The Rentalsman as an Alternative to the Courts in Landlord and Tenant Dispute Resolution

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The theme of this symposium — "Alternatives to the Courts in Dispute Resolution" — invites consideration not only of the possibility of dispute resolution without courts or lawyers, but indeed that of dispute resolution without the law itself. In a family or friend situation, and in a business situation too, it is a common occurrence for disputes to be settled, not by what the law might be, but by other considerations, for instance, friendship or reciprocity. These non-legal considerations often produce better results than do legal ones. The law is necessary, however, in those situations where the parties themselves cannot resolve their disputes.

In residential tenancies the law matters a great deal. If it is wanting, either substantively or procedurally, one or both parties may be forced to consider other alternatives. Until recently our landlord and tenant laws were wanting in almost every major respect. However, substantial improvements have been made across Canada in recent years, in both the substance of the law and its accessibility.

One jurisdiction, British Columbia, has departed from the legal norm in its reform legislation. Its *Residential Tenancy Act* provides that "an arbitrator shall make his decision on the merits of the matter and is not bound by legal precedent."[1] Similar words in an earlier Act[2] were interpreted by the British Columbia Court of Appeal to mean that the arbitrator "is not bound to make any of his decisions in accordance with the law, though of course he must follow the rules of natural justice in his procedure." Neither is he bound by his own previous decisions. "[H]e is expected to exercise common sense and a sense of fairness, and when those fail to lead to a solution, he is to be guided not by law but by his sense of the social policy of the legislation." [3]

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[1]S.B.C. 1984, c. 15, s. 42(1)(b).

[2]*Residential Tenancy Act*, S.B.C. 1977, c. 61, s. 48(1)(b)

[3]*Re Pepita and Dukas* (1979), 101 D.L.R. (3d) 577 at 592 (B.C.C.A.).

This approach will have some attraction for those who have seen justice defeated by legal technicality. There is, nonetheless, a price to be paid for this approach — the subjection of the parties to the discretion of the arbitrator. "Rule of law" is replaced by "rule of man" — a man who may not rule well. This problem varies in degree, depending on the matters covered by the discretion. I cannot address this in any detail in this comment, but I question the extent of the discretion given in the British Columbia legislation. If I must take my dispute to law, I would rather be governed by the law than by the individual hearing my dispute. If the law lacks common sense or fairness, or if it fails to take into account the social policy behind legislation, then, in my view, the law should be reformed, rather than simply leaving it to the individual decision-maker to decide each dispute according to that individual's own views.

Assuming that tenancy disputes are to be resolved according to law, I turn to consider whether there are better forums than the courts in which to do so. Do residential tenancy disputes have certain features calling for special treatment which, if implemented, would supplement or supplant the courts? Tenancy disputes run the full gamut from the very simple to the very complicated. However, the great majority of residential tenancy disputes fall within the simple category: not being very complicated in law or on the facts, and not normally involving large amounts of money. Accordingly, they normally do not warrant incurring significant expenses to achieve a resolution. However, such claims — while simple — are numerous. In fact, in the past year alone there were well over 5,000 reported tenancy disputes in New Brunswick, which is a small jurisdiction with a population of less than 700,000.[4]

It goes without saying that we want a dispute resolution system that is fair, effective and efficient. The challenge is to devise a system that has all these features. In the context of residential tenancy disputes, given the reality that most disputes will not warrant significant involvement of lawyers, the system needs to be as simple and informal as possible. New Brunswick has had such a system since 1983, when a province-wide network of rentalsmen was established to administer the *Residential Tenancies Act*,[5] which made major reforms in both substantive law and enforcement procedures. The rentalsmen were empowered to take on a number of responsibilities including: informing, educating, and advising landlords and tenants about their rights and responsibilities; investigating and mediating complaints; requiring landlords to comply with their obligations should a landlord fail to remedy a default, and having the obligations performed at the landlord's expense; requiring tenants to comply with their obligations and, should a tenant fail to remedy a default, requiring the tenant to leave the premises; administering all security deposits and adjudicating claims against them; and generally overseeing the legislation and its enforcement.

The rentalsmen do not have the power to resolve or adjudicate all residential tenancy disputes, but they do have substantial, albeit limited, powers to require both landlords and tenants to perform their obligations. The experience to date suggests that most disputes can be resolved satisfactorily by the rentalsmen through the use of these powers. The rentalsmen are very accessible to the public: one can go to them for

[4]Statistical summary prepared by the office of the Chief Rentalsman for the period 1 April 1986 - 31 March 1987.

[5]S.N.B. 1975, c. R-10.2, as am.

information and advice; their staff members encourage questions; and paperwork is kept to a minimum. This is evidenced by the more than 40,000 inquiries and complaints processed by their offices last year.[6] The courts are not nearly as accessible because their business is not to inform and educate, but to adjudicate. The staff members do not encourage questions, least of all those concerning rights and responsibilities. Paperwork is required absolutely, and if a claim does not come under the small claims jurisdiction of the court — in New Brunswick,[7] a claim for debt or damages for up to $1,000 — a lawyer is almost a must.

I do not say this by way of criticism of the courts; as I have previously mentioned, their business is to adjudicate. I merely emphasize my belief that the rentalsman's information and advice service is valuable not only in its own right, but also in the role that it plays in dispute resolution. Many disputes are resolved quickly once the parties obtain information about their rights and responsibilities. Indeed, disputes often can be avoided altogether when the parties have access to information in advance of a transaction.

As noted previously, rentalsmen do more than give information and advice. They also investigate, mediate, and in many cases adjudicate complaints. Here too, the rentalsman runs an informal shop. She proceeds not by calling the parties to a formal hearing, but by conducting an investigation into the complaint and taking an active part therein. This involves getting out of the office and gathering the relevant information by such reasonable means as interviews and inspections of premises. During this process, the rentalsman must, of course, proceed fairly and observe the rules of natural justice by ensuring that the parties have access to the results of the investigation and an opportunity to challenge them.

This is not the way in which a court proceeds. Indeed, the court's normal approach is quite to the contrary. In the normal trial "the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation."[8] It is for the parties, through their legal counsel, to put forward their best possible case. Normally, the judge must not get involved in the conduct of a case. For instance, "the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts."[9]

This system works well only when lawyers are involved. In cases falling within the small claims jurisdiction (where lawyers are not likely to be present), we have relaxed the rules. The judge still proceeds by holding a hearing, but the hearing is to be conducted "as expeditiously and informally as may be just."[10] Thus, the rules of evidence are not binding;[11] and the judge may call witnesses, ask questions,[12] and

[6] *Supra* at note 4.

[7] *New Brunswick Rules of Court*, R. 75, in *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 77.

[8] *Jones* v. *National Coal Board*, [1957] 2 All E.R. 155 (C.A.) at 159.

[9] *Ibid.*

[10] *Supra* at note 7, R. 75.12(1).

[11] *Ibid.*, R. 75.12(2)(b)

[12] *Ibid.*, R. 75.12(2)(c).

"inform himself in any other manner as to the matters in dispute."[13] Moreover, the judge "may appoint someone to inquire into and report on any question of fact."[14]

These are admirable measures, and the special small claims rules could, without great difficulty, be enlarged to cover most of the cases dealt with by the rentalsmen. However, in my opinion the investigative approach is more efficient and effective for these cases than is the hearing approach — however informal the hearing may be. Admittedly, an investigative approach does pose the danger of a loss of objectivity. On balance, however, I believe that it is a risk worth running. Actually, the rules for a small claim hearing do allow the judge a good deal of scope for investigation, but the fact remains that this goes against the fundamental grain of judicial philosophy. I cannot imagine judges investigating many landlord and tenant claims, let alone hundreds or thousands each year.

In any event, this is not the kind of case that should occupy the time of superior court judges, at least at first instance. As a general rule, I would suggest that if a case is not important enough to warrant legal counsel to argue it, it does not warrant a superior court judge to hear it. Again, the small claims rules in New Brunswick recognize this by allowing the judge to designate someone else to hold the hearing.[15] Following the hearing, the designated person delivers a report to the judge which includes his notes on the evidence, the issues, his finding, and his recommendations.[16] The judge is free to use the report as she wishes and to hear any additional evidence and arguments. The judge always makes the final decision.[17]

This leads me to a point that I would like to make on the constitutional issue posed by the rentalsmen. Professor Hatherly addresses this at length,[18] but I do want to mention that the issue concerns the effects of s.96 of the *Constitution Act, 1867*, and is restricted to a consideration of the rentalsmen's adjudicative functions.[19] Clearly, the rentalsmen are able, constitutionally, to carry out the other functions of their office. If it were decided that they do lack power to perform their adjudicative functions, I would suggest that the *Rules of Court* be amended to allow the rentalsman to be used by the judges in conducting hearings in all residential tenancy matters. Nova Scotia has implemented a somewhat similar system of hearings by residential tenancy boards.[20] Another alternative would be to use them "to inquire into and report on any

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[13] *Ibid.*, R. 75.12(2)(d).

[14] *Ibid.*, R. 75.12(6).

[15] *Ibid.*, Rule 75.08(2).

[16] *Ibid.*, Rule 75.15.

[17] *Ibid.*, Rule 75.16.

[18] M. Hatherly, "The Chilling Effect of Section 96 and Dispute Resolution" in this issue at 121.

[19] See J. McEvoy, "New Brunswick's *Residential Tenancies Act*: The Constitution and the Rentalsman" in (1983) 32 *UNB LJ* 231.

[20] *Residential Tenancies Act*, S.N.S. 1970, c. 13, ss 10A-10D, as enacted S.N.S. 1982, c. 54, and as am. S.N.S. 1985, c. 31.

question of fact,"[21] — another feature of the small claims rules in New Brunswick. This is, however, a less attractive alternative because the rentalsman's role would be more limited.

Another innovative and valuable feature of the rentalsman's operation relates to remedies, especially the power to perform the landlord's obligations at the landlord's expense. If, for example, the landlord is in breach of the obligation to maintain the premises in a good state of repair and fails to remedy the breach, the rentalsman may cause the repairs to be made.[22] This is something that the courts would never become involved in. Also, all remedies are available more quickly and cheaply from the rentalsman than they would be from the courts.

My final comment concerns a vital point, no matter who is to resolve tenancy disputes. A tenancy is not simply a single event transaction; it is an ongoing relationship, one which may be threatened by a dispute. The rentalsman operates in such a way as to minimize potential damage to this relationship because she does more than simply adjudicate: for example, she can mediate. The rentalsman is sure to be much more sensitive to the relationship than a court would be.

There are, however, definite limits to the goodwill that the rentalsman can bring to bear. A tenant who is considering making a complaint against the landlord may be reluctant to do so for fear that the landlord might retaliate by terminating the tenancy. This concern is seen to be valid when we consider that a monthly tenancy may be terminated with one month's notice. This could drastically undermine the tenant's legal rights.

Unfortunately, in the beginning, this lesson was lost on the government and the legislation made no provision against retaliatory eviction. The rentalsman's policy was to warn the tenant of this gap in protection: a policy which may have prompted an amendment of the legislation that was made within six months of its coming into force. The amendment provided that where a tenant made a complaint and then the landlord served a notice of termination within the next three months, the notice would be invalid unless the landlord satisfied a rentalsman that the landlord was not retaliating against the tenant for making a complaint.[23] This was a great improvement over the previous situation, but still it was not enough. In the following year the three month protection period was extended to one year.[24] When the Minister was asked in the House why he was making this change, he replied:

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[21] *Supra* at note 14.

[22] S.N.B. 1975, c. R-10.2, s. 6.

[23] *Ibid.*, s. 24.1, as enacted S.N.B. 1983, c. 82.

[24] *Ibid.*, s. 24.1, as enacted S.N.B. 1984, c. 60, which provides:

> Where a tenant makes a complaint against a landlord, a notice of termination of the tenancy served by the landlord within the period beginning the day on which the complaint was made and ending one year after that day is not valid if
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> (a) the tenant advises a rentalsman in writing within fifteen days after the receipt of the notice that he intends to contest the notice, and
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> (b) the landlord does not satisfy the rentalsman that he did not serve the notice of termination because the tenant made the complaint.

> As a matter of fact, one of my secretaries complained about her rent increase to the rentalsman's office and, three months after, she got her eviction notice. After that case was brought to my attention, I heard about other people who seemed to have been evicted simply because they had taken the matter of rent increases to the rentalsman. After discussing the matter with my staff and a number of tenants in this type of situation, I felt that if we were going to protect the tenant, we had to make it a 12-month period.[25]

One might say that it's the old story of the secretary getting the message across to the boss where everything else had failed.

Unfortunately, this does not end the story. The legislation gives protection against retaliatory eviction, but it does not make it is unlawful to retaliate.[26] Rather, it says that a notice to terminate a tenancy is ineffective in certain circumstances where it is a retaliatory action. The legislation does not directly address other forms of retaliation, such as an increase in rent or the refusal to renew a fixed term tenancy on expiration. This should be addressed at the earliest opportunity.

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[25]1984 New Brunswick Legislative Assembly, *Proceedings*, vol. II at 4562.

[26]Unlike, for instance, the *Employment Standards Act*, S.N.B. 1982, c. E-7.2, s. 28, which provides:

> Notwithstanding anything in this Act an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefor is related in any way to
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> (a) the application by an employee for any leave to which the employee is entitled under this Act; or
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> (b) the making of a complaint or the giving of information or evidence by the employee against the employer with respect to any matter covered by this Act; or if the dismissal, suspension, layoff, penalty, discipline or discrimination constitutes in any way an attempt by the employer to evade any responsibility imposed upon him under this Act or to prevent or inhibit an employee from taking advantage of any right or benifit granted to him under this Act.