BILL NO. 119: RESIDENTIAL TENANCIES ACT

BRIEF TO LAW AMENDMENTS COMMITTEE

Rollie Thompson
Professor, Schulich School of Law
Dalhousie University

1. Immediate Security of Tenure Is a Big Improvement

Bill No. 119 introduces immediate security of tenure for tenants in Nova Scotia. This has been a long time in coming. The government is to be applauded for taking this important step to bring Nova Scotia's residential tenancies law in line with most other Canadian provinces.

Many of the other changes in Bill No. 119 are less significant. The focus of my brief is the one other major change: the notice to quit procedure for unpaid rent. **The special procedure created under these amendments is unfair, runs counter to most residential tenancies procedures in Canada and will be prone to abuse.** There was no advance consultation on this change, so it comes out of the blue.

These amendments do not solve two of the other major problems in Nova Scotia's tenancies law: (i) the administration and return of security deposits; and (ii) enforcement of housing standards and repairs by landlords.

I teach Civil Procedure, Evidence and Family Law at the law school. I previously served as executive director of Dalhousie Legal Aid Service in 1982-85 and 1991-94. In 1994, I was appointed by the Nova Scotia Court of Appeal to argue against the validity of previous residential tenancies amendments, in a reference case that eventually went to the Supreme Court of Canada: *Reference re Residential Tenancies Act (Nova Scotia)*, [1996] 1 S.C.R. 186, allowing appeal from (1994), 130 N.S.R. (2d) 346 (N.S.C.A.). That reference case resulted in our current Nova Scotia tenancies system and I have continued to follow the law and practice in this area of law ever since.

2. Why Isn't the Usual Procedure Good Enough in These Cases?

Under the current *Residential Tenancies Act* (RTA), on a yearly or monthly tenancy, if a tenant is in arrears of rent for 30 days, the landlord can give the tenant notice to quit the premises within 15 days of the notice: s. 10(6). Under the proposed amendments in Bill No. 119, the landlord can give a 15-day notice to the tenant once the rent is in arrears for only 15 days, half the previous time period: Bill No. 119, ss. 5(5), 5(6)(6A).

Under the present scheme, if the landlord wants possession of the premises, the landlord must apply to the Director for an order terminating the tenancy and granting vacant possession: s. 17A(e). That order can only be granted after mediation and a hearing before a residential tenancies officer, a hearing where the landlord must prove that the rent is unpaid, that notice was properly served and that the landlord is entitled to possession of the premises. The tenant is served with notice of that hearing and he or she is entitled to be present and to raise any arguments to the contrary.

All that will change under the proposed amendments. Once the tenant is served with the notice to quit for unpaid rent, the tenant has two options: pay up the full amount of the arrears alleged by the landlord, or apply to the Director for an order to set aside the notice to quit: Bill No. 119, s. 5(6), (6A). Suddenly, the onus is shifted to the tenant, to prove that he or she doesn't owe the arrears. If the tenant does not pay up or apply to the Director, the tenant is "*conclusively deemed* to have accepted that the tenancy is terminated": (6C). The landlord can then apply to the Director to get an order for vacant possession, and the Director may grant the order, "without investigating and endeavouring to mediate a settlement and without holding a hearing": (6E). In effect, without any process at all.

The tenant is evicted without the landlord proving his or her case, without investigation, without a hearing, without anyone ever hearing both sides. This is a dramatic change from the present system. It is at odds with any other part of the current RTA. It's a kind of "negative option" approach to justice.

Ordinarily, if one party seeks a remedy, like the landlord here, that party has the duty to prove his or her case. It is the landlord who is alleging that rent is unpaid and that a tenant should be evicted from his or her home. If the landlord has a case, the landlord should be prepared to prove it. How hard can it be to prove that rent is unpaid, if it is in fact unpaid?

Why should the proposed amendments *both* shorten the period for eviction for unpaid rent *and* remove any burden from the landlord of proving his or her case? That hardly accords with any principles of fundamental justice.

Proposed section 10(6A), (6C), (6D) and (6E) should be rewritten to read:

(6A) Within fifteen days after receiving a notice to quit under subsection (6), the tenant may pay to the landlord the rent that is in arrears, and upon payment of that rent, the notice to quit is void and of no effect.

(6C) Where a tenant who has received a notice to quit under subsection (6) does not pay the rent that is in arrears, the landlord may apply to the Director under section 13 for an order for payment of the arrears and for the tenant to vacate the residential premises.

(6D) and (6E) are thus unnecessary.

3. Problems With This New and Unfair Procedure

The sections proposed here have been lifted from the British Columbia *Residential Tenancy Act* of 2002, s. 46. B.C. is the *only* Canadian province to establish such a draconian procedure as that proposed by Bill No. 119.

A review of all the other provincial tenancies laws shows that no other province has incorporated such an unusual provision for notice to quit for unpaid rent: Alberta, ss. 29, 34; Saskatchewan, s. 57; Manitoba, s. 95.1; Ontario, ss. 59, 69, 74; Quebec, *Civil Code,* s. 1971; New Brunswick, ss. 19, 21; P.E.I., ss. 13, 14, 16; N.L., ss. 18, 35. Every other province requires a "normal" process to be followed.

There are endless problems with the proposed sections:

(1) *No Proof by Landlord.* Nothing in the proposed section requires the landlord to do anything other than serve a notice to quit: s. 10(6D). No actual proof that rent is unpaid. A tenant can be evicted with no evidence of non-payment of rent. It's enough if the tenant does not respond. **This provision invites abuse by landlords.**

(2) *No Understanding.* My experience has been that many tenants presented with a notice to quit will not understand that they must contest the notice by making their own application. They will not appreciate that this is a "negative option" kind of scheme. Many will just move out. Some will try to pay the rent. Others will do nothing, expecting to be served with a notice of hearing. **If this draconian process is to be permitted, the notice to quit would have to be clear, very clear, about the "negative option" process.**

(3) *Burden of Proof.* If the tenant has to apply to the Director under proposed s. 10(6A)(b), would the burden be on the tenant to set aside the notice to quit? But the landlord would have all the information. And it is the landlord who is asking the Director for a remedy. Strange.

(4) *No Hearing.* If the tenant does not apply under s. 10(6A)(b), there is no hearing. But what if there is good reason for the tenant not applying within those 15 days? The tenant has no simple remedy. Section 10(6C) says the tenant is "conclusively deemed" to have accepted termination. And there's **no hearing**, no process, nothing to contest.

(5) *Good Reasons to Miss the Deadline.* There are lots of good reasons why a tenant might not pay up or apply as required by s. 10(6A). The tenant might be out of town or in the hospital, expecting to get money which doesn't arrive, etc. No matter how good the tenant's reason, there's still no process available. **Even British Columbia allows a tenant in these circumstances to apply for a review by the Director: see s. 79, especially s. 79(2).**

(6) *Appeal the Only Way to a Hearing.* Once the 15-days is up, there is no process available for the tenant. At that point, a tenant would have to find out if an order had been made and appeal it to the Small Claims Court to get any kind of hearing. A tenant *must* appeal, as the Director has made his order and there is no way to review or set aside an order, even if it is obtained by fraud. **This provision encourages, in fact requires, appeals.**

(7) *Small Claims Court Problems.* On appeal, what does the Small Claims Court do with a provision like s. 10(6C) that "conclusively deems" the tenant to have accepted termination? How do you appeal against that?

The B.C. provisions have caused problems, leading to review by the B.C. Supreme Court and critical comments about the rigidity of the Director's approach to these provisions there: *Ganitano v. Metro Vancouver Housing Corp.*, [2009] B.C.J. No. 1186, 2009 BCSC 787; *Sismey v. MacDonald Commercial R.E.S.*, [2010] B.C.J. No. 668, 2010 BCSC 499.

(8) *Charter of Rights.* Under this proposed provision, a tenant would be removed from his or her home without a hearing, a deprivation of his or her "life, liberty and security of the person", without adhering to the "principles of fundamental justice". A provision as unfair as this will inevitably lead to a constitutional challenge under section 7 of the *Canadian Charter of Rights and Freedoms.*

There is no good reason for the proposed procedure and its unfairness. There are many ways to set up a simple but fair procedure in cases of unpaid rent, ways that do not involve unproven allegations, "negative options" and denials of hearings. You can include a notice of hearing in the notice to quit. You can schedule a number of cases for one time, and if the tenant does not show, then an order for vacant possession can be granted after proof of unpaid rent by the landlord.

We don't have statistics from the Director of Residential Tenancies on the current procedures for vacant possession. We don't have any information on any specific problems with the present system. There was no advance consultation on this novel procedure. We don't have any attempts to solve any problems, real or perceived, through other procedural changes, changes that are less unfair.

If section 5(6) of Bill No. 119 is not redrafted, then the whole section should simply be deleted from the Bill and sent back for reconsideration.

December 2, 2010