New Brunswick's *Residential Tenancies Act*[1]: The Constitution and the Rentalsman

New Brunswick's *Residential Tenancies Act* was released from its seven year limbo and proclaimed in force as of 1 January 1983, notwithstanding doubts having been raised as to its constitutional validity. These doubts have been focused not at the general subject matter of the legislation, for there is no question of provincial competence with respect to landlord and tenant relations,[2] but to the chosen mechanism for enforcing or applying the law — the office of the rentalsman. The basis for the alleged invalidity is a purported contravention of a seemingly innocuous provision of the *Constitution Act, 1867*[3] respecting the appointment of judges. The purpose of this comment is to assess the constitutionality of the *Residential Tenancies Act*, or more particularly the office of the rentalsman, in light of the doubts expressed.

Section 96

The written constitution of a federal state such as Canada must be framed in terms of two fundamental types of provisions — institutional and distribution of powers. It should be self evident that the constitutional instrument must create not only the structures of the state, in terms of legislatures, courts and juristic units, but also set the parameters of inter-relationship between the structures created and between the structures and individual citizens. Such institutional provisions are to be contrasted with the subject matter distribution of legislative powers between the federal and provincial juristic units. That institutional provisions are superior to and control distribution of legislative power provisions was early recognized by Ritchie C.J. in *Valin* v. *Langlois*, a case concerning the validity of federal conferral of controverted elections jurisdiction upon provincial Superior Courts, in the following terms:

> . . . before these specific powers of legislation were conferred on Parliament and on the Local Legislatures, all matters connected with the constitution of Parliament and the Provincial Constitutions had been duly provided for, separate and distinct from the distribution of legislative powers, and, of course, over-riding the powers so distributed; for, until Parliament and the Local Legislatures were duly constituted, no legislative powers, if conferred, could be exercised.[4]

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[1]S.N.B. 1975, c.R-10.2.

[2]*Constitutional Act, 1867*, 30-31 Vict., c.3, s.92(13) (U.K.).

[3]*Ibid.*, s.96.

[4](1879), 3 S.C.R. 1, 11; affirmed, (1879), 5 A.C. 115 (P.C.).

A century later this seemingly obvious dichotomy of constitutional provisions has only recently been confirmed by the Supreme Court. In *Alberta Natural Gas Reference*[5] the Court was faced with the countervailing claims of federal legislative jurisdiction to impose a natural gas export tax pursuant to the broad federal taxation power[6], and provincial immunity from federal taxation mandated by section 125.[7] In direct conflict were a distribution of powers provision protected by a *non obstante* clause and an institutional provision governing the relationship between the federal and provincial juristic units. Which was to prevail? The multi-authored majority judgment includes the following decisive conclusion:[8] "The legislative powers conferred by Part VI (subsection 91 to 95) must be regarded as qualified by provisions elsewhere in the *Act*. Otherwise those other provisions are meaningless." This is a clear recognition and assertion by the Court that the distribution of powers provisions in the *Constitution Acts* are subject to and controlled by the institutional provisions.

One such institutional or "other provision" is section 96: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick." This bare appointing power has been judicially construed as imposing an effective separation of powers controlling provincial legislative jurisdiction respecting administration of justice[9] and powers of appointment.[10] It was early recognized that to strictly limit the scope of the section to mere nomenclature would allow provincial subversion of this constitutional restraint by the bare transfer of jurisdiction and powers from the named Courts to other tribunals or agencies.[11] Accordingly, a gloss has been judicially added to the bare words of the section so that its intendment is not one of mere nomenclature but of the exercise of such jurisdiction and powers reposed in the enumerated Courts. Therefore a cutoff point has been artificially imposed on the hierarchy of Courts — superior and inferior — such that a judge or any body exercising jurisdiction or powers such as to be constituted in law a section 96 Court must be federally appointed. All other judges or functionaries exercising jurisdiction or powers below the threshold established by section 96 may be provincially appointed.

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[5](1982), 42 N.R. 361, (S.C.C.). See also: *In Re The Initiative and Referendum Act*, [1919] A.C. 935 (P.C.); *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, 30 N.R. 271.

[6]s.91 . . . it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, — 3. The Raising of Money by any Mode or System of Taxation.

[7]No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

[8]*Supra*, footnote 5, at 387.

[9]*Constitution Act, 1867*, s.92(14): The Administration of Justice in the Province . . . .

[10]*Ibid.*, s.92(4): The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

[11]e.g., *Reference Re Adoption Act*, [1938] S.C.R. 398, 414 (per Duff C.J.C.).

Before turning to an examination of the threshold test for section 96, two matters may be briefly canvassed. First, it has often been stated, both by academic writers[12] and by some jurists,[13] that section 96 does not bind Parliament. Expressed in absolute terms, this general proposition, it is submitted, is in error. Rejection does not, however, connote acceptance of Lederman's thesis that there exists an extrenched status and core jurisdiction binding Parliament with respect to federal superior courts and curial agencies.[14] There is a middle ground.

A reading of section 96 reveals its neutrality as an appointing power with respect to functionaries exercising powers or jurisdiction above a threshold level. If one exercises such powers or jurisdiction, one must be federally appointed. In one sense, therefore, it is accurate to state that since all federal functionaries are federally appointed, section 96 could not be violated by Parliament and accordingly Parliament is not bound thereby. But what of Parliament conferring section 96 powers or jurisdiction upon a provincial appointee? Is it not self-evident that, for example, a provincial court judge exercising a superior Court jurisdiction conferred by a reorganization of the Criminal Code by Parliament would violate section 96? Objectively viewed, a provincial appointee would be exercising section 96 powers or jurisdiction in violation thereof. It is in this respect, it is submitted, that the controls inherent in the institutional provision, section 96, bind Parliament. It is to be noted that *Valin* v. *Langlois*,[15] the authority frequently cited for the proposition that "Parliament may repose jurisdiction, in respect of any matter within its competence in provincially appointed officers,"[16] was concerned solely with the competency of Parliament to confer controverted elections jurisdiction (a matter previously dealt with by Parliament itself) upon provincial superior courts, an issue which did not raise the restraint of section 96 and was therefore not considered by the Supreme Court or Privy Council.

Second, it is important to note the constitutional value of section 96. Characterized as "a cardinal provision of the statute"[17] and one of the "three

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[12]e.g., J. Willis, "Administrative Law and the British North America Act," (1939), 53 Harvard L.R. 251, 263-64; B. Laskin, "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case", (1955);33 C.B.R. 993, 994; P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell Co., 1977), 127.

[13]*R.* v. *McDonald*, [1958] O.R. 373, 382 (C.A.) (Laidlaw J.A.) *R.* v. *Canada Labour Relations Board, ex parte Federal Electric Corp.* (1964), 44 D.L.R. (2d) 440, 462-63 (Man. Q.B.) (Smith J.); *Papp* v. *Papp* [1970] 1 O.R. 331, 339 (Ont. C.A.) (Laskin J.A.); *Zacks* v. *Zacks*, [1973] S.C.R. 891, 908 (Martland J.); *Jones* v. *Attorney General of Canada* (1974), 45 D.L.R. (3d) 583, 590 (S.C.C.) (Laskin C.J.C.); *Ref. Re Family Relations Act of B.C.* (1982), 40 N.R. 206, 239 (S.C.C.) (Laskin C.J.C.). All of these statements may be expunged without affecting the final result in any of the cases.

[14]W.R. Lederman, "The Independence of the Judiciary", (1956), 34 C.B.R. 769.

[15]*Supra*, footnote at 4.

[16]*Papp* v. *Papp*, supra, footnote 13 at 339.

[17]*Martineau & Sons Ltd.* v. *Montreal*, [1932] A.C. 113, 120 (P.C.) (Lord Blanesburgh).

principle pillars in the temple of justice and . . . not to be undermined",[18] it has been consistently accepted as a cornerstone in securing the "impartiality and independence of the Provincial judiciary".[19] It was apparently felt that federally appointed, paid and tenured judges would have the independence necessary to impartially apply both federal and provincial law since they would not be solely dependent on either body for their jurisdiction or remuneration. Being federal appointees, with not only original but also supervisory jurisdiction over the inferior provincially appointed tribunals, it was further felt that a unifying influence would pervade the disparate provinces. From a mature constitutional perspective, one may argue that the constitutional value of section 96 lies in the creation of a forum for the adjudication of constitutional issues which is not wholly dependent on one or other partner in the federation. It is to be noted that it is from this perspective that critical calls for the reform of the Supreme Court of Canada have been based.

The threshold test for a violation of section 96 has been an evolving one. In *Toronto Corp.* v. *York Corp.*,[20] the Privy Council upheld a challenge to the validity of the Ontario Municipal Board, as then constituted, on the basis that, as a provincially appointed administrative body, it was not competent to exercise judicial powers analogous to those of a section 96 court.

The emphasis placed on the detached power in *Toronto Corp.* was effectively repudiated by the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*[21] There, the authority of the provincially appointed Board to issue a re-instatement order was challenged as an invalid exercise of judicial powers by an administrative body. The Privy Council, per Lord Simonds, agreed on the essentially administrative nature of the Board but dismissed the challenge after examining the institutional framework within which the power was exercised. The test propounded by Lord Simonds reversed the touchstone expressed earlier by Duff C.J. in *Reference Re Adoption Act*[22] such that the question was to be whether the jurisdiction "broadly conform[ed] to the type of jurisdiction exercised by superior, district or county courts."[23] Construing the scheme in issue, Lord Simonds placed particular emphasis on the absence of a *lis inter partes* in the traditional sense and the non-legal training of Board members in determining that the threshold test was not violated. It should be noted that, in focusing on its institutional setting, the Privy Council did not find it

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[18]*Toronto Corp.* v. *York Corp.*, [1938] A.C. 415, 426 (P.C.) (Lord Atkin).

[19]*Supra*, footnote 17; *Re Family Relations Act of British Columbia* (1982), 40 N.R. 206, 209-210 (S.C.C.) (Estey J.).

[20]*Supra*, footnote 18.

[21][1949] A.C. 134 (P.C.).

[22][1938] S.C.R. 398.

[23]*Supra*, footnote 21, at 154.

necessary to answer the initial question as to whether or not the disputed power was, in a detached sense, a judicial one.

Approximately three decades later, in *Tomko* v. *Labour Relations Board of Nova Scotia*,[24] the Supreme Court was faced with a challenge to the power of a provincial board to issue cease and desist orders, contended to be equivalent to a superior court power to grant an injunction. Laskin C.J.C., delivering the majority opinion, stressed that "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangement in which it appears and is exercisable under the provincial legislation."[25] Referring to the test enunicated in *John East*, Laskin C.J.C. determined that the exercise by the Board of its cease and desist power differed fundamentally from the injunctive power of a superior court. Important considerations included (a) that the Board did not have power to enforce its orders "in contradistinction to the power of a Superior Court to entertain contempt proceedings"[26]; (b) that "[un]like a Court, the Board or Panel makes its own investigation of the issues raised by the complaint and decides for itself on its findings whether an interim order should issue"[27]; and (c) the policy considerations pertaining to the "fluidity and volatility of labour relations issues"[28] which allow for efforts at settlement before or after the making of a Board order.

The final link in the evolution of the current threshold test for a violation of section 96 was achieved in the 1981 Supreme Court decision in *Re Residential Tenancies Act of Ontario*.[29] Noting an earlier critical comment of the British Columbia Court of Appeal that "no general tests are offered or established in the *Tomko* judgment for the characterization of the function, the characterization of the institutional arrangements, and the examination of their relationship"[30], Dickson J., in delivering the judgment of the Court, proceeded to synthesize prior judicial authority in enunciating the following three-step general test:[31]

> The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation . . .

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[24][1977] 1 S.C.R. 122; (1975), 69 D.L.R. (3d) 250.

[25]*Ibid.*, S.C.R. 120; D.L.R. 255.

[26]*Ibid.*, S.C.R. 121; D.L.R. 256.

[27]*Ibid.*, S.C.R. 122; D.L.R. 257.

[28]*Ibid.*

[29](1981), 37 N.R. 158 (S.C.C.).

[30]*Pepita* v. *Doukas* (1979), 16 B.C.L.R. 120, 126; 101 D.L.R. (3d) 577, 582 (B.C.C.A.) (Lambert J.A.).

[31]*Supra*, footnote 29, at 174-76.

> If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s.96 courts, that is the end of the matter . . . If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by section 96 courts at Confederation, then one must proceed to the second step of the inquiry.
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> Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function . . . [T]he question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity' . . .
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> If, after examining the institutional context, it becomes apparent that the power is not being exercised as a judicial power, then the inquiry need go no further . . . On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context . . . The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal . . . so that the tribunal can be said to be operating 'like a section 96 court'.

Capsulated, the threshold test requires a historical inquiry into the detached power of jurisdiction, an examination of its particular exercise by the provincial appointee and finally an examination of its exercise within the institutional context. If at any step a negative response is concluded with respect to the question of analogy or conformability to a section 96 court, the power or jurisdiction has been validly conferred upon the provincial appointee. Reversing the perspective, an affirmative conclusion must be reached at each step for the power or jurisdiction to be held to be invalidly conferred. The process involves a shift in focus from the particular to a general perspective. It should be obvious that the test can be short-circuited by proceeding directly to step two (or three) on the assumption that prior step(s) are affirmative, thereby obviating the necessity for the historical inquiry. On a more general level, it should also be obvious that in seeking to allow provincial flexibility in structuring provincial administration of justice, the Court has provided a mechanism by which section 96 courts can be effectively denuded of all powers and jurisdiction through properly framed legislative schemes. This was the solitary warning of de Grandpre J., who, dissenting in *Tomko*, in effect criticized the majority reasoning as "tantamount" to abolishing the jurisdiction of section 96 courts sooner or later".[32]

Recent Non-Landlord-Tenant Decisions

Constitutional issues seem cyclical. The number of recent decisions of the Supreme Court of Canada pertaining to section 96 reflect a current awareness or popularity of the issue among the Bar. While many of the

[32]*Supra*, footnote 24, S.C.R. 145; D.L.R. 275.

controversies have no direct relationship to the particular legislation the putative subject of this comment, the judicial consideration of the disputed powers or jurisdiction in terms of institutional context (steps 2 and 3) may be of precedential or argumentative value. Accordingly, a cursory review of some of these authorities is in order.

In both *Farah* v. *Attorney General of Quebec*[33] and *Crevier* v. *Attorney General of Quebec*,[34] the Supreme Court held invalid the exercise of appellate or supervisory jurisdiction where the provincially appointed appeal body functioned in isolation as such was not inexorably bound up in the primary administrative scheme. In *Farah*, a Transport Tribunal composed of Provincial Court judges was empowered to hear "in appeal, . . . any question of law, any decision of the [Transport] Commission which terminates a matter".[35] The Court had no difficulty in equating this statutory appellate jurisdiction with the inherent supervisory jurisdiction of Superior Courts at Confederation and in holding that the legislation in question merely involved a bare transfer of that very jurisdiction to a non-section 96 body. As noted by Laskin C.J.C., "where an administrative appeal agency is constituted, divorced, as is the Transport Tribunal here, from involvement in the exercise of original jurisdiction under the *Transport Act* and given a purely appellate authority . . . there is a meshing both of jurisdiction and power, giving it the form and authority of a section 96 Court".[36] In *Crevier*, a Professions Tribunal, composed of Provincial Court judges and established to hear appeals from 38 Disciplinary Committees governing Quebec professionals, was held to be similarly invalidly constituted. Laskin C.J.C., delivering the judgment of the Court, characterized the Tribunal as "not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them . . ."[37]

Appellate jurisdiction confided in the Lieutenant-Governor in Council was, however, upheld in the more recent Supreme Court decision in *Capital Regional District* v. *Concerned Citizens of British Columbia et al.*[38] Pursuant to the provincial *Pollution Control Act*,[39] appeals from decisions of the regulatory Board were alternatively available to the Supreme Court of British Columbia and the Lieutenant-Governor in Council, both of which were

[33](1978), 21 N.R. 595.

[34](1981), 38 N.R. 541.

[35]*Transport Act*, S.Q. 1972, c. 55, s.58(a).

[36]*Supra*, footnote 33, at 628.

[37]*Supra*, footnote 34, at 555. Note also Laskin C.J.C.'s discussion of privitive clauses with respect to s.96: "In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s.96 Court." *Ibid.*, at 556.

[38]21 December 1982 (unreported).

[39]S.B.C. 1967, c.34.

empowered to "determine the matters involved and make any order that . . . appears just . . ."[40] In delivering judgment for a unanimous Court, Laskin C.J.C. determined that the appellate function of the Lieutenant-Governor in Council was not isolated from, but rather "intertwined" in, the administrative scheme. The appellate function was only one of four — appointing power, regulation-making power, directory and supervisory power, and appellate power — that were reposed in the Lieutenant-Governor and was one which, in the legislative history of the scheme, pre-dated appeals to the Supreme Court of British Columbia. That the directed appellate authority of both the Lieutenant-Governor in Council and the Court were legislatively identical did not necessarily require a uniform approach. Concluded Laskin C.J.C.:[41] "There are no express directions in [the statute] that compel the Lieutenant-Governor in Council to yield to a purely judicial assessment of an appeal nor, in my opinion, does the word 'just' compel such an assessment. Policy remains open to a body which is a policy-making tribunal." Accordingly, the disputed function having been characterized as nonjudicial, section 96 was not violated.

Mississauga v. *Regional Municipality of Peel*[42] illustrates the immersion of a putative section 96 judicial power within the institutional context of an administrative scheme such that its exercise by non-section 96 functionaries is nonviolative of section 96. In yet another unanimous judgment pertaining to this issue delivered by Laskin C.J.C., the Ontario Municipal Board was held validly constituted to determine the vesting of assets and liabilities consequent upon a municipal restructuring. The challenge to the constitutionality of the Board's power involved a segregation of the particular power from other functions or powers, a process Laskin C.J.C. characterized as an attempt "to turn the clock back and to restore *Toronto* v. *York* as the governing authority in this field of constitutional law".[43] It was further held that the requisite historical inquiry with respect to the subject power confirmed its exercise by non section 96 courts.[44]

In *Massey-Ferguson Industries Ltd. et al* v. *Government of Saskatchewan*,[45] a unanimous Supreme Court applied the Ontario *Residential Tenancies* three-step test in upholding the validity of Saskatchewan's *Agricultural Implements Act*.[46] As part of a comprehensive scheme regulating distributors, dealers and consumers of farm equipment, the Legislature provided that the provincially appointed Board might award compensation or damages from a

[40]*Ibid.*, s.12(5).

[41]*Supra*, footnote 38, slip judgment p. 8.

[42][1979] 2 S.C.R. 244; 26 N.R. 200.

[43]*Ibid.*, S.C.R. 251; N.R. 206.

[44]*Ibid.*, S.C.R. 254; N.R. 209.

[45](1981), 39 N.R. 308 (S.C.C.).

[46]R.S.S. 1978, c.A-10.

fund, financed by levies imposed on distributors, where a farmer made application alleging "a loss, due to an unreasonable delay in the availability of a repair or who considers he has incurred a loss due to the vendor or the general provincial distributor, not fulfilling the conditions or warranties as set out in this Act or in a conditional sales contract . . ."[47] Though somewhat akin to judicial settlement of contractual disputes, Laskin C.J.C. distinguished the powers of the Board, in administering what he characterized as an insurance fund, on the basis that, in contradistinction to a section 96 court: (a) compensation was not strictly determinable in accordance with legal considerations alone, since "claims on the Fund may result from loss or damage which is not attributable to any person's fault in a legal sense"[48]; (b) the adjudication involved a claim against the Fund, not a *lis inter partes* "in the traditional sense" involving a distributor or dealer as compensatory defendant; and (c) the Board enjoyed an independent investigative role "unlike the neutral process of a Court".[49] In light of these distinguishing features, Laskin C.J.C., in analysis restricted to the institutional context, validated the power reposed in the Board. It is interesting to note that for the purposes of his analysis, Laskin C.J.C. was willing to assume, but with doubt, that the historical inquiry step in the *Ontario Residential Tenancies* test had been satisfied.

Finally in this series, mention must be made of *Re Family Relations Act of British Columbia*.[50] Distinguishing this legislative scheme from others discussed was that the inpugned powers or jurisdiction were to be exercised by inferior court judges, thus obviating the necessity of steps two and three in the *Ontario Residential Tenancies* test since the institutional context remained curial and the powers and jurisdiction judicial. The sole determinative issue was the historical inquiry of step one which, of course, is where the majority and minority parted on the issues of guardianship and custody and access.

Recent Landlord — Tenant Decisions

Provincial reorganization of the administration of traditional landlord-tenant relations has occasioned seven separate judicial considerations of section 96 in this context. The first and perhaps the most futile was the 1978 *Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements*.[51] Without the benefit of existing or draft legislation or even a basic proposal, the Alberta Court of Appeal was faced with the impossible

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[47]*Ibid.*, s.6(D).

[48]*Supra*, footnote 45, at 323-24.

[49]*Ibid.*, at 325.

[50](1982), 40 N.R. 206 (S.C.C.).

[51](1978), 89 D.L.R. (3d) 460 (Alta. S.C., A.D.).

task of determining the constitutionality of a provincially appointed tribunal granting orders for possession to a landlord or orders for specific performance in respect of a tenancy agreement. In the absence of an institutional context and in light of a historical inquiry which confirmed section 96 "jurisdiction respecting land, possession, specific performance and the relationship of landlord and tenant"[52], the Court had no alternative but to hold that the exercise of such powers or jurisdiction could not be conferred on provincial appointees. The decision, aside from the historical inquiry respecting the detached powers, is of more significance as an illustration of poor use of the reference device than of precedential value.

That was not the situation, however, before the British Columbia Court of Appeal in *Pepita* v. *Doukas*.[53] There, a tenant challenged the constitutional validity of an order terminating his tenancy made by a rentalsman on the statutory basis that "the conduct of the tenant, or a person permitted in or on the residential property by the tenant, has unreasonably interferred with the enjoyment or safety of occupants in the residential property so that it would be inequitable to those other occupants to allow the tenancy agreement to continue."[54] It is interesting to note an analytical divergence between the judgment of the B.C. Court, per Lambert J.A., in *Pepita* and that subsequently delivered by Dickson J. in *Ontario Residential Tenancies*. In contradistinction to Dickson J. who in step two of his enunciated test requires analyses of the subject function in its institutional context in order "to determine whether the function itself is different when viewed in that setting",[55] Lambert J.A. concluded that the subject function itself does not change but rather the question is whether the characterization of "the tribunal as a whole is different when the powers include the impugned function than it is when its powers do not include that function."[56] In this view, the emphasis should not be on the particular power or jurisdiction examined in an increasingly expansive process but rather the exercising body has its nature as an administrative tribunal altered because of the inclusion of the subject power or jurisdiction. "In short, clothing the tribunal with the function makes a difference to the tribunal but not to the function", stated Lambert J.A.[57]

In considering the detached power of issuing termination orders, Lambert J.A. drew attention to a distinction between the deliberative and executive aspects of the function. If consideration focused exclusively on the final executive aspect of making the order, there would be no differentia-

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[52]*Ibid.*, at 471.

[53](1979), 16 B.C.L.R. 120 (C.A.).

[54]*Residential Tenancy Act*, S.B.C. 1977, c.61, s.22(a).

[55]*Supra*, footnote 31.

[56]*Supra*, footnote 53, at 127.

[57]*Ibid.*, at 128.

tion from the executive aspect in similar matters by section 96 courts.[58] The crucial focus, however, was not the mere executive but the deliberative aspect. In proceeding to the determination of the issues, was the question to which the tribunal applied its "deliberative skill" different from that of a section 96 court?[59] The answer to this question controlled, in the view of Lambert J.A., the preliminary step of historical inquiry with a view to conformity or analogy to section 96 powers or jurisdiction. However, Lambert J.A. did not resolve the "difficult and obscure" issue of historical analysis, opting instead to concentrate on the institutional context as the decisive factor.[60]

Institutionally, Lambert J.A. distinguished the functioning of a rentalsman under the B.C. *Residential Tenancy Act* from a section 96 court on the following basis:[61] (a) the statutory ability of the rentalsman to render decisions, independently of legal precedent, according to the merits of the case or, as stated by Lambert J.A., by "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"[62]; (b) the lack of enforcement power in the rentalsman; (c) that a termination proceeding might be initiated not only by the direct parties to the landlord-tenant relationship but also another tenant or on the rentalsman's own initiative (subsection 47(2)); (d) the foundation for a termination order lay not strictly within the confines of the consensual landlord-tenant agreement but the statutory rights and obligations enunciated in the particular legislative provision; and (e) the mediatory role of the rentalsman as opposed to the strictly adjudicative court function. Lambert J.A. also held that the subject power was not divorced or isolated from the general administrative (quasi-judicial) functions of the rentalsman but was "closely intertwined". In his words, "the [termination order] function is not readily severable from that framework to leave a complete and comprehensive legislative scheme."[63] Utilizing Lambert J.A.'s own test, the deliberative aspect involved in the exercise of the rentalsman's termination order power was not conformable or analogous to that of a section 96 court in either its detached but particularly its institutional form.

Recognizing the significance attached in both *John East* and *Tomko* to a distinct social policy underpinning the legislation (in those cases peaceful collective labour relations), Lambert J.A. sought to further support his conclusions by defining the social policy of the *Residential Tenancy Act*. However, in setting that policy as "security of tenure and quiet enjoyment by

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[58]*Ibid.*, at 131.

[59]*Ibid.*

[60]*Ibid.*, at 131-32.

[61]*Ibid.*, at 136-37.

[62]*Ibid.*, at 136.

[63]*Ibid.*, at 137.

tennants"[64] with respect to the mechanism of the rentalsman, he did not distinguish the traditional policy of landlord-tenant relations enforced by courts beyond noting the substitution of government control for freedom of contract. This failure to particularize a unique social policy behind modernization of landlord-tenant relations, especially the lack of the collective versus private rights distinction, has continued to trouble courts.

Specifically at issue in the *Ontario Residential Tenancies Reference*[65] was the constitutional validity of the authority and power of the provincially appointed Residential Tenancies Commission to make eviction and compliance orders as provided in the *Residential Tenancies Act, 1979*.[66] Prior to a thoughtful review of precedent and the enunciation of his three step test,[67] Dickson J., in delivering the judgment of the Supreme Court, set forth the broad legislative history of the Ontario scheme and in the course of these preliminary matters made two significant observations: (a) that "resolution of disputes between landlords and tenants has long been a central preoccupation of the common law courts"[68] and (b) that the "most significant role" of the Commission was dispute resolution triggered "upon application" of either landlord or tenant, or a third party "in one of two circumstances".[69]

Step one, the historical inquiry, was virtually conceded against the preliminary validity of the legislation by the admission of the Ontario Attorney-General that the eviction and compliance order powers were not only analogous to ejectment and injunctive powers of section 96 courts "but are the same powers".[70] Dickson J., in declaring that such powers were those of a section 96 court, stated that the essential features of the orders were the same in 1967 as under the subject legislation — "[i]n an ejectment in 1867 a landlord was . . . seeking the removal of a tenant from his land . . . [and] a landlord seeking an injunction against a tenant in pre-Confederation times is in substantially the same position as a modern landlord seeking compliance under the *Act*".[71]

Step two, the analysis of the impugned powers as exercised in the institutional context of the Commission, from the perspective of determining whether the powers were still 'judicial' (*i.e.*, still section 96 powers),

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[64]*Ibid.*, at 134.

[65]*Supra*, footnote 29.

[66]S.O. 1979, c.78.

[67]*Supra*, footnote 31.

[68]*Supra*, footnote 29, at 161.

[69]*Ibid.* at 169; repeated, 185.

[70]*Ibid.* at 177.

[71]*Ibid.*, at 178.

was also determined against the validity of the legislation. Dickson J. noted that even in the context of a third party complaint to the Commission, a *lis inter partes* existed involving the landlord and the tenant; the function of the Commission being "to determine the respective rights and obligations of the parties according to the terms of the legislation."[72] In contradistinction to the labour relations cases where the subject dispute was not defined in terms of a private *lis* between employer-employee but a collective interest in an allegedly unfair labour practice, landlord-tenant disputes involve no real collective interest in the particular private *lis*. Additionally, it had been argued that the Commission would not necessarily be acting judicially since it was statutorily directed to decide "upon the real merits and justice of the case."[73] It is to be noted that in *Pepita*, the B.C. legislation similarly directed the rentalsman but added the qualification that the rentalsman was not bound by legal precedent. In dismissing this argument, Dickson J. noted that the Commission, in hearing disputes, did so "in accordance with rules of law, and by the authority of the law" in a forum controlled by the procedural safeguards of the *Statutory Powers Procedure Act, 1971*[74] such as the right to counsel, to call, examine and cross-examine witnesses, and to written reasons for decision.[75] Accordingly, Dickson J. concluded that the exercise of the powers in their institutional context remained 'judicial'.

Step three, the examination of the broader functioning of the tribunal as a whole in order to determine whether the "adjudicative function is a sole or central function . . . so that the tribunal can be said to be operating like a section 96 court"[76] was also held against the validity of the legislation. Notwithstanding the admitted educative and mediative functions of the Commission, Dickson J. reiterated his earlier conclusions that "the central function of the Commission is that of resolving disputes, in the final resort by a judicial form of hearing."[77] The mediative function of the Commission was not significant to the issue, per Dickson J., because it depended upon the receptivity of the parties involved without which a judicial hearing was required. No doubt because of the judicial nature of any required hearing, the Commission's statutory investigative function[78] was not referred to by the Court.

Violative of all three steps in the enunicated test, the exercise of eviction and compliance order powers by the Ontario Residential Tenancies Com-

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[72]*Ibid.*, at 183.

[73]*Supra*, footnote 66, s.93(1).

[74]S.O. 1971, c. 47.

[75]*Supra*, footnote 29, at 184.

[76]*Ibid.*, at 176.

[77]*Ibid.*, at 185.

[78]*Supra*, footnote 66, s.108: "The Commission may, before or during a hearing, (a) conduct any inquiry or inspection it considers necessary; and (b) question any person, by telephone or otherwise concerning the dispute."

mission was accordingly held unconstitutional as an infringement of section 96.[79]

In Nova Scotia, the law-applying functions conferred upon a provincially appointed Board by a legislative scheme of landlord-tenant law reform have similarly been held afoul of section 96. In *Easton* v. *Residential Tenancies Board*,[80] a decision of the Trial Division which preceded the Supreme Court of Canada judgment in *Ontario Residential Tenancies*, Sullivan J. relied heavily upon the Court of Appeal decision in the latter case[81] in holding invalid the provincial Board's mediative function[82] and its authority to issue termination[83] and possessory orders.[84] For the reasons stated by the Ontario Court of Appeal and subsequently reiterated by the Supreme Court, Sullivan J. held that the situation was not a *Tomko* one of new collective rights regulated by an administrative body unlike a section 97 court, but rather that of traditional private rights merely being adjudicated in a new setting not dissimilar in function from a section 96 court. In the curial institutional context of the Board, the mediative function, coupled as it was with the power to "give advice and direction",[85] was held violative of section 96 because the power of direction was interpreted as a power of decision or "authoritative instruction" — a curial adjudicative function. This power, as well as the termination and possessory order powers, were held to be not merely incidental or subsidiary to other administrative functions of the Board but its core elements.

In *Burke* v. *Arab*,[86] the Nova Scotia Appeal Division relied unduly on the Supreme Court of Canada reasoning in *Ontario Residential Tenancies* in virtually relieving the provincial Board of any viable functions. This is all the more remarkable since, as with *Easton*, the constitutional issue arose in the context of a *lis inter partes* — an appeal by a tenant from a lower court decision allowing a claim by a landlord for the excess over the damages limit awarded by the Board. Instead of limiting itself to the particular statutory power exercised by the Board in the matter, the Court held invalid

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[79]The provisions of the Ontario *Residential Tenancies Act* in issue never having been proclaimed, no curative measures have yet been enacted by the Ontario Legislature.

[80](1980), 41 N.S.R. (2d) 44.

[81]*Reference Re Residential Tenancies Act* (1980), 26. O.R. (2d) 609 (C.A.).

[82]*Residential Tenancies Act*, S.N.S. 1970, c.13, s.11(3)(b).

[83]*Residential Tenancies Act*, S.N.S. 1970, c.13, as amended by S.N.S. 1973, c. 70, s.2 adding s.11(3)(g).

[84]*Ibid.*, s.11(3)(h). The Attorney-General conceded that the power to order vacant possession was a historical s.96 power and referred to R.S.N.S. 1864, c.140, s.2; R.S.N.S. 1884, c.126, s.1.

[85]*Supra*, footnote 82.

[86](1981), 49 N.S.R. (2d) 181. Appeal to the Supreme Court of Canada dismissed 31 January 1983, Bulletin of Proceedings Taken in the Supreme Court of Canada, 4 February 1983.

the whole range of powers conferred upon the Board[87] except general investigative and educative functions and the very mediative function held invalid in *Easton*, which decision was not referred to by the Court. Among the powers held unconstitutional are several clearly or arguably non-section 96 functions or powers such as the investigative power pertaining to violations of the *Act* itself. Feeling itself bound by the *Ontario Residential Tenancies* decision in the matter before it, the Court held that the Nova Scotia legislation was not dissimilar from that considered in the Ontario case and that the essential nature or primary role of the Board was to resolve disputes in a judicial manner.[88]

A further matter in the scheme of landlord-tenant reform — rent review or control — has also been considered in light of section 96. Rent review differs from other reform of basic landlord-tenant relations because of its more easily discernible social policy superseding private contractual rights. Based on an assumption that renters comprise a lower economic segment of society and that there is an inequality of bargaining power in times of inflationary accommodation costs, the Legislature may see fit to subsume private arrangements and rights between landlords and tenants by a general policy of restraint in favour of tenants as a collectivity. If that is the true rationale, the tool of rent review is suspect since obviously direct subsidization of needy tenants would more particularly accomplish the goal. There is, however, a relationship between the recognizable social policy and the enforcement mechanism.

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[87]It is in the function of the residential tenancies board and it shall have power,

> (a) to investigate and review matters affecting landlords and tenants and provide and dessiminate information concerning rental practices, rights and remedies;
> (b) to mediate disputes between landlords and tenants and give advice and direction to landlords and tenants in disputes;
> (c) to investigate allegations of violations of the provisions of this Act and the statutory conditions provided by Section 6;
> (d) to investigate and review the rent charged for residential premises and determine whether the rent to be approved or varied;
> (e) to direct the tenant to pay the rent in trust or accept rent payable by a tenant and hold the same in trust pending performance by a landlord of any act the landlord is required by law to perform;
> (f) to require the return of a security deposit or money or other value or a portion thereof held by or for a landlord or tenant;
> (g) to provide for the termination of the tenancy between the landlord and the tenant where the residential premises are being physically damaged by the tenant or the tenant is conducting himself in such a manner as to unduly interfere with the possession or occupancy of other tenants;
> (h) to direct that the landlord be put into possession of the residential premises where the tenant is in arrears of rent for more than fourteen days for weekly tenancies and more than forty-five days for monthly or yearly tenancies;
> (i) require the payment of money by the landlord or the tenant, said payment not to exceed five hundred dollars.

[88]*Supra*, footnote 86, at 198. The constitutional position of the alternative law-applying functionaries included in the legislative scheme, the provincial magistrates per s. 10, though not directly discussed, was alluded to by the Court. Since there can be no doubt of the curial nature of these functionaries and that the injunctive, termination and possessory order powers conferred upon them by the *Act* are historically s.96 powers, there can be no doubt of the invalidity of their exercise by the provincially appointed magistrates.
Curative legislation, S.N.S. 1982, c.54, amends the *Residential Tenancies Act* by conferring overall jurisdiction on the County Court with the Board relegated to an investigative function reporting to the Court.

In *Cohen* v. *Dhillon*,[89] the B.C. County Court held valid a provincial legislative scheme of rent review where the Commission acted in an administrative non-section 96 manner by initiating the review proceedings itself and conducting its own investigation. In so doing, the Commission acted in a non-curial manner in what the County Court characterized as "administering a legislative scheme of rent control, apart entirely from the contract between those parties."[90] A similar scheme was upheld by the Nova Scotia Supreme Court, Appeal Division in *Fort Massey Realties Ltd.* v. *Rent Review Commission*[91] though in a most unsatisfactory cursory manner. The Court, after extensive references to *Cohen* v. *Dhillon*, seemingly drew on some incontestable support by stating *in abstractu* that "boards or commission have always been deemed essential to such controls."[92] The Court further quoted Dickson J. in the *Ontario Residential Tenancies References* as follows:[93] "In 1975 the Legislature of Ontario introduced *The Residential Premises Rent Review Act*, 1975 (2nd Sess.) c.12, to establish rent control. The ability of the province to administer a rent review system, of course, in no way encroached on the traditional jurisdiction of the section 96 courts to order termination, eviction and compliance." The relevance of this quotation to the determination of the issue is at least nebulous since in no way can Dickson J. be thought to have impliedly sanctioned rent control as inherently non-violative of section 96. Completing a rather unsatisfactory analysis, the Court, without expressly utilizing the *Ontario Residential Tenancies* test, held that it had not been violated.

Summary

The preceding review of recent section 96 authorities illustrates many significant points pertaining to the second and third steps in the *Ontario Residential Tenancies* test which may be material to our analysis of the constitutional validity of the New Brunswick legislation. First, it is important to recognize the controlling context of the particular legislative scheme in issue before the Court. Constitutional law provides nothing more than "rules of the game" the application of which vary with the context. The "rules" merely keep the players honest; proper legislative drafting can avoid a violation of the rules. Mere application by rote of judicial precedent in the absence of careful analysis of the particular legislative context in issue, as unfortunately seems to be illustrated by the Nova Scotia Appeal Division decisions in *Burke* v. *Arab* and *Fort Massey Realties Ltd.* v. *Rent Review Commission*, may fail to discern the crucial subtleties upon which precedents are distinguished.

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[89](1979), 13 B.C.L.R. 334 (Co. Ct.).

[90]*Ibid.*, at 345.

[91](1982), 50 N.S.R. (2d) 451.

[92]*Ibid.*, at 460.

[93]*Ibid.*; quoting, supra, footnote 28, at 167.

Second, the importance of a *lis inter partes*. Analyzed on the basis of a distinction between private rights and policy-based collective rights, the absence of a *lis* in the traditional sense was of significance in *John East Iron Works* and *Tomko* pertaining to labour relations and in *Massey-Ferguson* concerning a farm implement insurance fund. However, in *Ontario Residential Tenancies* the Supreme Court affirmed the existence of a *lis* in the traditional sense in landlord-tenant proceedings even when the adjudicative process was initiated by a third party. The issues in dispute remain the respective rights and obligations of the landlords and tenants concerned, not superimposed collective rights or obligations.

Third, an independent investigative function may qualitatively differentiate the suspect provincially appointed functionary from a section 96 court, as in *Tomko* and *Massey-Ferguson*. Unlike the passivity of a court, the Board or Commission may itself actively gather information upon which to determine the issues before it.

Fourth, a statutory direction to determine a matter "on the real merits" or "as appears just" will not allow a provincially appointed functionary to render a decision apart from the strict legal rights of the parties, per *Ontario Residential Tenancies*. However, a further qualification dispensing with the strict application of legal precedent will allow a policy-oriented, non-judicial decision as in *Pepita* v. *Doukas*, or by the inherent policy bias of the tribunal as in *Concerned Citizens of B.C.*

Fifth, a section 96 power or function may be exercised by a provincially appointed functionary where the power or function is not divorced from but intertwined in a broader administrative scheme and is not its sole or central function, per *Farah, Crevier, Pepita* v. *Doukas* and *Ontario Residential Tenancies*.

Sixth, an adjudicative process involving a judicial form of hearing is one of the hallmarks in determining whether, in its context, a power or function is exercised judicially.

The New Brunswick Legislation

Breach of landlord-tenant relations by either party, either at common law or statute, evokes a limited array of remedies. If the relationship is to be terminated, the parties are to be placed in the *status quo ante* — the tenant is to surrender and the landlord to regain immediate possession. If the relationship is to continue, the party in breach must be made to fulfill his obligations in the future and perhaps compensate for past omissions. Though the nomenclature changes the essence remains the same, as noted by Dickson, J. in *Ontario Residential Tenancies*.[94] Thus the orders for pos-

[94]*Supra*, footnote 71.

session considered in *Ref. Re Proposed Legislation* and *Easton*, the eviction orders in *Ontario Residential Tenancies*, and the termination orders in *Pepita* v. *Doukas* and *Easton*, all amount in general to a return of the landlord to possession of the leased premises. The courts have had no difficulty in characterizing such powers as analogous or conformable to those historically exercised by section 96 courts. The second remedy, respecting the present and future fulfillment of obligations, whether expressed as an order for specific performance as in the *Ref. Re Proposed Legislation*, or as a compliance order in *Ontario Residential Tenancies*, has similarly been held a historically section 96 power or function.

Under New Brunswick's *Residential Tenancies Act*[95], the arsenal of powers conferred upon the provincially appointed rentalsman are the first mentioned tenancy-termination powers designated as eviction orders and notices to quit and the latter continuing-tenancy power of compliance orders. A historical inquiry particularized to the pre-Confederation court structure in New Brunswick is not essential since the section 96 court concept is not individualized for each province but is a broader common concept.[96] Therefore, on the basis of the authorities discussed it can be accepted, or at least assumed, that the first step in the *Ontario Residential Tenancies* test has been satisfied: the powers or jurisdiction of the rentalsman are broadly conformable to those historically exercised by a section 96 court.

Step two involves consideration of the exercise of these powers, in the context of the institutional setting structured by the legislative scheme, in order to determine if they are still characterizable as "judicial".

The compliance order power of the rentalsman is set out in sections 5 and 6 of the *Act*. By section 5, where a landlord alleges a failure on the part of a tenant to fulfill his obligations under the *Act* or the tenancy agreement, the landlord may so advise the rentalsman after notice to and failing remedial action by the tenant. Subsection 5(3) states that the rentalsman "(a) may conduct an investigation; (b) may inspect the premises; and (c) after conducting an investigation or inspecting the premises or both, *may require the tenant to fulfill his obligations*" (emphasis added). Subsection 6(3) is an equivalent provision with respect to a complaint by a tenant that a landlord has not fulfilled his obligations.

Where a tenant fails to heed a compliance order, the rentalsman is empowered by subsection 5(4), to "serve on the tenant a notice to quit terminating the tenancy and requiring the tenant to vacate the premises . . ." However, failure by a landlord to obey a compliance order will result, by subsection 6(4), in the rentalsman himself performing the obligation. Secondly, a notice to quit may also be issued where, pursuant to subsection 6(8), a rentalsman determines that it is reasonable to do so "on

[95]S.N.B. 1975, c.R-10.2.

[96]But see, *of Landlord and Tenant, and Replevin*, R.S.N.B. 1854, c. 126.

the basis of destruction of the premises or other cause." Thirdly, where, following notice by the landlord and an investigation by the rentalsman within five days of the notice, a tenant has been found not to have paid his rent, the rentalsman may issue a notice to quit.

A notice to quit under the *Act* is not an executable order; failure by a tenant to vacate the premises does not, by itself, invoke any penalty. Remedial action lies in a further application by a landlord to the rentalsman for an eviction order which may be issued, pursuant to section 21, where a notice to quit has not been complied with by a tenant or where a tenant has not vacated following receipt of a notice to terminate (section 24). In the former instance, the rentalsman may issue the eviction order without an investigation, though one is required in the latter. An eviction order is executable by the Sheriff (subsection 21(4)).

In their institutional setting, the powers of the rentalsman cannot be construed as "judicial" for the purposes of section 96 nor as still conformable to those of a section 96 court. Admittedly, there remains in issue a dispute over private rights, a *lis inter partes*, between landlord and tenant. But the functioning of a rentalsman does not approach that of a curial body. In contradistinction to *Ontario Residential Tenancies*, there is no requirement and indeed no provision for a formalized hearing before a rentalsman for the adjudication of rights. Rather, the rentalsman has a separate investigative role prior to the issuing of a compliance order, notice to quit or eviction order. It is consequent to the investigation that an order may issue and is to be noted that the generally factual inquiry may be, of necessity, lacking in formal procedures, as in section 19(2) where the investigation has a five day time frame.

However, this does not mean that a landlord or tenant can be denied the protection afforded by the rule *audi alteram partem* or the concepts of natural justice and procedural fairness. The right of the parties to be "heard" does not necessarily evoke all the procedural safeguards of a formalized curial form of hearing. The standard of procedural fairness required is a variable one and may amount to no more than being "given access to and the opportunity to refute . . . any information gathered . . . in the cause of [the] investigation which was prejudicial."[97] For administrative law purposes, characterization of a function as "judicial" evokes the rule of natural justice. The undoubted adjudicative function of the rentalsman would be so characterized. However, for constitutional law purposes, such characterization does not necessarily follow. The indicia of a "judicial function", offered by Dickson J. in *Ontario Residential Tenancies*[98] for the purpose

[97]*Re Downing and Graydon* (1978), 92 D.L.R. (3d) 355, 373 (Ont. C.A.) (Blair J.A.); see also, *Re Nicholson*, [1979] S.C.R. 111; J. Evans *et al*, *Administrative Law: Cases, Text & Materials* (Toronto: Emond-Montgomery Ltd., 1980), ch.1,2. This would also appear to satisfy *Canadian Charter of Rights and Freedoms*, s. 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice."

[98]*Supra*, footnote 31.

of step two in the test of a violation of section 96, are admittedly applicable to the adjudicative function of the rentalsman. It must be remembered, however, that that function is not an isolated one but is coupled with a nonjudicial investigative function with less than judicial form of procedures. As noted earlier with respect to *Tomko* and *Massey-Ferguson*, an investigative function may qualitatively differentiate a law-applying body from a section 96 court.

Further, a notice to quit differs fundamentally from a section 96 court order in that it is not itself an enforceable order but merely, as its name suggests, a notice. It is but a preliminary step which may culminate in an enforceable order. In *Tomko*, that the Labour Relations Board could not enforce its cease and desist order was considered to be of significance by the Supreme Court; *a fortiori* with respect to the weaker notice to quit. With respect to a compliance order, that the rentalsman may himself fulfill the landlord's obligations clearly distinguishes the functioning of the rentalsman from a section 96 court.

The provision which causes the most concern from a constitutional perspective is subsection 6(8) which allows a rentalsman to issue a notice to quit "on the basis of destruction of the premises or other cause". Detached from the legislative scheme, it calls for a "determination" by the rentalsman; there is no investigative function to shelter the power. However, it would be in error to separate this function from its broad institutional context — the rentalsman's functions as a whole.

The second step in the Ontario *Residential Tenancies* test must be determined in the negative. The powers or functions of the rentalsman under the New Brunswick *Residential Tenancies Act* are not "judicial"; are different from a section 96 court when viewed in their institutional setting, and in the terms of the third step in the test, the rentalsman cannot be said to be operating "like a section 96 court". The other major tasks of the rentalsman are clearly non-judicial, for example, the administration of the security deposit fund (section 8) and the educative and mediative functions (subsection 26(2)(a)(b)(c)).

Appeals to the Court of Queen's Bench from a decision or order of a rentalsman may be made on the bases of lack of jurisdiction or error of law (per subsection 27(1)). Nowhere in the legislation is there conferred upon the rentalsman authority to make decisions or orders apart from legal precedent as in *Pepita* v. *Doukas*. In *Ontario Residential Tenancies*, the Ontario Court of Appeal placed particular emphasis on the "question of law" ground of appeal from decisions of the Residential Tenancies Commission in demonstrating that the Commission was to make a strictly legal decision.[99] Similarly the argument may be made *vis a vis* New Brunswick's rentalsman. However, it must be borne in mind that the Ontario Commission was to

[99]*Supra*, footnote 81, at 636.

adjudicate disputes in the forum of a judicial form of hearing; the rentalsman does not. The deciding factor remains that the powers exercised by the rentalsman in their institutional setting are not conformable or analogous to the functioning of a section 96 court.

Conclusion

While no *a priori* analysis, especially constitutional analysis, can be entirely free from doubt, it is submitted that New Brunswick's *Residential Tenancies Act* does not violate the *Constitution Act, 1967* section 96 with respect to the powers and jurisdiction of the rentalsman. Application of the relevant test in the context of judicial precedent would indicate that the investigative function of the rentalsman qualitatively differentiates the rentalsman from a section 96 court.

JOHN P. McEVOY*

*B.A. (S.T.U.), LL.B. (U.N.B.), LL.M. (Osgoode). Assistant Professor, Faculty of Law, University of New Brunswick.