An Examination of Some of the Recent Amendments to the Ontario Landlord and Tenant Act

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I. Introduction

Ontario’s was the first Canadian legislature to attempt to overcome certain anomalies in the law applicable to residential tenancies.\(^1\) The effect of many of the Act’s provisions remained uncertain until

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\(^{1}\) In this article reference to the “Act” is to The Landlord and Tenant Act, R.S.O. 1970, c. 236. Reference to the “amended Act”, the “recent amendments to the Act”, or similar combinations of words, refers to S.O. 1975 (2nd Sess.), c. 13, in force December 18, 1975. The legislation referred to in the first sentence of the article is Part IV of the Act, which was enacted by S.O. 1968-69, c. 58, in force on January 1, 1970. Part IV, which is concerned with residential tenancies, was enacted after the tabling of the Ontario Law Reform Commission’s Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies (Toronto: Dept. of Attorney General, 1968) [hereinafter “Interim Report”]. Most of the recommendations made by the Commission were incorporated in the legislation. Part IV was amended by S.O. 1972, c. 123, in force June 30, 1972, after the tabling of the Ontario Law Reform Commission’s Report on Review of Part IV, The Landlord and Tenant Act (Toronto: Dept. of Justice, 1972).

The excellent examination of the Act, prior to the most recent amendments, made by Donald H. L. Lamont, in his Residential Tenancies; The Landlord and Tenant Act, Part IV (2d ed. Toronto: Carswell, 1973), is recommended to those who wish to gain a greater understanding of the Act up to that time. For a recent interesting and useful examination of the law affecting residential tenancies, the reader is referred to V.R. Upans, Ontario Residential Tenancies (Toronto: CCH Canadian Ltd., 1976), as it is not my intention to deal with all of the changes brought about by the amended Act, nor to treat those dealt with as a practice guide.

Some of the important changes brought about by the enactment of Part IV and still in force are:

(a) Abolition of the landlord’s right to require or receive a damage security deposit (s.84(1))

(b) Obligation of a landlord to pay annually his tenant interest on security deposit for rent at the rate of 6 per cent per year (s.84(2))

(c) Prohibition against a landlord requiring delivery of post-dated cheques or other negotiable instruments by his tenant (s.85(3))

(d) Regulation of security deposits (damage and rent) held as at January 1, 1970 (s.85)

(e) Remedy of distress abolished (s.86)

(f) Doctrine of interesse termini abolished (s.87)
authoritative court decisions were rendered. Would the courts view the Act as intending to overcome the traditional orientation of landlord and tenant law towards land law doctrine?²

(g) Doctrine of frustration of contracts and The Frustrated Contracts Act made applicable to tenancy agreements (s.88)

(h) Distinction between covenants in esse and in posse abolished. For the purpose of the running of lease covenants, it no longer matters whether "the things are in existence at the time of the demise" (s.90)

(i) The right of the landlord to arbitrarily or unreasonably withhold consent to an assignment, subletting or other parting with possession has been abolished (s.91(3))

(j) Control of the right to impose charges for giving consent under s.91 (3) established (s.91(4))

(k) Landlord must mitigate damages upon a tenant's abandoning the rented premises as in the case of a breach of contract (s.92)

(l) Contract rules respecting the effect of a breach of a material covenant by one party on the obligation to perform by the other party made applicable to tenancy agreements (s.89)

(m) Limits imposed on the landlord's right to enter the rented premises (s.93)

(n) No restriction may be imposed on rights of certain classes of political canvassers to enter the rented premises (s.94)

(o) No alteration of locking system except by mutual consent (s.95)

(p) (i) Imposition of an obligation on the landlord to provide and maintain rented premises in a defined state of repair and fitness for habitation (s.96(1))

(ii) Imposition of an obligation on the tenant for cleanliness of the rented premises and for certain forms of damage (s.96(2))

(iii) Summary procedure for enforcing s.96 obligation (s.96(3))

(q) Relief against rent acceleration clauses (s.97)

(r) Prohibition against contracting out of the provisions of Part IV (s.82 (2))

The security of tenure provisions of the recent amendments to the Act would appear to have been influenced by the British Columbia Landlord and Tenant Act, S.B.C. 1974, c. 45, Part III; and the Manitoba Landlord and Tenant Act, R.S.M. 1970, c. 106, as amended by S.M. 1975, c. 37, adding ss. 103 (4), (6), (7) and (12).

2. Although it deals with a commercial tenancy, Highway Properties Ltd. v. Kelly, Douglas & Co., [1971] S.C.R. 562; 17 D.L.R. (3d) 710, indicates the willingness of the Supreme Court of Canada to recognize that a lease is not merely a conveyance but is also a contract; and that, given the present attitude towards leasing arrangements, the ascendancy of the "estate" element should no longer be automatically accepted:

There has, however, been some questioning of the persistent ascendancy of a concept that antedated the development of the law of contracts in English law and has been transformed in its social and economic aspects by urban living conditions and by commercial practice [emphasis added]. (at 569; 17 D.L.R. (3d) at 715)
Sufficient time has now passed for many of the most important provisions of the Act to have been adjudicated upon by the superior courts, and it would be safe to say that the Act usually has been given a liberal interpretation. Many of the old rules based upon doctrines of feudal tenure have been held to be superceded by the statutory rules which are more consistent with developments associated with contract law.³ This latter change has been reflected

In M.R. Gorsky, *The Landlord and Tenant Act Amendment Act, 1968-69 — Some Problems of Statutory Interpretation*, [1970] L.S.U.C. Special Lectures, *Recent Developments in Real Estate Law* (Toronto: DeBoo, 1970) 439, I examined a variety of possible interpretations which might be forthcoming, with respect to a number of important sections, once the Act had been in operation for some time. ³. In the recent case of *Pajelle Investments Ltd. v. Herbold* (1976), 62 D.L.R. (3d) 749 at 755; 7 N.R. 461 (sub nom. Herbold v. Pajelle Investments Ltd.) at 468-69 (S.C.C.), Spence J., who delivered the judgment of the Court, stated his agreement with the reasons of Schroeder J.A., in delivering the reasons of the Ontario Court of Appeal ((1975), 4 O.R. (2d) 133 at 138; 47 D.L.R. (3d) 321 at 326). He cited the following passage from Schroeder J.A.'s judgment:

The recent amendments to the *Landlord and Tenant Act* have brought about substantial changes in the relations between landlord and tenant and indeed, those amendments affect the relations of tenants in large apartment buildings not only towards each other, but go beyond that and obligate them to exercise a measure of control over persons who are invited by them to come to the premises as guests or visitors. The legislation reflects the effort on the part of legislators to govern and control the standard of social behaviour of inhabitants of large modern multiple-housing units not only towards their lessors but also towards each other with a view of promoting peace and tranquility from a social as well as from an environmental standpoint.

The *Pajelle* case is also significant in that the Supreme Court of Canada accepted the ruling of the Court of Appeal that it was within the jurisdiction of the County Court Judge, who hears an application, made pursuant to section 96(3) of the Act, to hear a matter of dispute raised by the tenant (the question of an abatement of rent) that was not alluded to in the tenant's documents filed with the Court prior to the hearing ((1976), 62 D.L.R. (3d) 749 at 756; 7 N.R. 461 at 470, referring to 4 O.R. (2d) 133 at 138; 47 D.L.R. (3d) 321 at 326):

It cannot be successfully argued that the granting of such relief was so unrelated to the principal claim of the tenants made pursuant to the provisions of s.96(3) (a) that it should be disentenanced on the ground of remoteness.

Spence J. further stated at 757; 7 N.R. at 471, of the judgment of the Supreme Court of Canada:

I am in agreement with the view expressed in the judgment below that the learned County Court Judge did possess that power but I feel that he should not have exercised it unless his determination was based on evidence and only if the parties have had an opportunity to make representations thereon. In my view, neither of those prerequisites was present. I am therefore, of the opinion that this appeal should be allowed only to the extent that it should be referred back to the County Court of the Judicial District of York so that the proper amount of
in judgments which accept the Act as remedial in nature and interpret it accordingly.  

the abatement of rent may be determined upon a reference unless the parties are able to arrive at a reasonable settlement.

This aspect of the judgment reinforces the urgent need for addressing the procedural problems of proof, which will remain no matter how the substantive rights of the parties are adjusted by the legislation. *(Infra at 683-97)*

4. In another recent case, *Fleischmann v. Grossman Holdings Ltd.* (Ont. C.A.) (delivered May 14, 1976, but as yet unreported), the Court of Appeal, in interpreting the provisions of section 96(1) of the Act held (at 8) that a tenant has a cause of action for the negligent breach of the statutory duty of repair, and "that it provides therein a standard of care that must be observed by the landlord; that the breach thereof can be asserted in an action; and that the tenant is not confined to invoking the procedure outlined in s.96(3)". In so holding, the Court agreed with the judgment of Holland J. in *Cunningham v. Moore*, [1973] 1 O.R. 357; 31 D.L.R. (3d) 149 (H.C.). This question had earlier been left open by the Court of Appeal in the cases of *Morrow v. Greenglass* (1975), 5 O.R. (2d) 353; 50 D.L.R. (3d) 337 and *McQuestion v. Schneider* (1976), 8 O.R. (2d) 249; 57 D.L.R. (3d) 537.

The *Fleischmann* case is also of interest because it concerned the interesting question of whether a landlord might indirectly contract out of his "obligations that flow from his own negligence in complying with the statutory duty [of repair]". Dubin J.A., at 12, stated that he agreed with the following statement of the County Court Judge in the judgment under appeal:

To find otherwise would mean, in my view, that the legislature, having imposed a duty to repair on the landlord under Section 96(1) which it cannot contract out of by virtue of the provisions of Section 82 (2), would be limiting the tenant to the remedies set forth in Section 96(3) which would, in my view, place too narrow an interpretation on Section 96 and create an injustice by virtue of the statute saying the landlord must repair; it cannot contract out of this obligation but, if it does so and does so negligently, it can contract out of its liability to pay the resulting damage. It follows that, if the landlord cannot contract out of its statutory duty to repair, then it should not be able to contract out of the ensuing obligation to pay the damages which arise from the failure to repair properly.

The *Fleischmann* case may, however, be subject to certain limitations. In the case of *Milley v. Hudson*, [1971] 3 O.R., part 37, blue page 8; not reported in full, the Court of Appeal held, in a landlord’s claim for rent in the Division Court (now the Small Claims Court), that the tenant could not set-off the cost of repairs done by him, relying on section 96(3) (b), and that such relief could only be granted in an application made pursuant to section 96(3). It is difficult to see why this should be the case unless it was the opinion of the Court that there was no right known, except under section 96(3) (b), for a tenant to be able to deduct the cost of repairs from rent owed. However, see the cases referred to in E. K. Rhodes, ed., *Williams’ Canadian Law of Landlord and Tenant* (4th ed. Toronto: Carswell, 1973) at 218-219, from which it would be reasonable to conclude that where the landlord had an obligation to repair the tenant might, at common law, repair and deduct the cost from the rent. *Taylor v. Beal* (1591), Cro. Eliz. 222; 78 E.R. 478; *Brown v. Toronto General Hospital Trustees* (1893), 23 O.R. 599 (C.A.) *(obiter)*; *Tarrabain v. Ferring*, [1917] 2 W.W.R. 381; 35 D.L.R. 632 (Alta. S.C., A.D.), *aff’d without written reasons* (1919), 59 S.C.R. 670; [1918] 2 W.W.R. 172. However,
Neither landlords' nor tenants' associations were initially very enthusiastic about the changes brought about by the Act. It became evident that the procedure for enforcing the provisions of the Act evoked the major complaints, rather than the matters of substance. Landlords were unhappy with what they regarded as unreasonable delays in recovering possession from tenants who had failed to pay rent or were otherwise in breach of their obligations under the Act or the tenancy agreement. A second source of dissatisfaction for landlords was the abolition of the right to a damage security deposit. Of these two major areas of complaint, more concern was expressed over the problems surrounding recovery of possession. While the loss of the power to insist upon payment of a damage security deposit still remains as a source of complaint, it has ceased to be a principal grievance. The main concerns of landlords are associated with enforcing the right to terminate the lease and recover possession and with the frustrations arising out of the current rent restraint legislation.

Tenants' complaints tended to emphasize matters not dealt with by the Act, such as the absence of a provision providing for rent restriction or rent control. Criticism of what the Act had provided for stressed the difficulty experienced by tenants in enforcing their newly acquired rights. In the latter category were included the expense of hiring a lawyer and the difficulty in securing the services of expert witnesses (including securing their cooperation once it was made known to them that litigation was contemplated or had been commenced). Expert witnesses are often required in cases involving the landlord's alleged breach of the statutory duty to provide and maintain the rented premises in a fit state of repair.

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5. The statutory provisions referred to, providing for the only means of legally recovering possession of the rented premises, except for cases where there had been an abandonment by the tenant, and abolishing self-help, were found in R.S.O. 1970, c. 236, s. 106(1), as amended by S.O. 1972, c. 123, s. 3. It is not my intention to deal with the proceedings for re-entry except as they exist under the recent amendments. For an examination of the previously applicable procedure, see Lamont, supra, note 1.
6. See section 84(1)
7. Infra at 683-97
8. Infra at 683-97 and 702-03
9. Section 96(1)
Low income tenants have complained about the considerable difficulty encountered in obtaining a certificate under the Ontario Legal Aid Plan for the purpose of suing or defending a case arising under the Act.¹⁰

One of the matters which received little attention when the Act was first enacted was security of tenure. Because any system of landlord and tenant law which intends to provide meaningful security of tenure requires some form of rent restriction, and as the Act made no provision for controlling rents, it is understandable that security of tenure did not figure greatly in Part IV, either when first enacted or when it was first amended in 1972.¹¹

Underlying the reforms intended to improve the legal position of tenants was the assumption that a landlord’s fundamental right was to be paid the rent on time, and that he ought not to be made to suffer certain kinds of conduct on the part of the tenant, or those for whom the tenant was responsible, without being able to terminate the tenancy and recover possession by means of a summary remedy.¹² Because the landlord remained relatively free to terminate the tenancy he retained considerable power to behave arbitrarily. Such a right naturally contributed to the insecurity of the tenant, who was subject to the whim of his landlord, should the latter be unwilling to renew a lease.¹³ Tenants might be unwilling to press for the performance of certain obligations, fearing retaliation by the landlord.

Until rent review mechanisms were established, it was difficult to

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¹⁰. See The Legal Aid Act, R.S.O. 1970, c. 239, s. 16. Also see S.R. Fodden, Landlord and Tenant Law Reform (1975), 12 Osgoode Hall L.J. 441 at 471
¹¹. The Ontario Law Reform Commission, in its Interim Report, supra, note 1 at 64, referred to this fact, citing the experience of rent control during the Second World War, as outlined in an article by Wishart F. Spence, now Spence J. of the Supreme Court of Canada, entitled Rental Control in Canada, contained in the first volume of the 1945 Refresher Course Lectures of the Law Society of Upper Canada (Toronto: De Boo, 1945) at 295.
¹². See Interim Report, supra, note 1 at 9
¹³. Prior to the recent amendments, section 107(2) (now repealed, see infra at 688-89 and note 74) provided limited protection to a tenant, by giving the judge the authority to refuse to grant an order or writ of possession where it could be shown that the notice to quit had been given because the tenant had complained to any governmental authority, because of the landlord’s alleged violation of some statute or municipal by-law concerned with health or safety standards, including a housing standard by-law, or because the tenant had attempted to secure or enforce his legal rights. This subsection would only apply in the case of periodic tenancies where a notice to quit was required. In any event, the onus of proof would usually be difficult to satisfy.
fashion effective security of tenure provisions. With the enactment of *The Residential Premises Rent Review Act, 1975* however, it became possible to amend the Act so as to provide for a form of security of tenure; for as there cannot be genuine security of tenure without some controls on rent, there cannot be an effective form of rent control in the absence of reasonable security of tenure. From the legislative debates it is evident that the connection did not escape the attention of the legislature, nor did the anticipated impact of the termination of the rent restriction provisions on the security of tenure provisions contained in the amendments to the Act.\textsuperscript{15}

By far the most significant change effected by the amendments to the Act is to, in effect, convert tenancies of residential premises (with minor exceptions which will be noted) into tenancies of an indeterminate nature which the tenant may terminate on notice but which the landlord can only terminate for cause (as defined in the Act).\textsuperscript{16}

If the amendments to the Act do, in fact, safeguard the essential rights of the landlord (the rights to be paid the rent reserved when due, and not to have to suffer certain forms of obnoxious conduct on the part of the tenant or on the part of those persons for whose actions the tenant ought to be held responsible) then the imposition of security of tenure is justified. If the legislature is successful in identifying the forms of obnoxious conduct which ought to be proscribed, on pain of the tenant having the tenancy terminated, then all the landlord will have lost is the right to act capriciously in terminating a tenancy. A similar diminution of the right to act capriciously may be noted in consumer law, into which division landlord and tenant law has been steadily moving as a result of statutory enactments. There may be some justice in preserving the right of a small landlord, who rents a few apartments in the house where he lives, to terminate a tenancy at an appropriate time when he "cannot get along" with a tenant; and there would appear to be some public sympathy for such a position. However, a tenant who lives up to his vital obligations but nevertheless remains subject to the insecurity of the old law, must inevitably suffer a loss of his sense of self worth when subjected to the arbitrary conduct of his landlord. For most tenants there is no longer any real alternative to

\textsuperscript{14} S.O. 1975 (2nd Sess.), c. 12, as amended by S.O. 1976, c. 2 and 36
\textsuperscript{15} Legislature of Ontario Debates, Tuesday, November 25, 1975, Afternoon Session at 931
\textsuperscript{16} *Infra* at 673-83
living in rented accommodation because of the high cost of acquiring other forms of interests in land.

While providing the tenant with security of tenure, the legislature must also provide a reasonable means of recovering possession of the rented premises in those cases where the vital rights of landlords have been breached. Tenants must, at the same time, have a realistic means of presenting their position to an adjudicating tribunal where a genuine dispute exists.

As long as a system of adjudication does not enable landlords to obtain possession speedily in a proper case, the Act will have imposed an unfair burden on them. Similarly, where tenants are unable to secure reasonable redress, quickly and at reasonable cost, then the substantive provisions of the Act will lose much of their impact. Judges who delay unduly in granting to the landlord the right to regain possession, because of the financial and other problems of a tenant who has "no place else to go", impose a social cost on the landlord which more properly belongs with the state. Unless the provincial or municipal authorities are willing to step in and accept this cost the legislation will have succeeded only in undercutting the basic property rights of landlords.17

Tenants' legal rights ought to be similar to other consumer-oriented legal rights; and these are only as meaningful as the procedures for their realization. Fundamental to a procedural system are the following: (a) a hearing on the merits within a short time after commencement of proceedings; (b) availability of trade witnesses who can be relied upon to accept their responsibility seriously; (c) counsel prepared to argue the case, including relevant points of law, after careful preparation; and (d) reasonable cost. In the absence of these minimum requirements it is impossible for a fair system of adjudication to exist. If all that can be guaranteed is the system of justice which too often prevails in the Small Claims Courts, which is justified because of the relatively small amounts of money involved, then the adjudicative system will continue to be unacceptable.

17. The concerns expressed by landlords over the apparent inability of the procedure provided by the Act for regaining possession are dealt with in the Ontario Law Reform Commission's Report on Review of Part IV, supra, note 1 at 8-14. The changes effected in the procedures by S.O. 1972, c. 123, did not have any noticeable effect on landlords' complaints concerning this subject. In this paper, I have concluded that the changes effected by the recent amendments to the sections dealing with the procedure for regaining possession are not likely to provide
It has been claimed that parties to Small Claims actions are satisfied with the system of adjudication found there. Even if that is true, there must be a concern for the future of a system of adjudication which, in many cases, leads to decisions in the absence of meaningful evidence on the merits, and in the absence of an appreciation of the relevant law. To tolerate such a system of adjudication under the Act can only have the effect of subverting the intention of the legislature.

There are alternatives to the present system of adjudication. But special tribunals for trying landlord and tenant disputes or new agencies for administering the Act will not in themselves bring about improvements, for neither of these approaches necessarily endeavours to change the fundamental deficiencies of the present systems. If an attempt is made to remedy the problems referred to, a change in the very nature of the forum may be of some value. 18

Major objections to the introduction of a system which would attempt to provide remedies capable of meeting the minimum landlords with much relief from matters which have given rise to their continuing complaints.

18. During the second reading of the amendments to the Act (supra, note 15) the Attorney-General, the Honourable Mr. R. McMurtry, Q.C., stated at 936:

In choosing the county courts as the forum that has been provided for by the amendments, I want to make it clear first that we do not rule out the possibility that a new forum or court structure may be necessary in the future in order to deal with the landlord and tenant relationship, which is of course so fundamental to our society. What we were most concerned about was to provide a forum that was going to be accessible to tenants and landlords at an early date; and of course, with the county court structure well in place, this was a consideration.

Secondly, there is a matter of constitutionality which I did not wish to discuss at length at this particular point in time, because constitutionally writs of possession have always been dealt with by courts constituted of federally appointed judges. This is a matter that has given us some concern, notwithstanding the fact that we are aware that other provinces have not. I don't say they have ignored the constitutional issue, but they have not been dissuaded by it from setting up special landlord and tenant courts.

More important than either of these matters, I think, should be the recognition of the very important legal relationship that exists between a landlord and tenant and, as I'm sure was well known by all the members of the Legislature, there is a very large body of jurisprudence already in existence in relation to the landlord and tenant relationship. Not just because of that, but considering the very special legal relationship that will continue regardless of any legislation that is passed by this Legislature or any Legislature in the future, it's our very strongly held belief that such a forum should be provided and staffed by people who do have some special understanding of this legal relationship.
standards set out above are: (a) that it would be too expensive to operate; (b) that it would result in the court or other tribunal being inundated with cases and (c) that it would result in a departure from traditional values inherent in the adversarial system of justice.

If one accepts the proposition that the administration of justice is best served where disputes are adjudicated upon by applying the relevant law to the material facts, then any system of adjudication which, on the grounds of expediency, accepts a lesser standard, ought to be rejected. It is often overlooked that the only difference between a Supreme Court case and one tried by a judge in a Small Claims Court is the amount of money involved. The issues, both as to the applicable substantive and adjectival law, may be almost identical.\(^{19}\) Acceptance of the lower standards of a Small Claims Court is often based on the amount of money involved. However, it must be remembered that it is a lesser standard of justice. The parties know less of the case they have to meet, and face greater difficulties in dealing with the evidence and the law. What is retained are some of the trappings associated with court hearings.

In Fodden, supra, note 10 at 473, the author concluded that:

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\ldots \text{insofar as the reforms aimed at redressing the imbalance in the law (which had favored the landlord) through the agency of the court, the reformed law has not achieved its goal. I submit that such failure has occurred in large measure because of an "over-judicialization" of the law — a heavy reliance was placed on the courts as effectuators of the law rather than on a more flexible, accessible administrative body. A tribunal of the latter type, more readily than a court, can assume an interventionist stance and itself investigate complaints or even act on its own motion. Courts must assume a reactive posture, placing the onus on tenants to formulate, press and prove grievances without assistance. Tenants now do not sue.}
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The author's statements were based on the results of a study of "files of residential landlord and tenant cases tried in the County Court of the Judicial District of York" (id. at 451), with a view to obtaining some insight into the "impact of [the] law . . ." (id. at 452).

The data obtained by Fodden does tend to support his conclusion that tenants have not made effective use of their new rights in the court context.

19. In the case of Smith v. Galin,\(^{1956}\) O.W.N. 432 (C.A.), MacKay J.A., in dealing with the jurisdiction of a judge of the Division Court (now the Small Claims Court) to disregard general principles of law, stated (at 434):

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\text{This statutory provision [now R.S.O. 1970, c. 439, s. 55] that the judge may make such order or judgment as appears to him just and agreeable to equity and good conscience does not, in my opinion, entitle the judge to disregard general principles of law, but may very well be interpreted to clothe the Court with jurisdiction to disregard technical defects that would defeat the justice of the claim.}
\]
Being essentially matters of form they cannot overcome the problems of getting at the substance of the case.

If expediency is to govern the development of a system of adjudication because the dispute is over a relatively small amount of money, it cannot be overlooked that many landlord and tenant disputes concern important property rights. When these property rights are elevated, by substantive changes, to a secure form of tenure, it is no longer sufficient to justify maintenance of the lesser standard of adjudication by relying on the strength of the old arguments; for important rights, in addition to money, are now involved.

Because the development of a satisfactory system of adjudication may result in some departure from traditional ideas of adversary jurisprudence traditionalists are not likely to be pleased. However, major changes in the litigation process are presently being examined. Comparable changes, adapted to the special needs of the landlord and tenant relationship, should be examined and implemented where conventional procedures have been found to be lacking.

Before discussing possible changes in the system of adjudication, I will examine the nature of the major substantive and procedural changes which have been made recently to the Act.

II. The Principal Amendments

1. Termination for Specified Causes Only

The device employed by the amendments to achieve security of tenure was to restrict the number of grounds for terminating a tenancy. This will mean that a landlord will no longer be able to refuse arbitrarily to renew a tenancy for a fixed term or to terminate a periodic tenancy, in both cases subject to a restricted number of

20. A questionnaire was distributed recently to members of the Law Society of Upper Canada by a Committee headed by W. Williston, Q.C., to examine the efficacy of the Ontario Rules of Practice. An examination of the questionnaire indicates that the Committee is investigating a variety of procedures including devices which, if accepted, would require a good deal more openness in the discovery aspects of litigation and in this way effect a considerable alteration in the adversary system as we know it. It is essential, in endeavouring to preserve the basic integrity of the existing system of adjudicating civil disputes, that those who have the ultimate say in what changes are introduced be conscious of the shortcomings of the system as it affects many ordinary people. No matter how well the system may function for some, where a major failure in its capacity to serve the practical needs of others is shown to exist, a reasonable solution must be sought.
exceptions. In addition, only certain kinds of conduct will enable a landlord to commence proceedings which could result in the tenancy being declared terminated and possession recovered.

Section 99(1) (d) requires that a landlord, giving notice of termination of a tenancy, must,

(i) specify the reasons and particulars respecting the termination, and
(ii) inform the tenant that he need not vacate the premises pursuant to the notice, but that the landlord may regain possession by application for a writ of possession to be obtained from the clerk or judge of the county court, which application the tenant is entitled to dispute.

Section 99(1)(d)(i) is intended to impose a termination for cause only provision on the landlord, where the tenancy is of a periodic nature. Because section 103c., subject to exceptions which will be noted, provides that “upon the expiration of a tenancy agreement for a fixed term the landlord and the tenant shall be deemed to have renewed the tenancy agreement as a monthly tenancy agreement upon the same terms and conditions as are provided for in the expired tenancy agreement”, it follows that all tenancies, whether from period to period or for a fixed term, become subject to the termination for cause only requirement. It is, however, still possible for the parties to terminate a tenancy without cause or notice by abandonment (section 98(3)). Periods of notice are set out in sections 100 (weekly tenancy), 101 (monthly tenancy), 102 (yearly tenancy), 103 (fixed terms less than a year) and 103 a. (fixed terms one year or more).

Where termination is to be effected before the end of the tenancy agreement, cause for termination is restricted to cases where the tenant:

(a) . . . fails to pay rent in accordance with the tenancy agreement . . . [in which case notice of termination becomes effective] . . . not earlier than the twentieth day after notice is given.21

The tenant can avoid the effect of the notice if he pays the rent demanded within fourteen days of his receiving the notice of termination.22 Section 103e.(3) requires the notice of termination to contain a notice to this effect. Failure on the part of the tenant to pay the rent within the fourteen day period enables the landlord to take action for termination and possession.23 Notwithstanding the failure

21. Section 103e. (1)
22. Section 103e. (2) and (3)
23. Section 103e. (4)
to pay the rent, as described, the tenant may obtain a permanent stay of proceedings, after an application has been brought by the landlord under section 106, if the arrears of rent and costs of the application are paid into court.\textsuperscript{24}

(b) . . . causes or permits undue damage to the rented premises or its environs and whether by his own wilful or negligent acts or by those of a person whom the tenant permits on the residential premises.\textsuperscript{25}

c) at any time during the term of the tenancy exercises or carries on, or permits to be exercised or carried on, in or upon the residential premises or any part thereof, any illegal act, trade, business, occupation or calling.\textsuperscript{26}

d) . . . [o]r a person permitted in the residential premises by him [so conduct themselves in a manner] . . . that . . . substantially interferes with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants.\textsuperscript{27}

e) [o]r a person permitted in the residential premises by him through an act or omission in the residential premises or its environs [seriously impairs] the safety or another \textit{bona fide} and lawful right, privilege or interest of any other tenant . . . \textsuperscript{28}

(f) [permits] the number of persons occupying the residential premises on a continuing basis [to result] in the contravention of health or safety standards including any housing standards required by law.\textsuperscript{29}

g) [being] a tenant of residential premises administered for or on behalf of the Government of Canada or Ontario or a municipality or any agency thereof or forming part of a non-profit, limited dividend housing project financed under the \textit{National Housing Act} (Canada) has knowingly and materially misrepresented his income or that of other members of his family occupying the residential premises.\textsuperscript{30}

In the cases covered in paragraphs (b) to (g), the notice of termination does not become effective before a date being no earlier than "the twentieth day after the notice is given" which notice must specify " . . . the act or acts complained of" and state (as the case may be) that

\begin{itemize}
\item 24. Section 103e. (5)
\item 25. Section 103f. (1) (a)
\item 26. Section 103f. (1) (b)
\item 27. Section 103f. (1) (c)
\item 28. Section 103f. (1) (d)
\item 29. Section 103f. (1) (e)
\item 30. Section 103f. (1) (f)
\end{itemize}
the tenant, within seven days . . . pay to the landlord the reasonable costs of repairing the premises or to make the repairs to the reasonable satisfaction of the landlord in the cases mentioned in clause [(b)] or to cease and desist from the activities in the cases mentioned in clause [(d)] or [(e)] or to reduce the number of persons occupying the premises in the case mentioned in paragraph [(f)]. 31

In the case of breaches involving damage to the rented "premises or its environs" the tenant has seven days from receipt of the notice to pay "the reasonable costs of repairs or [to] make arrangements satisfactory to the landlord to pay such costs or to make such repairs to the reasonable satisfaction of the landlord". Compliance by the tenant causes the notice of termination to become void. 32

In the cases involving disturbance of reasonable enjoyment by other tenants or the landlord or of impairing the privileges of others, the tenant must "cease and desist" from the activities mentioned in those cases within the same seven day period. Compliance by the tenant similarly causes the notice to become void. 33

In the case of overcrowding there must be a reduction in the number of persons occupying the premises within the same seven day period. Compliance by the tenant similarly causes the notice to become void. 34

Upon failure to pay the rent within fourteen days after service of the notice or to comply with the terms of the notice served pursuant to section 103f. (2) within the seven day period after service, or where the notice is with respect to matters covered by paragraphs (c) or (g), the landlord may make an application, inter alia, for an order declaring the tenancy agreement terminated and for a writ of possession. 35 Thus, the tenant has a means of preventing his landlord from pursuing the important remedies of termination and recovery of possession in five of the seven cases by remedying the breach complained of. Self-help in recovering possession has, by

31. In the case of similar breaches, as are referred to in sections 103f. (1) (a), (c), (d) and (e), section 19(2) of the Act, applicable to non-residential tenancies, provides that the "notice specifying the particular breach complained of . . ." where it is capable of remedy, as a condition of proceeding to exercise a right of re-entry or forfeiture, need only provide a "reasonable time" for remedy and payment of compensation.

32. Section 103f. (2)

33. Id.

34. Id.

35. Section 103e. (4) and section 103f. (3)
Legislation, been abolished and the court-sanctioned procedures for recovering possession are restricted to cases where cause for termination, as defined in the Act, has been shown to exist.\textsuperscript{36}

Because of the special nature of breaches in the nature of committing an illegal act, carrying on an "illegal trade, business or calling", misrepresenting income in public housing, no provision is contained in the amendments which permits the tenant, in such cases, to remedy the breach and thereby prevent proceedings being taken for termination and possession.

So as to limit the exercise of the right to preserve the tenancy, upon remedying the named breaches,\textsuperscript{37} the amendments further provide that where "a notice of termination has become null and void . . . by reason of the tenant complying with the terms of the notice within the seven days and the tenant within six months thereafter again contravenes any of the clauses . . . the landlord may serve on the tenant notice of termination of the tenancy agreement to be effective not earlier than the fourteenth day after the notice is given and the landlord is entitled to make application forthwith" \textit{inter alia} for termination and possession.\textsuperscript{38}

Because no grounds exist for regaining possession during the currency of the tenancy, other, than those listed in the amended Act, landlords will be limited to an action for damages or for an injunction, if the tenant commits a prohibited act which does not fall within the above-listed causes for termination of the tenancy and recovery of possession. For example, the not unusual clause prohibiting the keeping of animals in the rented premises would not be grounds for a section 106 application unless the keeping of the particular animal resulted in a breach of one of the matters dealt with in section 103f.(1).

In theory (but only in theory) a default judgment for the relief provided under section 106 could be obtained within a month after the day of service of notice of termination. Also, in theory, the application under section 106 could be heard within a month of the service of the notice of termination. Problems in obtaining a speedy adjudication will be discussed in the context of an examination of the procedure provided for under section 106.\textsuperscript{39}

\textsuperscript{36} Section 107(1)
\textsuperscript{37} Sections 103f. (1) (a), (c), (d) and (e)
\textsuperscript{38} Section 103f. (4)
\textsuperscript{39} \textit{Infra} at 683-97
It is submitted that the grounds for early termination established in the amendments are not unfair to either the landlord or the tenant. It is in their enforcement that fairness will be tested. If it turns out that in a proper case prompt final adjudication and recovery of possession is not the rule, then the legitimate complaints of landlords concerning justice delayed will not have been redressed. It is also apparent that in leaving emergency situations to be dealt with by the usual proceedings for an injunction the amended Act has created, or at least failed to remedy, a serious potential source for discord and frustration. Any procedure for dealing with landlord and tenant disputes is deficient if it fails to provide a summary avenue for obtaining injunctive relief, both in cases where possession can be ordered and where injunctive relief would be the primary remedy being sought.

In addition to the provisions which permit early termination for cause, a judge may direct the issue of a writ of possession in certain special situations at the end of the term or period of the tenancy where:

(a) . . . the landlord *bona fide* requires possession of the residential premises for the purpose of occupation by himself, his spouse or a child or parent of his or his spouse, and the landlord has compiled with section 103b.\(^4\)

This subsection was enacted in recognition of the landlord’s claim to possession for himself and certain persons closely related to himself or his spouse.\(^4\)

Section 103b. permits a tenancy to be terminated, in such case, upon the giving of “not less than sixty days notice”. Termination will be effected “. . . at the end of (a) the period of the tenancy; or (b) the term of a tenancy for a fixed term”.

Presumably, a judge hearing an application under section 106 would not direct the issue of a writ of possession unless he was satisfied of the *bona fides* of the landlord’s requirement. It would also seem that a tenant would have an action against his landlord for damages caused by a notice being given pursuant to section 103b. where the possession required was not for the purposes designated. However, a statute can only accomplish so much and it is inevitable that some abuses will occur. The alternative was to impose an unfair

\(^{40}\) Section 103g. (3) (a)

\(^{41}\) In the absence of an extended definition, common law spouses would not be included.
burden on landlords who genuinely require possession of the premises for the reasons stated. If a requirement had been imposed that an affidavit of *bona fides* be sworn by the landlord, before serving the notice for the reasons provided for in section 103g. (3) (a), there would perhaps have been a reduced likelihood of abuse.

(b) . . . the residential premises in respect of which the notice of termination was given are administered for or on behalf of the Government of Canada or Ontario or a municipality or any agency thereof or form part of a non-profit, limited dividend housing project financed under the *National Housing Act* (Canada) and the tenant has ceased to meet the qualifications required for occupancy of such premises.42

As in the case of rented premises required to house the landlord and a certain class of relative, this provision was, no doubt, considered necessary to avoid conflict with recognized needs which are felt to supercede security of tenure. It is doubtful that such a provision was necessary in the case of the “Government of Canada or Ontario” as there is no provision binding the Crown in the right of the Province of Ontario to the Act and it is doubtful that the Crown in the right of the Dominion of Canada could be bound by a provincial enactment.43

(c) . . . the tenant was an employee of an employer who provided the tenant with residential premises during his employment and his employment has terminated.44

This subsection recognizes the special case of the tenant who occupies that position by virtue of his employment and only so long as his employment continues.

(d) . . . the tenancy arose by virtue of or collateral to a *bona fide* agreement of purchase and sale of a proposed unit within the meaning of *The Condominium Act* and the agreement of purchase and sale has been terminated.45

Because the tenant, in the circumstances described in this subsection, is primarily a purchaser of real property, and the status of tenant is agreed to only for the purpose of permitting early occupancy of the condominium unit, usually prior to registration of

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42. Section 103g. (3) (c)
44. Section 103g. (3) (d)
45. Section 103g. (3) (e)
the unit under *The Condominium Act*, it is only reasonable to permit termination of the tenancy agreement should the agreement of purchase and sale be terminated.

The same right ought to exist in the case of any tenancy which arises by virtue of or collateral to an agreement of purchase and sale, and not only one covered by section 103g. (3) (e). It is not likely that this would lead to leases artifically being made collateral to agreements of purchase and sale in order to avoid the restrictions on the termination of residential tenancies. If such a provision did lead to such a practice it would be a dangerous one for landlords to engage in. If the purchase price was reasonable the landlord would risk losing the property. On the other hand, if the purchase price was grossly inflated the landlord would risk having a court ruling that the transaction was intended only as a lease and that in substance the parties never intended to enter into an agreement of purchase and sale.

(e) ... where a landlord requires possession of residential premises for the purposes of:

(a) demolition;

(b) conversion of use for a purpose other than rental residential premises; or

(c) repairs or renovations so extensive as to require a building permit and vacant possession of the premises the landlord may, at any time during the currency of the tenancy agreement, give notice of termination of the tenancy agreement, provided that the date of termination specified shall not be sooner than,

(d) 120 days after the date the notice is given, and

(e) the end of the tenancy agreement.

It would appear that sections 103d. (1) (d) and (e) should have read:

(d) 120 days after the date the notice is given; or

(e) the end of the tenancy agreement whichever is the later period.

What must have been intended was a period of notice not less than 120 days. However, the tenancy period was not to be cut short if it had more than 120 days to run when the notice was given.

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46. R.S.O. 1970, c. 77
47. Sections 103d. (1) (a), (b) and (c)
48. The peculiar language of section 103d. (1)(d), (e) does not appear to have troubled
Recent Amendments to the Ontario Landlord and Tenant Legislation

In addition to the other possibilities, section 103d. provides the landlord with a means of getting out of the rental market. No doubt this provision will be objected to by tenants' representatives as an obvious means of eroding needed rental stock. From the landlord's position it would seem to be going beyond the reasonable regulation of a relationship by forcing him to retain the premises as rental residential premises. The purpose of the subsection is also to permit demolition and major repairs or renovations.

Some effort has been made to protect the interests of tenants when the landlord has given notice under section 103d. (1). Section 103d. (2) provides that the tenant may terminate the tenancy agreement, where he has received a notice under section 103d. (1): (a) upon giving the landlord, at least ten days notice in writing, 'specifying an earlier date of termination', and (b) by paying to the landlord the "proportionate amount of rent due up to the date of the earlier termination". Section 103d. (2) (b) further provides that in the case where the tenant elects to give notice under the subsection, "the tenant is entitled to take into account the amount of any security deposit he has paid for rent". This latter provision may create doubt indirectly as to a tenant's right to take the rent security deposit into consideration in other cases. For example, where a tenant has given notice of intention to terminate a tenancy, in other cases, there would seem to have been no doubt that the tenant could take the rent security deposit paid into account for the last period of the tenancy. This is a result of the deposit being only a security that the rent will be paid. Because section 103d. (2) (b) has mentioned specifically this right, the question may now arise as to whether it merely declares an existing right or creates a new one. It might be argued, on behalf of a landlord, that in the absence of such a right being granted by statute, it would not exist, as, until the tenant actually vacates possession, there remains the possibility of overholding and hence the need and justification for retaining the deposit remains. Clarification could be accomplished by a simple amendment.

(f) . . . has persistently failed to pay rent on the date it becomes due and payable.

Upans, supra, note 1 at 65. Also, see Regulation 217/16 made under section 16(4) of the amended Act where the intention of section 103d. (1) is made clear.

49. Section 99
50. Section 103d. (2) (a)
51. Section 103d. (2) (b)
This provision differs from that found in section 103 e. (1) in that it is concerned not only with rent in arrears but with a tenant’s persistent habit of making late rental payments. A tenant can avoid the effect of being in arrears in paying rent by making payment as above described. Such behaviour can, however, have a day of reckoning at the end of the term. It is still open to the judge to relieve against forfeiture in such cases. Presumably, the granting of such relief would be dependent on such matters as the seriousness of the habit, the degree of tolerance displayed by the landlord and the extent of the inconvenience imposed by the default on the landlord.

Of course a landlord faced with a tenant who persistently makes late rent payment can commence proceedings for payment alone in the expectation that the imposition of costs will act as a deterrent to the continuation of the practice.

(g) . . . one or more of the causes for termination of a tenancy agreement specified in section 103 e. or 103 f. exist.

Because section 103g. (3) concludes with the words "... and the judge shall not consider any cause for termination not specifically mentioned in this Part", the parties cannot agree upon a "cause" for termination other than those covered in Part IV. Experience suggests that expanding the right to add to the "causes" for termination would lead to landlords insisting on causes which would render the amendments largely ineffective.

If it is generally accepted that the essential rights of landlords are: the right to receive the rent when due; protection from tenants who cause or permit undue damage; protection from tenants who carry on or permit any illegal acts, trade, business, occupation or calling; protection from tenants who conduct or permit activities which interfere with the reasonable enjoyment of the landlord or other tenants; freedom from serious impairment of safety or other bona fide and lawful right, privilege or interest by some act or omission of the tenant or person for whom he is responsible; protection from over-crowding of the rented premises; then, unless other causes are subsequently found to have been overlooked by the legislature, there is some justification for prohibiting what amounts to a contracting out of the limited reasons which will support an

52. Section 103f. (1) (a)
53. Section 106 (1) (g)
54. Section 103e. (1) and Section 103f. (1) (a) - (d)
application for termination and possession.\textsuperscript{55} There are, no doubt, many activities which, while annoying, would not now be treated as cause for termination. If adequate procedures were established for obtaining injunctive relief, such behaviour could be controlled adequately. For example, the keeping of a dog contrary to the regulations made part of the tenancy agreement, where the dog does not commit acts which amount to "cause" for termination, could be enjoined without placing the lease in jeopardy. Similarly, breach of such regulations as those concerning the kind of interior and exterior decoration which is permitted, could be restrained, thus preserving the rights of the landlord relating to the appearance of the building, without jeopardizing tenure.

Significantly, the legislation has not enlarged what have sometimes been referred to as "tenant and tenant" rights. Often the landlord does not wish to intervene in disputes between his tenants. In its present form, the landlord alone can act to terminate the tenancy for breaches under sections 103f. (c) & (d). This would not be objectionable if a summary remedy for tenant and tenant disputes was made available for disputes arising under the last mentioned subsection.\textsuperscript{56}

2. Adjudication of Disputes

The amendments to the Act continue the specially designed procedures for adjudicating questions arising out of the repair and maintenance obligations imposed by the Act\textsuperscript{57} and for termination of the tenancy agreement and associated relief.\textsuperscript{58} In the case of

\begin{itemize}
  \item \textsuperscript{55} Section 82 (1) prohibits contracting out of the provisions of Part IV:

    This Part applies to tenancies of residential premises and tenancy agreements notwithstanding any other Act or Parts I, II or III of this Act and notwithstanding any agreement or waiver to the contrary except as specifically provided in this Part.

  \item \textsuperscript{56} The Province of Manitoba has enacted legislation, S.M. 1972, c. 39, s. 3, amending its \textit{Landlord and Tenant Act}, R.S.M. 1970, c. 136, by introducing sections 98 (4) and (5), which enable a landlord, in cases of alleged nuisance or disturbance by a tenant or person permitted on the premises by the tenant, "of his own volition, or upon complaint made to him by any person resident in the building . . . if he is satisfied that the complaint is justified, [to] request . . . " that the nuisance or disturbance be discontinued. If it is not discontinued, an information may be laid before a magistrate against the offending tenant or person or both. See M.R. Gorsky, \textit{An Examination and Assessment of the Amendments to the Manitoba Landlord and Tenant Act (Part I)} (1972), 5 Man. L.J. 59 at 70-73

  \item \textsuperscript{57} Section 96

  \item \textsuperscript{58} Section 106
\end{itemize}
section 106, the legislature has made necessary amendments clarifying the extent of the jurisdiction possessed by the judge, and in certain significant cases extending that jurisdiction.

Prior to the amendments, proceedings were brought by way of an application by originating notice of motion (by a landlord) "before a judge of the county or district court in which the premises are situate . . .". Through what appears to have been an oversight the right to make the application was limited to landlords. The amended section provides that a "landlord or a tenant" may "apply by summary application" and not by "originating notice of motion". It is not likely that the difference in designation will, by itself, lead to any change in the way the judges treat the procedure.

Section 106, as it previously existed, provided that the application was "for an order for payment of arrears of rent and compensation under section 105 and for an order declaring the tenancy terminated, or any of them". This unfortunately worded provision was intended to avoid a multiplicity of proceedings where claims might be made for possession and rent arrears. But could an application be made pursuant to section 106 for rent arrears alone, where no issue concerning possession could arise? The difficulty presented by permitting a claim for arrears of rent alone was that it would oblige a tenant, in such cases, to pay the rent arrears into court as the price of being permitted to raise a defence based on breaches of convenant by the landlord. In the case of Re Sam Richman Investments (London Ltd.) and Riedel, Houlden J., delivering the judgment of the Divisional Court, held that the

59. S.O. 1972, c. 123, s. 3, repealing s. 106 and substituting a new s. 106
60. Id.
61. However, see the judgment of the Court of Appeal in Re Herbold & Pajelle Investments Ltd. (1975), 4 O.R. (2d) 133 at 135-36; 47 D.L.R. (3d) 321 at 322-3, where Schroeder J.A. referred to the provisions of the Consolidated Rules of Practice, R.R.O. 1970, Reg. 554, r. 11(1) and (2):

Where by any statute a summary application without the institution of an action may be made to the court or a judge in a manner therein provided, such application may also be made by originating notice but any security required by such statute shall be given.

Schedule (2) of that Rule makes it applicable:

(2) . . . to proceedings which by any statute or rule may be taken in a county court or before a judge of a county court.

section only permitted a claim for arrears of rent where the tenant could be considered to be overholding. The Act has now been clarified to reflect this judgment.  

Under the amended Act, the powers of the judge have been expanded so as to permit the making of an order for the "... return of a security deposit and interest thereon", thus enabling a tenant to avoid the difficulty of having to proceed before a Provincial Court Judge pursuant to section 108 (1) to obtain a conviction for contravention of the provisions of section 84 or section 85, or by way of an action in a Small Claims Court. In the case of the *quasi*-criminal proceeding, the onus would be the same as in the usual criminal case. In the case of a proceeding in a Small Claims Court, the difficulty has been the time lag before the trial date and the often considerable wait before the case is heard on the trial date.

Section 106(1) (e) specifies that the judge may order an "abatement of rent". Although section 106, as originally enacted, did not provide specifically for such relief, the amendment made in 1972 clarified the right to such relief and many judges have so interpreted the section.

In the case of *Saini Enterprises Ltd. v. Cambridge Leaseholds Ltd.*, it was held that in the case of proceedings for possession

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63. Section 106(2) and section 106(3)
64. Section 106(1) (e)
65. S.O. 1968-69, c. 58, s. 105
66. S.O. 1972, c. 123, s. 3, repealing R.S.O. 1960, c. 236, s. 106 and substituting s. 106, which by s. 106(4) indicated by inference that a claim for breach of a landlord's covenants could be raised by a tenant in a landlord's application for rent or compensation under section 105.
67. In the case of *Re Victoria Park Community Homes Inc. and Buzzsa* (1976), 10 O.R. 2d 251 (Co. Ct.), Stayshyn Co. Ct. J. (at 254) permitted a defence based upon breaches of section 96(1) by the landlord "in the interest of avoiding a multiplicity of proceedings, and having all matters in dispute before the presiding judge determined at the same time ...". Judge Stayshyn disagreed with Cornish Co. Ct. J. in *Re Pajelle Investments Ltd. and Booth (No. 2)* (1975), 7 O.R. (2d) 229 (Co. Ct.) who would restrict claims for abatement of rent to applications under section 96.

The County Court Judge has assumed that the right to relieve from forfeiture is a right which has been conferred upon him. Under the Statute as it now stands, the Court can alone grant relief. The County Court Judge, acting under Part III
before a judge as *persona designata*, there was no jurisdiction to
grant relief against forfeiture "on such terms and conditions as the
judge may decide", unless it was clear from the legislation that such
jurisdiction was vested in the judge. Section 106 (1) (g) now gives
the judge power to relieve against forfeiture.

It would seem that this jurisdiction will be exercised in much the
same way as in the case of the summary proceedings for regaining
possession in the case of non-residential tenancies.\(^6^9\) This is subject

\[\text{[the summary procedures for possession still applicable to non-residential}
\text{tenancies, and then applicable to all tenancies] is not a "court" but a mere}
\text{*persona designata*.}

The jurisdiction to grant relief from forfeiture under Part III of the Ontario
*Landlord and Tenant Act* was conferred by amendment made in the revision of the
statutes in 1927. "See s. 4 of an Act to provide for the Consolidation of the Statutes
of Ontario, assented to on the 5th day of April 1927, found at p. xxvi of the first
volume of R.S.O. 1927, and the proclamation, p. cxcix of Vol. 4" now found as
(C.A.). As no similar amendment had been made to the New Brunswick Landlord
and Tenant Act, R.S.N.B. 1952, s. 14(2), the Court of Appeal held that a
County Court Judge, assuming jurisdiction under Part III of the New Brunswick
Act, similarly had no jurisdiction, as *persona designata*, to relieve against
forfeiture for breach of a lease.

Prior to the recent amendments to the Ontario Act, the only provision which might
have supported an argument in favour of permitting a judge to relieve against
forfeiture was section 106 (10). The latter subsection provided that:

The judge may order that the enforcement of the writ of possession be
postponed for a period not exceeding oneweek and such other relief as may be
equitable in the circumstances.

Certainly the power to relieve against forfeiture provided for in section 20 (1) of the
Act would not have applied to proceedings brought pursuant to section 106.

In *Fodden*, *supra*, note 10 at 463, the figures cited disclose that relief against
forfeiture was regularly granted in section 106 applications. Because the provisions
of section 96(3) specifically provided for relief against forfeiture in the case of
enforcement of the repair and cleanliness obligations, it might have been argued
that the words "equitable in the circumstances" in section 106(10) do not include
the granting of relief against forfeiture. That judges assumed they did have
jurisdiction to relieve against forfeiture may be an example of the "palm tree
justice" referred to in A. Weinrib; *The Ontario Landlord and Tenant Amendment
Act* (1971), 21 U. Toronto L.J. 92 at 95 where the author conjectured as to how
section 96(3) might be interpreted.

See the *Victoria Park* case, (1976), 10 O.R. (2d) 251 at 256. The judge referred to
*The Judicature Act*, R.S.O. 1970, c. 228, s. 22, as a basis for relieving against
forfeiture. However, the power there conferred is on the Court and not upon a judge
534 (C.A.)

\(^6^9\). See *Re Jeans West Unisex Ltd. and Hung* (1976), 9 O.R. (2d) 390; 60 D.L.R.
(3d) 446 (H.C.)
to differences brought about by the restriction in the granting of such relief in certain specified cases of non-residential tenancies. However, it is unlikely that relief against forfeiture will be granted a tenant who has been served with a notice of termination for breach of sections 103f. (1) (b) and (f). In such cases, it is difficult to see how relief against forfeiture could be granted.

As a “paper” remedy, section 106(1) provides for a hearing within a reasonable period. Section 106(4) provides for “4 clear days notice before the day for the return of the motion”. Section 106(10) provides for a hearing “forthwith or at such time and place as the judge may appoint”. A system of landlord and tenant law which is to gain acceptance by the parties must insure a hearing without lengthy delays. Frustrations, brought about by delays in obtaining relief, can become a source of undermining the purposes of the Act. What social value is served by requiring a landlord, with a valid claim, to wait for many months while the tenant remains in the premises without paying rent? Section 106(6) provides some relief against the tenant who defends merely as a means of delaying the hearing.

No dispute to a claim for arrears of rent or compensation under section 105 may be made by the tenant under subsection 5 on the grounds that the landlord is in breach of an express or implied covenant unless the tenant has first paid to the clerk of the court the amount of the rent and compensation claimed to be in arrears less,

(a) amounts paid by the tenant for which he alleges he is entitled to set-off under clause (b) of subsection 3 of section 96, as substantiated by receipts filed; and

(b) amounts of rent and compensation alleged by the tenant by his dispute to have been paid as substantiated by receipts filed or verified by affidavit.

It has not yet been decided whether “implied covenant” would include a statutory obligation in the nature of a covenant imported into or implied in the tenancy agreement.70

Unfortunately, section 106(6) does not take into consideration rent which accrues due after the amounts there provided for have been paid to the clerk. In the event of a considerable delay before judgment is given, the landlord could suffer a loss which might be avoided if provision had been made for requiring rent, accruing due

70. See Upans, supra, note 1 at 76 where the author would appear to take a different position.
after commencement of the proceedings, to be paid to the clerk until judgment. It must be recalled that if the tenant prevails he will not lose the money. If the landlord is successful, however, given the recent legislation, he may never recover what is owed to him.

Additional losses may be suffered by landlords where the judge delays his consent to a writ of possession being issued and where there are further delays in enforcement. Delays in enforcement have often been encountered because of concern for the welfare of tenants. Unless there are changes in the law, landlords will continue to be made the agency of the state to furnish free rental accommodation to impecunious tenants. The amendments have done nothing to address this problem. It would appear that, indirectly, the increased costs suffered by landlords could be passed on to the landlord’s other tenants in a rental market characterized by low vacancy rates.

Delays in obtaining redress can also result from:

(a) The time lag between the hearing of the application and the making of the appropriate order.

(b) The imposition of "terms and conditions as the judge considers appropriate" to the enforcement of a writ of possession.\(^7\)

Some restraint is imposed by section 107 (2) (b) of the amended Act which permits postponement for up to one week for the enforcement of the writ of possession. However, what judge would not delay enforcement of the writ of possession where it was shown that the tenant and his family had no place to go? Almost all people would accept the need to prevent this hardship, especially where young children are involved. What is not agreed upon is who should bear the cost of preventing the hardship caused when a tenant ceases to be entitled to retain occupancy of the rented premises. At present, it is likely that it will be the landlord, or his other tenants, who will bear the cost. Such a result seems inevitable given the language of the Act which was introduced in 1972.\(^2\)

Although section 107(2) (b) provides for the judge postponing the enforcement of the writ of possession "for a period not exceeding one week", section 107(2) (a) provides that the judge may "refuse to grant the application unless he is satisfied, having regard to all the circumstances, that it would be unfair to do so . . .". It would

\(^7\) Section 106(11)
\(^2\) S.O. 1972, c. 123, s. 3, adding s. 106(10)
therefore appear that the writ of possession will not issue as a matter of course. This provision may become a source of difficulty if the word "unfair" is treated as providing a basis for dealing with hardship cases. It is unlikely that this was the intention of the legislature, as section 107(3) provides a list of reasons for a judge refusing to grant the application.

This list, which is not to "restrict the generality of subsection 2", of section 107, nevertheless, does not cover hardship cases, with the possible exception of section 107(3) (e):

... a reason for the application being brought is that the premises are occupied by children, provided that the occupation by the children does not constitute overcrowding and the premises are suitable for children.

Section 107(2) (a) would seem to be restricted to cases where the landlord's action was prompted by non-business reasons, such as a desire to subvert the reliance by tenants on the protection afforded by the Act. Section 107(3) (e), however, arguably represents a "hardship" case, as many families experience greater difficulty in obtaining rental accommodation because they have children. Section 107(3) (e) might not be viewed as being concerned with a hardship case: it deals primarily with a situation where the landlord is not genuinely acting to get rid of a tenant who is in breach of a provision which furnishes a permitted basis for obtaining a writ of possession, but where the real reason for the landlord's action is the presence of children. "Unfair", as used in section 107(2) (a), would therefore incorporate other reasons for refusing to grant a writ of possession where the landlord's motivation for seeking the writ was based on legally irrelevant motives and not on one of the permitted reasons.

Section 107(3) may have considerable practical effect in a case where a tenant is in breach of any of the provisions of the Act which would serve as a basis for termination of the tenancy and obtaining possession, and the landlord is in breach of the former section. A not dissimilar situation is encountered in the cases under The Labour Relations Act where the alleged valid reason of management for dismissing an employee is intertwined with a prohibited reason, such as the employee's union activity.

73. R.S.O. 1970, c. 232
74. See R.S.O. 1970, c. 232, s. 79. See Local 2345 International Brotherhood of Electrical Workers, AFL CIO CLC, (Complainant) v. Onward Manufacturing Company Limited, (Respondent), [1976] OLRB Rep. 71. This case was brought
under section 79 of the Ontario Labour Relations Act, in which the complainant alleged that the grievors had *inter alia* been discharged because of their union activity, or because they were members of a trade union or were exercising their rights under the Labour Relations Act.

At 75 of the Decision of the Board, it is stated:

The Board has long held that in complaints such as this, anti-union motivation does not have to be the sole reason or even the predominant reason for the activity complained of for the Board to find that the Act has been breached. A recent decision of the Ontario High Court in considering the comparable section of the Canada Labour Code upheld this interpretation.

"In considering an enactment devoid of the words, "sole reason", or "for the reason only" and resting only on the word "because", the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the Canada Labour Code has been transgressed."

See the *Bushnell* case (1974) 1 O.R. (2d) at page 442. This decision was upheld in a decision of the Court of Appeal dated April 4, 1974 and found at 4 O.R. (2d) 288.

In proceedings of this type the Board does not have the authority to make a determination with respect to the fairness of the actions taken by the respondent. Rather, the question before the Board with respect to each of these terminations is whether or not the respondent was motivated by anti-union sentiment. The Board referred to the reversal of the onus in the *Barrie Examiner* case (1975) OLRB October 6, 1975 wherein the Board stated:

"Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts — first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

It may be that section 107(3) will have the effect of placing a greater burden on the landlord of demonstrating his entitlement to a writ of possession, because "... the judge shall refuse to grant the application [for the writ of possession] where he is satisfied that:

(a) the landlord is in breach of his responsibilities under this Act or of any material covenant in the tenancy agreement;

(b) a reason for the application being brought is that the tenant has complained to any governmental authority of the landlord's violation of any statute or municipal by-law dealing with health or safety standards including any housing standard or by-law;

(c) a reason for the application being brought is that the tenant has attempted to secure or enforce his legal rights;

(d) a reason for the application being brought is that the tenant is a member of an association, the primary purpose of which is to secure or enforce legal rights of tenants, or that the tenant is attempting to organize such an association; or

(e) a reason for the application being brought is that the premises are occupied
Section 106(8) provides the means of setting aside a default judgment upon an *ex parte* motion made within seven days of the order. Where the judge is satisfied on "reasonable grounds" that a dispute exists an order may be granted. Section 106(9) provides for a judge extending the time for bringing the application "upon being satisfied that a proper case has been made for so doing". If provision had been made for safeguarding the landlord's claim for rent, as suggested above, the delays resulting from such orders would not impose an undue hardship. Section 106c. (2) ensures that where a tenant takes an appeal to the Divisional Court from a final order under Part IV, the tenant must pay "additional rent or compensation accruing to the date of filing of the notice" of appeal. This subsection recognizes the need to protect the landlord against loss of rent pending recovery of possession, but, as in the case of section 106(6) does so imperfectly.

In a case where two applications have been brought, one under section 106 and one under section 96 or section 114, because the issues in the two applications are often inter-related, as where the landlord proceeds under section 106 for arrears of rent and possession and the tenant relies on a breach of the landlord's repair and maintenance obligations under section 96, the amended Act now provides for the judge fixing a common hearing date to hear all matters in issue between the parties.\(^7\)

There was an attempt in the amended Act to make the proceedings under Part IV less formal. Thus, section 106(e) (1) permits "a party to an application under this Part [to] be represented by counsel or an agent". This change was, no doubt, prompted by a desire to reduce the legal expenses of pursuing rights under the Act, as well as to make it easier to secure "legal" assistance.

Landlord and tenant litigation cannot be treated as simple and uncomplicated. Take the example of a relatively "uncomplicated" proceeding against a tenant who intends to rely, in his dispute, upon the alleged failure of the landlord to carry out his repair and

by children, provided that the occupation by the children does not constitute overcrowding and the premises are suitable for children.

It would therefore appear irrelevant that there are other valid reasons for the application being made. This provision (s.107 (3)) may lead to a considerable number of problems where the tenant has provided an ample justification for a landlord’s application for possession but the landlord is found to have breached any of the provisions of section 107(3). It would have been better to give the judge discretion to refuse the application bearing in mind "all of the circumstances".

\(^7\) Section 106(12). The provisions of section 114 will be discussed *infra* at 702.
maintenance obligations. The lawyer for either party, if he is to represent his client adequately, should spend time to acquaint himself with the nature of the claim, which would include an attendance upon his client to discuss the matter and receive instructions. Following the meeting, the nature and content of the interview might be dictated and transcribed and the transcription reviewed. If there is a possibility of settlement this would normally have to be pursued. Where the dispute arose out of certain breaches of the repair and fitness obligations contained in the Act, it would be necessary to have the details investigated by competent trade witnesses. Their reports would have to be obtained and examined. Prudence dictates that they should be interviewed in preparation for the hearing and their anticipated evidence recorded and reviewed with them. The various court documents would have to be prepared, reviewed and filed. Payment might have to be made in compliance with section 106(6). Prior to the hearing, careful counsel would attend upon the client in order to review the evidence in preparation for the hearing. If successful, the necessary order would have to be prepared and arrangements made for execution and entry. Finally, proceedings might also be necessary to obtain payment of the moneys out of court.\textsuperscript{76} For the landlord it might be necessary, upon obtaining a writ of possession, to insure that it was enforced by the sheriff.

It is unnecessary to comment on the ways in which certain of the matters described might not be pursued except to say that failure to do so would have only one justification: expediency. That is, the financial implications of the issue are considered to be of insufficient importance so as to warrant the expenditures called for. This, however, misses the point. The issue is the right to a real hearing of a vital issue: the right to a secure tenancy of premises, reasonably fit for the purpose for which they were intended. Similarly, the landlord should not, where he has fulfilled his obligations, be deprived of his rent or possession of the premises.

On occasion, articled clerks are given the conduct of proceedings under Part IV, thus effecting a saving in fees. However, to the extent that they do not take the steps described above in preparation for the hearing, they will be prepared imperfectly. Counsel who is not certain what his client or trade witness will say in support of what he believes to be the case for his client, and who has not

\textsuperscript{76} Section 106d.
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prepared a brief on the applicable law, will be prepared inadequately. Yet, there is no simple way to get around the limit of most clients' willingness or ability to incur legal expenses for the legal services described. It is no secret that legal aid certificates are not granted very easily in landlord and tenant proceedings. Often, this is not because of matters related to the merits of the case, but because of the policy which appears to affect area directors. Recent pronouncements of the Attorney-General for Ontario indicate an ever more restrictive policy in issuing legal aid certificates.77

Representation by agents may present a partial solution to the difficulty in obtaining legal aid certificates. Unless they are trained to perform the functions described, the situation will in no meaningful way have been improved. Section 106e. (2) indicates that agents, other than members of the Ontario Bar, will be excluded where the judge finds them "not competent [to] properly represent [their client]" or "[where they do] not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser". What about the barrister who appears to the judge to be incompetent? To be effective, the reform will, in some way, have to lead to the creation of a significant group of qualified agents. Such a situation can only result from the establishment of a training programme. I do not overlook the role which might now be played by student legal aid societies if changes in the Legal Aid Regulations are forthcoming.78

Will law firms perform this function? If not, will some other establishment undertake to do so? Will an agent be able to function except as an employee of a barrister and solicitor entitled to practise in Ontario? If the business of agent in small claims cases represents a legal undertaking, why should an agent representing a person pursuant to section 106e. (1) be treated differently?79

77. See Globe & Mail (Toronto), February 14, 1976
78. In this regard, see Fodden, supra, note 10 at 470. Although section 106 e.(1) now permits representation by an agent, in order to permit law students associated with Student Legal Aid Societies to act as agents under section 106e.(1), there will have to be an amendment to the regulations made pursuant to The Legal Aid Act, R.S.O. 1970, c. 239. At present, jurisdiction of students who are members of Student Legal Aid Societies does not include appearances under the procedures provided for in the Act, See R.R.O. 1970, Reg. 557, rr. 74-78, as amended
79. See The Small Claims Court Act, R.S.O. 1970, c. 439, s. 100, and also see C.F. McKeon, Small Claims Court Handbook (3d ed. Toronto: Carswell, 1975) at 79. However, see The Solicitors Act, R.S.O. 1970, c. 441, s. 1, which places an apparent restriction on the charging of fees in such cases.
Because judges have felt themselves bound by accepted rules of evidence in adjudicating landlord and tenant disputes, the proceedings often become less summary, more technical and more expensive. With the introduction of the right to be represented by agents, the legislature has opened up the possibility of a party being represented at lower cost. Experience in Small Claims Courts, where non-lawyers may appear as agents, would indicate that with adequate training and experience, agents will provide a useful alternative means of obtaining representation.

With a view to making the summary proceedings less subject to criticism, because of the retention of the rules of evidence which apply in the courts, and which tend to place the party without a lawyer at a disadvantage, section 106g. (1) was enacted:

Subject to subsections 2 and 3, a judge of the county or district court may admit as evidence at a hearing under this Part, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceedings and may act on such evidence, but the judge may exclude anything unduly repetitious.

Hearsay evidence may therefore be received and acted upon. This change is not very startling, and in any event, it is not likely that judges will admit all hearsay evidence.

Section 106g. (2) restricts the discretion of the judge by making inadmissible in evidence at a hearing anything that would be “inadmissible in a court by reason of any privilege under the law of evidence; or . . . that is inadmissible by statute”.

Section 106g. (3) prevents section 106g. (1) from overriding the provisions of “any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings”.

Section 106g. (4) permits copies of documents or other things to be admitted as evidence, where the “judge is satisfied as to their authenticity”.

In order to overcome difficulties encountered, where the original documentary evidence filed as evidence is required to be left with the judge, section 106g. (5) permits a photocopy to be made and used in place of the documents filed and released. Alternatively, the photocopy certified by the judge may be released. In disputes
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involving business records, it would often cause great inconvenience if an entire series of records had to be left with the judge merely because some of the contents were required for the purpose of the hearing. Section 106g. (6) enables

[a] document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by the judge, . . . [to be] admissible in evidence in proceedings in which the document is admissible as evidence of the document.

Where there is no real dispute concerning evidence which would normally be admissible on the grounds that it is hearsay, section 106g. may prove of some benefit. However, where the opposite party is prepared to tender direct evidence to contradict the hearsay evidence, the result will often be the same as before the amendment. Where the issue, for example, is whether the landlord has been in breach of his obligation to repair, it might prove to be of little value to a party to be able to enter hearsay evidence, if the opposite party has a trade witness in court prepared to give direct evidence. 80

Understandably, tradespersons are not anxious to suffer the inconvenience of having to appear in court as witnesses. In case of a serious contest, an uncooperative trade witness represents a considerable detriment to a party’s case. Where a trade witness is bound by an ongoing commercial relationship (such as often exists with landlords) he is more likely to be agreeable to preparing a complete report of the situation presented to him, after making a proper investigation. He is also more likely to be agreeable to attending on the party’s lawyer so that the preparation of that party’s case will be based on the lawyer’s being sufficiently familiar with the trade witness’s testimony.

Insurance companies have recognized agreements with expert witnesses, such as doctors, who appear regularly in court to testify in cases involving the interest of the companies. It would therefore be possible for landlords’ or tenants’ organizations to make such arrangements on behalf of their members. 81

80. See Re Ontario Housing Corporation & Dingle, [1972] 3 O.R. 123 (Co. Ct.), where the judge stated that while a party does not have to adduce oral evidence, and chooses to tender affidavit evidence which is challenged by oral evidence, the oral evidence will usually prevail unless it is discredited and disbelieved. The procedures provided for under section 106 permit viva voce testimony. Also, see Re Pajelle Investments Ltd. and Booth (1975), 6 O.R. (2d) 181 at 184 (Div. Ct.)

81. There is a relatively unexplored role for tenants’ organizations. Given the large number of tenants in Ontario, if small payments could be obtained from the membership, the funds collected could be used for retaining expert witnesses and as
In cases where more than one tenant "has a common interest in respect of an application under [Part IV] one or more of those persons may be authorized by a judge of the county or district court in which the premises are located to make or defend an application on behalf of, or for the benefit of all". 82 It may now become possible, because of the numbers involved in certain cases, for tenants to be able to afford the services of experts where the cost might have been beyond the resources of a single tenant. It will first be necessary to see how the courts interpret this interesting "class action" provision. What is a "common interest"? It would seem that, in context, the provision is intended to avoid a multiplicity of proceedings. For example, it might apply where the proceeding concerns failure of the landlord to repair common areas such as the stairways, parking lot or laundry room. It is difficult to see how "common interest" could be extended to cover claims related to individual rented premises. 83 A reduction in the number of hearings might be achieved by enabling the applications of a number of tenants in the same building involving similar issues to be heard at the same time. In this way, a trade witness, who is required to testify about more than one rental premises, could do so at one time. The state of repair of one of the apartment units in a building may give rise to similar questions affecting the state of repair of other units. The condition in one of the rented premises may turn out to be markedly different from the others, and there might be special significance in this fact which could be overlooked if each case was heard separately. In such cases there is also the greater possibility of inconsistent orders being made. Even in the absence of such a provision there is no reason that the evidence could not be given as described above, if the judge was of the opinion that it would be fair well for financing test cases to the appeal court level. There has been a reasonable elaboration of the Act by the courts. But the tendency towards fuller elaboration would be accelerated if a means were available for litigating test cases. It would appear that the use of tenant (or for that matter, landlord) associations as a vehicle for financing cases would not amount to illegal maintenance and would represent a salutary influence in the development of the law. Too often, confusion arises because of the lack of guidance available to country court judges.

I appreciate that Fodden, supra, note 10 at 450, concluded that the courts had not, to the date of his article, done much to elaborate the extent of tenants' rights under the Act. Certainly, since that time, although the volume of reported cases has not been great, the nature and extent of some of the most important provisions of the Act have been further clarified. Supra, notes 3, 4

82. Section 106f.
83. See Upans, supra, note 1 at 77-78
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3. Withholding or Interfering with the Supply of Services

Because landlords may no longer resort legally to self-help in retaking possession of the rented premises, section 107 of the Act was amended to prohibit a landlord from withholding “supply of any vital service such as heat, fuel, electricity, gas, water or other vital service, that it is his obligation to supply under the tenancy agreement during the tenant’s occupation and until the date on which a writ of possession is executed”. It was thus intended to prevent the circumventing of the provision prohibiting resort to self-help. Section 107(4) (a) of the recent amendments has added to the obligations of the landlord in providing that he should not “deliberately interfere with the supply of any such vital service whether or not it is his obligation to supply such service”.

The previous provision made it incumbent on a landlord to furnish the “vital services” referred to even where the tenant was, for example, in arrears of rent. In the absence of such a provision the landlord could argue that he was, in such circumstances, no longer obligated to supply heat, fuel, electricity, etc. Where the furnishing of a vital service was not the landlord’s responsibility, he would have no obligation to do so at common law or by statute. What the recent amendment apparently intends is to restrict the landlord’s power of shutting off a main valve or panel so as to prevent receipt of a vital service by the tenant, which service the landlord is not obliged to supply pursuant to the tenancy agreement. There is a significant difference between discontinuing a service which the landlord was bound to furnish and interfering with the supply of such service which the landlord had no obligation to furnish. The amended Act creates an additional means of enforcing the prohibition.

Section 107(4) (b) supports the intention of section 107(1), which latter subsection restricts the landlord's recovery of possession of

84. As to problems which may be encountered in endeavouring to have the cases tried at the same time, see Re Pajelle Investments Ltd. and Booth (No. 2) (1975), 7 O.R. (2d) 229 at 232-33
85. S.O. 1972, c. 123, s. 4(2), amending R.S.O. 1970, c. 236, by adding s. 107(3)
86. Id.
87. Section 108(1), See infra, note 90
the rental premises to cases where the tenant has vacated or abandoned the rented premises or where possession is regained by authority of a writ of possession. Section 107(4) (b) is intended to prohibit conduct engaged in for the purpose of causing the tenant to give up possession of the rented premises. Because section 107 (4) (b) only prohibits acts which "substantially interfere with the reasonable enjoyment of the premises for all usual purposes by a tenant or members of his household . . .", does this mean that acts of interference which are insubstantial will be tolerated, even where they interfere with the reasonable enjoyment of the premises for all usual purposes? A situation might arise where the landlord interferes substantially with the reasonable enjoyment of the premises for all usual purposes, of a member of the tenant’s household, with a view to causing that person to give up possession of the premises, and such conduct would not be prohibited by section 107 (4) (b).

Section 107 (4) (b) also covers cases where the acts complained of are intended to cause the tenant "to refrain from asserting any of the rights provided by the Act, or . . . by the tenancy agreement".


Section 108 of the Act creates a number of offences punishable on summary conviction. The maximum fine upon conviction has been increased by the recent amendments from $1,000 to $2,000. As well as the increase in the maximum fine, contravention of certain additional sections of the Act have been created as offences. Prior to the amendments, section 10888 created offences of: (a) knowingly contravening the provisions of section 84 (the landlord (i) requiring or receiving a damage security deposit; (ii) failing to pay interest on a permitted rent security deposit not exceeding one month’s rent; or (iii) requiring delivery of any post-dated cheque or other negotiable instrument to be used for payment of rent); (b) section 85 (a section applying to security deposits held by landlords on January 1, 1970, which may be retained subject to (i) payment of interest annually at the rate of six per cent per year; (ii) repayment to the tenant, together with accrued interest, within fifteen days of the tenancy being terminated or renewed; subject to an extension of time being ordered on summary application to a judge of the County or District Court of the county or district in which the premises are situated.

88. R.S.O. 1970, c. 107, s. 107, as amended by S.O. 1972, c. 123, s. 5
Where a landlord "proposes to retain any amount of the security deposit", he must "so notify the tenant together with the particulars of and grounds for the retention and he shall not retain such amount unless" he obtains the written consent of the tenant after receipt of the notice, or he obtains an order from the judge; (c) section 94 (restricting access to certain political canvassers by the landlord or his servant or agent); (d) section 95 (alteration of locking system by the landlord or the tenant except by mutual consent); (e) section 104 (failing to post up conspicuously and maintain posted the legal name of the landlord and his address for service and a copy of Part IV or a summary thereof as prescribed by the regulations). Section 104 now also applies to a landlord of a mobile park and to a landlord renting more than one rented premises in the same building and retaining possession of part of the building for use of all tenants in common; and (f) section 107 (landlord must regain possession only through resort to Part 10 and not through self-help).

In addition to the sections noted previously, contravention of which can lead to penal sanctions, breaches of the following sections have been created as offences: (a) section 86 (distraining in default of payment of rent, the remedy of distress having been abolished); (b) section 93 (entry of premises by the landlord, except in cases there described); and (c) sections 111, 112, 113 (to be described below).

It is most unlikely that a landlord's servant or agent who contravenes the sections listed in section 108 would be guilty of an offence. The sections do not refer specifically to servants and agents, as does section 94. The definition section of the Act, which defines "landlord", does not include in the definition servants or agents. This could lead to difficulties where a servant or agent had

89. Section 104(2)
90. See supra at 697-98
91. Section 1(b). See In re Totem Tourist Court and Skaley, [1973] 3 O.R. 867 (D.C.J.). There remains the problem noted in Lamont, supra, note 1 at 5:

Part IV refers to tenancy agreements between landlords and tenants, and therefore applies to the usual understanding of that relationship. However the words "landlord" and "tenant" are defined in section 1(b) and (e) and include other persons permitting and enjoying occupation. Just who is otherwise included is difficult to say, as the Courts have stuck to a narrow interpretation of the application of the Act to landlords and tenants.

In the case of R. v. Poulin, [1973] 2 O.R. 875; 12 C.C.C. (2d) 49 (Prov. Ct.), the judge (at 876; 12 C.C.C. (2d) at 49) concluded that the Act does not cover an occupant who is a roomer in a rooming house.
done something which would have amounted to a breach of a prohibition contained in a section of the Act, if he was a landlord, and the action had not been expressly or impliedly sanctioned by the landlord. A case could arise where the landlord would escape conviction, because he did not contravene the section "knowingly" and his servant or agent, who had carried out the complained of conduct, could not be found guilty of the offence.

5. Mobile Home Parks

The subject of mobile homes has been dealt with specifically by the amendments to the Act and the term "residential premises" has been expanded to include "land intended and used as a site for a mobile home used for residential purposes, whether or not the landlord also supplies the mobile home". Section 111(1) provides that: "subject to subsections 2 and 3, a tenant has the right to sell, lease, or otherwise part with the possession of his mobile home while it is situated within a mobile home park". The exceptions referred to apply to (a) tenants of "premises administered by or for the Government of Canada or Ontario or a municipality or any agency thereof", (As the Crown has not been made subject to the provisions of the Act, it was unnecessary to relieve it from the

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I feel that the word "occupant" as used in s. 1(e) includes persons in premises that are occupied by other people or by some other persons in the relationship of landlord and tenant.

The recent amendments do not appear to have changed the law and it would seem to still be possible to create relations outside the Act, such as roomers and licensees of residential premises.

In the case of Re Pajelle Investments Ltd. and Booth (1975), 6 O.R. (2d) 181 (Div. Ct.), the Court did refer to the fact that the definition of landlord in section 1(b) is inclusive rather than exclusive and that section 3 of the Act describes a "much broader view of the landlord and tenant relationship . . ." (at 183). However, the Court did not alter the established rule that there must be a landlord and tenant relationship for the proceedings under the Act to be available.

This still leaves open the question of how broad a view of the landlord-tenant relationship may be taken because section 3 of the Act states that the relationship "does not depend on tenure" and because section 1(b) provides that "landlord" includes not only lessor and owner but the "person giving or permitting the occupation of the premises . . . ."

If the legislature wished to include such persons as licensees and lodgers it would have been desirable to have done so specifically rather than by possible inference.

92. Sections 111-114
93. Section 1(c) (ii)
94. Section 111(2)
application of any provisions of the Act)\textsuperscript{95} and (b) the right of a landlord to provide in a tenancy agreement that the “right of a tenant to sell, lease, or otherwise part with possession of his mobile home while it is situated in a mobile park is subject to the consent of the landlord, and, where it is so provided, such consent shall not be arbitrarily or unreasonably withheld”.\textsuperscript{96} The landlord is only permitted to charge reasonable expenses incurred thereby.\textsuperscript{97} In case of any question arising concerning the disposal of the mobile home by the tenant, as described in section 111(3) or (4), a summary application may be made by either of them to the County or District Court Judge of the county or district in which the premises are situated.\textsuperscript{98}

Section 111(6) limits the right of a landlord to act as the tenant’s agent in any negotiations to sell, lease, or otherwise part with possession of a mobile home except pursuant to a written agency contract. Such a provision would not prevent the landlord from obtaining a “written agency contract” which might include provision for sale of the mobile home, as agent of the tenant, to cover arrears of rent.

Section 112 endeavours to limit the landlord’s ability to make charges except with respect to the rent for the land occupied and for such services as electricity, gas and water furnished. By the terms of the latter section only reasonable expenses can be charged for:

(a) the entry of a mobile home into a mobile home park;
(b) the exit of a mobile home from a mobile home park;
(c) the installation of a mobile home in a mobile home park;
(d) the removal of a mobile home from a mobile home park; or
(e) the granting of a tenancy in a mobile home park.

Section 113(1) prohibits the landlord of a mobile home park from restricting a tenant’s freedom “to purchase goods or services from the person of his choice”. However, section 113(3) permits the landlord to restrict or prohibit entry of tradesmen into the mobile home park where the tradesman has:

(a) unduly disturbed the peace and quiet of the mobile home park;
(b) failed to observe such reasonable rules of conduct as have been established by the landlord; or

\textsuperscript{95} Supra, note 43
\textsuperscript{96} Section 111 (3)
\textsuperscript{97} Section 111(4)
\textsuperscript{98} Section 111(5)
(c) violated the traffic rules of the mobile home park.

With the growth of mobile home parks, the need for controlling and regulating their management and operation became apparent. Section 114 of the Act endeavours to impose on the landlord several obligations concerning: removal of garbage, maintenance of roads, snow removal, maintenance of essential services, maintenance of grounds, structures, enclosures and equipment intended for the common use of tenants and the repair of damage to tenants' property caused by wilful or negligent conduct of the landlord.

A tenant in a mobile home park is responsible "for ordinary cleanliness of the rented premises. . .".99

It is apparent that the obligations imposed by sections 114 (1) (f) and (2) are adaptations of similar obligations imposed with respect to residential tenancies, other than for space in mobile home parks.100 Similarly, section 114(3) endeavours to create a summary means of enforcing the obligations created by section 114, as was created in the case of section 96(3).

6. Notice of Rent Increases

The amount of rent which may be charged by landlords in Ontario is subject to review under The Residential Premises Rent Review Act, 1975.101 It is not intended to consider the latter Act in any detail in this paper, except to note that it subjects certain tenancy agreements to statutory guidelines which limit the size of rent increases during the periods prescribed in the Act, subject to certain provisions for higher increases being the result of mutual agreement of the parties or the decision of a rent review officer. Section 20 of the latter Act provides for its repeal on the first day of August, 1977.

It is imperative, during the period in which the latter Act is in force, that a landlord who desires to obtain an increase in rent from a rent review officer, in addition to complying with the requirements of the latter Act, serves the notice provided for by section 115 (1) of the Act:

A landlord shall not increase the rent for residential premises unless he serves on the tenant a notice in writing setting out his intention to increase the rent and the amount of the increase

99. Section 114(2)
100. Section 96(1) and section 96(2)
101. S.O. 1975 (2nd Sess.), c. 2, as amended by S.O. 1976, c. 2 and 36, hereinafter referred to as the "Rent Review Act"
intended to be made not less than ninety days prior to the end of,
(a) the period of the tenancy; or
(b) the term of a tenancy for a fixed period.

Section 115 (4) provides:

Subject to the provisions of The Residential Premises Rent Review Act, 1975 (2nd Session), an increase in rent by the landlord where the landlord has not served a notice according to the provisions of subsection 1 is void.

The Ontario Divisional Court has held that failure to comply with section 115(1) voids an application for an increase in rent provided for by the Rent Review Act.\(^{102}\)

When the Rent Review Act ceases to be in force, a tenant who receives notice under section 115(1) must give proper notice of termination (as specified therein) to his landlord or “he shall be deemed to have accepted” the increases in the amount specified in the notice, or such increases as “may be agreed upon in writing . . . ”.\(^{103}\)

Unless tenants are aware of their obligations under section 115(2) many of them will become “locked in” unwittingly to leases at increased rents. The apparent frustration of Ontario landlords with the Rent Review Act makes it highly probable that the demise of rent review will lead to the phenomenon of a landlords’ “catch-up”. It would have added only slightly to a landlord’s burden under section 115(1) to require inclusion in the notice of a warning that the provisions of section 115(2) apply in the event that the required notice of termination is not given.

However, until the Rent Review Act ceases to be in force, the tenant will be able to rely on the review provided for under the latter Act, and the “deemed acceptance by a tenant of an increase [in such a case] does not constitute a waiver of the tenant’s right to take whatever proceedings are available to him under any law in force that provides for the review of rent increases”.\(^{104}\)

III. Conclusion

When the Rent Review Act ceases to be in force, if it is a not succeeded by some form of legislation which serves a similar purpose, the security of tenure provided for by the amended Act

\(^{102}\) Devitt v. Sawchyn (D.C.), not yet reported
\(^{103}\) Section 115(2)
\(^{104}\) Section 115(3)
may not be sufficient to provide more than paper protection. If the present extreme reduction in building starts of rental residential property is not a temporary phenomenon, the government will be faced with a number of unpleasant alternatives: it may refrain from renewing rent review and risk a hostile tenant response at what may be considered unwarranted rent increases. Or it could continue rent review, and face a hostile response from young people finding a shortage of rental accommodation and from landlords who may further reduce their commitment to rental development. It may be possible to retain reasonable security of tenure, even after the end of the Rent Review Act, if some means can be developed for identifying retaliatory rent increases.

As has been suggested, even if a means can be found for safeguarding security of tenure (by insuring that it is not destroyed by permitting retaliatory rent increases) it will still be necessary to remedy a number of deficiencies in the Act:

1. Landlords must be assured that they will not suffer lengthy delays in obtaining and enforcing a writ of possession when they are legally entitled to possession. One month from the date of commencement of proceedings would be fair to landlords, who can obtain some protection by requiring a rent security deposit. Hardship cases ought not to be the responsibility of the landlord, unless he is to be reimbursed for assuming the burden. It is the responsibility of the state to assist tenants who are experiencing hardship, and not that of the landlord or other tenants. If landlords' organizations could document their case adequately that they experience lengthy delays in recovering possession, even where they act promptly, they will have a stronger case for legislative redress or for an examination of the ways in which judges or sheriff's officers may be responsible for the delay in the enforcement of landlords' remedies.

2. For security of tenure to be truly meaningful, it will be necessary to overcome problems encountered in the procedures established by the Act. While some improvement may be afforded by certain of the amendments, there is reason to consider the establishment of a landlord-tenant tribunal which would hold sittings at night, as well as during the day. Hearing dates should be flexible so as to

105. By merely changing the forum for settlement of landlord and tenant disputes it is unlikely that significant improvement can be expected to occur in the enforcement of the rights and obligations contained in the Act. The forum must also
accommodate the needs of the parties. *Ad hoc* judges (or chairmen if representatives of the parties of interest are to form part of the tribunal) might be appointed from members of the bar. The tribunal might make greater use of on site inspection in such cases where a view would assist determination. Reports of experts appointed by the judge (*e.g.*, plumbers, carpenters, *etc.*) would reduce the problems associated with proof which have been described above.

3. Provision must be made for obtaining injunctive relief in a summary manner, and without the necessity for proceeding with a court action.

Certainly, the concept of security of tenure is a necessary one if tenants are to maintain a degree of dignity where they live, which was not always possible where the tenancy might be terminated for capricious reasons and where other arbitrary powers were possessed by landlords. At the same time, the law will be judged seriously deficient by landlords, unless they can be assured that they will be able to recover possession for just cause without unwarranted delays.

Although the new changes in the Act represent a bold attempt to introduce meaningful security for tenants, they leave many doubts concerning whether true security of tenure will be possible in practice and whether landlords will be made any more secure in relation to their fundamental rights.

provide for new machinery dedicated to treating the kinds of problems here discussed. There must be an adequate, well-trained staff to serve provincial needs, and the staff must be sufficiently trained in the law which they will be dealing with as well as in the techniques of mediation and conciliation. As well, legal advisers must be available to the staff members. For a discussion of the Manitoba Rentalsman, see M. R. Gorsky, *An Examination and Assessment of the Amendments to the Landlord and Tenant Act (Part I)*, supra, note 56 and *Part II* (1973), 5 Man. L.J. 270