirement that all property be held for sixty days\textsuperscript{127} has not been adopted in Bill 96. Instead there is different treatment of property in different situations.\textsuperscript{128} Time periods vary from the right of immediate disposal or sale, through thirty or sixty day waiting periods. The landlord is expressly absolved from any liability in the treatment of property. The most expedient treatment of property by a landlord is allowed where the premises have been “vacated” in accordance with a notice of termination, an agreement to terminate the tenancy or an order of the Tribunal.\textsuperscript{129} The residing at the premises, this would preclude the deeming provision from taking effect.

\textsuperscript{125} Combined with this has been the primary issue of whether the property was indeed abandoned in the first place.

\textsuperscript{126} \textit{RTA}, s.63.

\textsuperscript{127} Property that is a tenant’s mobile home has a 60 day waiting period before sale or disposition. This is presumably in recognition of the property’s greater than usual value. However, the period, if intended to be remedial, is nevertheless quite unrealistic. Property of a tenant who abandoned the premises cannot be disposed of for thirty days after an order terminating the tenancy under s.73, Bill 96.

\textsuperscript{128} Section 40, Bill 96 deals with the treatment of abandoned property where the premises has been “vacated” rather than abandoned. There are also three special provisions: s.48 deals with the property of a deceased tenant; s.74 deals with property left in an “abandoned unit” and s.104 deals with the treatment of an abandoned mobile home.

\textsuperscript{129} Bill 96, s.40. The \textit{RTA} required the same treatment of property whether the premises had been “vacated or abandoned”. Neither term was defined in the \textit{RTA}. Bill 96 indirectly defines the term “vacated” as situations where the premises have been left under
tenant who has "vacated" the premises has no right to come forward at a later date to claim the property or its value. More extensive rights exist for tenants who have abandoned the premises and for the estate of a deceased tenant. These may come forward within six months of an order terminating the tenancy or of the tenant's death, respectively, to reclaim either the tenant's property or the proceeds from the landlord.\(^\text{130}\) Where the property is a tenant's mobile home or land lease home,\(^\text{131}\) the property may not be disposed of before 60 days' notice,\(^\text{132}\) and the tenant may also come forward within 6 months from the day the notices are given to claim the property or the proceeds. It is unclear why the right to reclaim the property or the proceeds is denied to tenants who have "vacated" the premises. Moreover, it seems that a landlord's right to deal with the property immediately and without any supervision or redress available to the tenant creates an incentive for landlords to deal quickly and irresponsibly with a tenant's possessions. This is anything but an equitable and fair system. It will likely lead to serious interpersonal conflicts outside of the ambit of this or any other tribunal. It is foreseeable that hard feelings will be of considerable magnitude and serious consequence.

Another aspect of the abandoned property regime is that while Bill 96 continues the illegality of distress,\(^\text{133}\) it codifies the landlord's right to distress in the case of abandoned property by allowing a landlord to recover arrears out of the proceeds of a sale and before returning any property.\(^\text{134}\)

\(^{130}\) i.e., Bill 96, s.48(3) (deceased tenant's property) & s.74(5) (property left on abandoned premises). The landlord can dispose of the property immediately only if it is unsafe or unhygienic.

\(^{131}\) Bill 96, s.104. Although s.104 refers to "mobile home", it is arguable that this must also mean "land lease home." Section 97 states that Part V of Bill 96 (including s.104), which refers only to "mobile home parks," applies with necessary modifications to "land lease communities". Arguably, if s. 104 is to apply to land lease communities, it must apply to land lease homes. It would have been preferable if the relevant provisions were more clearly worded.

\(^{132}\) This is the only situation in which the landlord must give notice before a sale or other disposition of a tenant's personal property. Under the RTA, in most cases the landlord had to keep the property for sixty days and the tenant had the right of recovery in that period.

\(^{133}\) i.e., Bill 96, s.29.

\(^{134}\) e.g., s.48(3)(b); s.74(5)(b) and s.104(4)(b).
CONCLUSION
There are many other aspects of Bill 96 which merit consideration. Unfortunately, the limitations of space make this impossible within the context of this article. While the Supreme Court of Canada indicated in the Nova Scotia Reference that it did not wish to be seen as undermining the importance of the power of eviction, this is precisely what the Court has done. In so doing, it has also undermined the importance of security of tenure for those living in rented residential premises by making it easy for political winds to batter the causes of society’s more vulnerable members.135

It is true that many of the changes made in Bill 96 could have been made without transferring jurisdiction to an administrative tribunal. However, it is doubtful that those changes would have been made without the catalyst of the opportunity to do so.

Only time will tell how the Rules of Procedure are to be formulated, applied and periodically changed. Only hindsight will tell us whether quality and equality were achieved. Looking at what we have against what we are to be given, weighing the benefits held out to tenants in light of the benefits handed to landlords, tossing in the uncertainties of the market place and of the new economy, and the non-existent present sense of political and social responsibility for those less fortunate among us, I have to surmise that tenants are in for a period of impotence and disaffection.

135. It is well recognized that, statistically, residential renters constitute society’s more vulnerable members: i.e., the elderly, the very young, the disabled, racial minorities, women, the poor. The fact that many advantaged people are also renters does not change this basic fact.