

6-1-2016

Further Research Update: Paralegals, the Cost of Justice and Access to Justice: A Case Study of Residential Tenancy Disputes in Ottawa

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Recommended Citation

Wiseman, David, "Further Research Update: Paralegals, the Cost of Justice and Access to Justice: A Case Study of Residential Tenancy Disputes in Ottawa" (2016). *Canadian Forum on Civil Justice*. 41.
<https://digitalcommons.osgoode.yorku.ca/cfcj/41>

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FURTHER RESEARCH UPDATE:

Paralegals, the Cost of Justice and Access to Justice: A Case Study of Residential Tenancy Disputes in Ottawa

A further and final year of data gathered for this case study has reinforced the message that paralegals, who purportedly offer more affordable and accessible legal services than lawyers, are continuing to make a significant contribution to the resolution of residential tenancy disputes in Ottawa, but only for landlords and, largely, for corporate landlords. The reinforcement of this message across a data set now spanning five years of residential tenancy dispute cases for the Eastern Region of the Landlord and Tenant Board of Ontario further solidifies a conclusion that *who* provides more affordable and accessible legal services can have an impact on *whose* legal needs are serviced. This, in turn, raises more fundamental questions about *whether* access to justice is really being improved in this context at all.

As introduced in a [previous](#) CFCJ Newsletter, this research project aims to identify the role of paralegals in the Ontario residential tenancy dispute resolution system and to analyze their impact on the cost of justice and access to justice, especially for low-income tenants. The impetus for this study is two-fold. First, in the face of a perceived ongoing crisis in access to justice, increasing emphasis is being placed on the potential of paralegals to offer affordable, efficient and effective legal assistance to people with unmet legal needs. In other words, paralegals may provide a means for re-configuring the costs of justice and thereby improving access to justice. Second, anecdotally-reported experiences of participants in the [Housing Justice Project](#), a joint-initiative of the Faculty of Law at the University of Ottawa and ACORN Ottawa that provides assistance to low-income tenants, indicated that paralegals are playing a significant role in the residential tenancy dispute system, but more for landlords than for tenants.

Against this background, this research project initially gathered and preliminarily analyzed all reported decisions (on CanLII) of the Ontario Landlord and Tenant Board for the Eastern Region (which includes hearings in Ottawa, as well as in Kingston, Brockville and other smaller communities) for the four years preceding commencement of the research (mid-2009 to mid-2013). Since many claims do not reach the decision stage, and since only a modest proportion of decisions are reported, the total number of decisions gathered is only a small sub-set of the total number of claims filed with, and resolved through, the LTB for the Eastern Region. The decisions included claims filed by both landlords (typically for eviction) and tenants (typically for maintenance and, relatedly, rent abatements).

An interim research update, provided in an [earlier](#) CFCJ Newsletter, provided preliminary results of the ongoing analysis of the data set. That interim update compared the set of cases for 2009-10 and 2012-13 in terms of the prevalence of the different types of representatives that are permitted to appear before the LTB, as well as self-representation, for landlords and tenants. The preliminary analysis revealed that, for tenants, the prevalence of the different types of representatives

remained similar as between the two years, with a generally high rate of self-representation among tenants (>60%) and with paralegals playing only a very marginal role ($\leq 1\%$). For landlords, a key difference in prevalence of the different types of representatives was the seemingly significant increase in the role of paralegals, from 20% to 28%, as between the two periods. This appeared to have come about through a matching decrease in reliance on non-legal representatives (falling from 29% to 20%). Since non-legal representatives are typically employees or agents of corporate landlord entities, this suggested that corporate landlords are the main beneficiaries of the increased prevalence of paralegals in the residential tenancy dispute system.

Subsequently, a further set of cases was gathered from CanLII for the years 2013-14 and 2014-15. Unfortunately, the number of cases reported through CanLII for the Eastern Region of the LTB for 2014-15 was unusually small ($n=24$) and so, although not revealing any meaningful inconsistency with the rest of the data set, that year of cases has been excluded from the project. This research update reports on the further and final year of cases for 2013-14, while also revisiting the earlier and overall data set in an attempt to elicit more fine-grained information on types of representatives and to begin sketching the resultant landscape of head-to-head representation dynamics.

Prevalence of Different Types of Representation

The tables and charts below report the prevalence of different types of tenant and landlord representation for each of the five years from 2009-10 to 2013-14. It should be noted that these annual data sets are generally not large enough, compared to the total annual number of cases for the region (which are typically in the range of 8000 applications) to be treated as representative samples. But these cases are all that is publically available and analysis of them at least indicates potentially significant attributes that, if representative, would warrant consideration.

The first table reports on tenant representation and includes a newly developed distinction within the category of 'Lawyer' between those who could be identified as practicing either at a community legal clinic or the Ottawa Housing Help community non-governmental organization, labeled 'public', and those who could not be so-identified, labeled 'private'. It should be noted, however, that some of the Lawyers designated as 'private' may be appearing on the basis of legal aid certificates and so would be better counted as 'public'. It is also important to note that the category of 'Duty Counsel' representation captures only a portion of the representation assistance, and none of the other types of assistance, provided by publicly-funded duty counsel lawyers to tenants. Specifically, casework statistics on the Eastern Region duty counsel program provided by the Advocacy Center for Tenants of Ontario show that duty counsel, who usually assist around 25% to 30% of total tenants, provide summary advice to around 90% of the tenants they assist but provide representation services to only 30% to 50% of assisted tenants. Moreover,

not all representation services are necessarily identifiable in the written decisions and orders that constitute the data set.

Prevalence of Different Types of Tenant Representation at Ontario LTB, Eastern Region (2009-10 to 2013-14)										
Tenant Rep'n	Y09-10 (n=155)		Y10-11 (n=216)		Y11-12 (n=118)		Y12-13 (n=344)		Y13-14 (n=91)	
	%	R#	%	R#	%	R#	%	R#	%	R#
Self	62	1	62.5	1	54	1	69.7	1	61	1
Duty Counsel	19	2	17.5	2	26	2	13.6	2	18.6	2
Lawyer	11	3	11.1	3	13.5	3	7.8	3	14	3
-- <i>Public</i>	5.8		6		7.5		3.8		8.5	
-- <i>Private</i>	5.2		5.1		6		4		5.5	
Non-legal	4.5	4	3.2	5	3.3	4	4.3	4	5.4	4
Legal Worker	2.5	5	4.6	4	1.6	5	3.4	5	1	5
Paralegal	0.6	6	0.4	6	0.8	6	0.8	6	-	-

As can be seen, the further and final year of data reflects the earlier analysis of tenant representation, in that over 60% of tenants self-represented. In terms of paralegals, their previously very marginal level of prevalence declined to non-existent. The relative prevalence of the different types of representatives over the 5 years is visually depicted in the following chart.

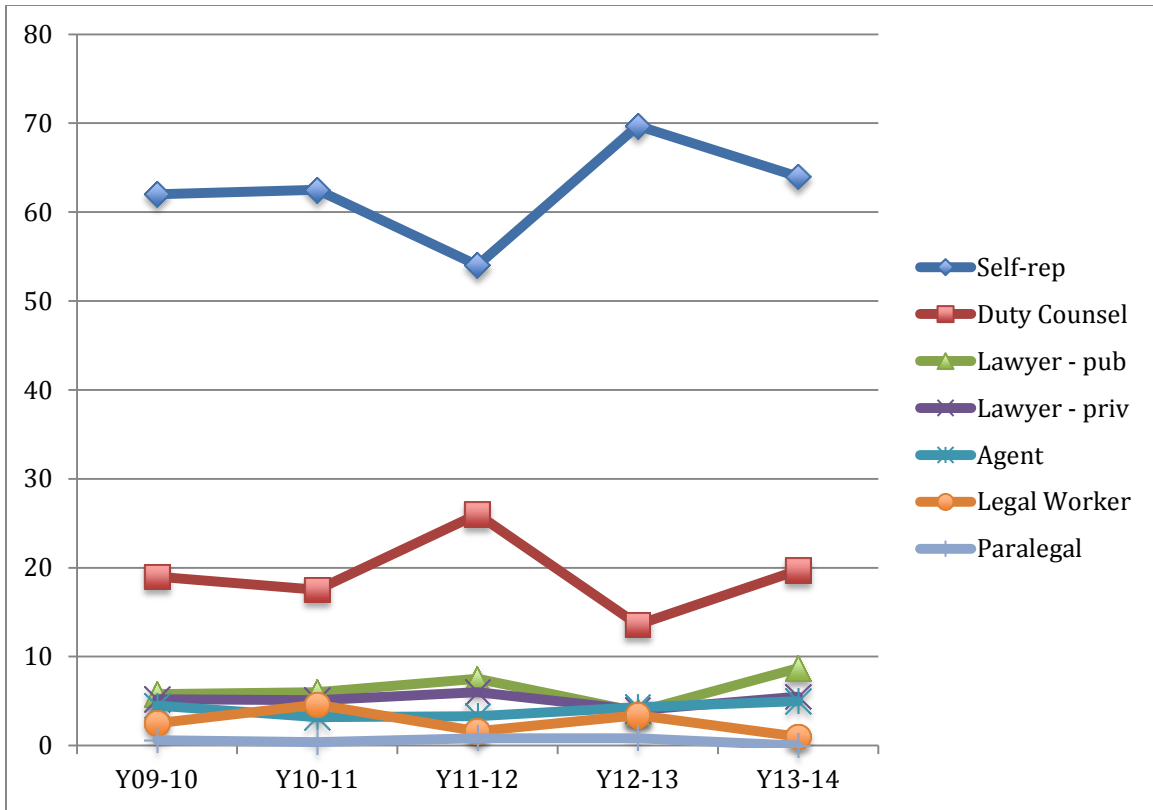


Chart 1: Prevalence of Different Types of Tenant Representation at Ontario LTB, Eastern Region (2009-10 to 2013-14)

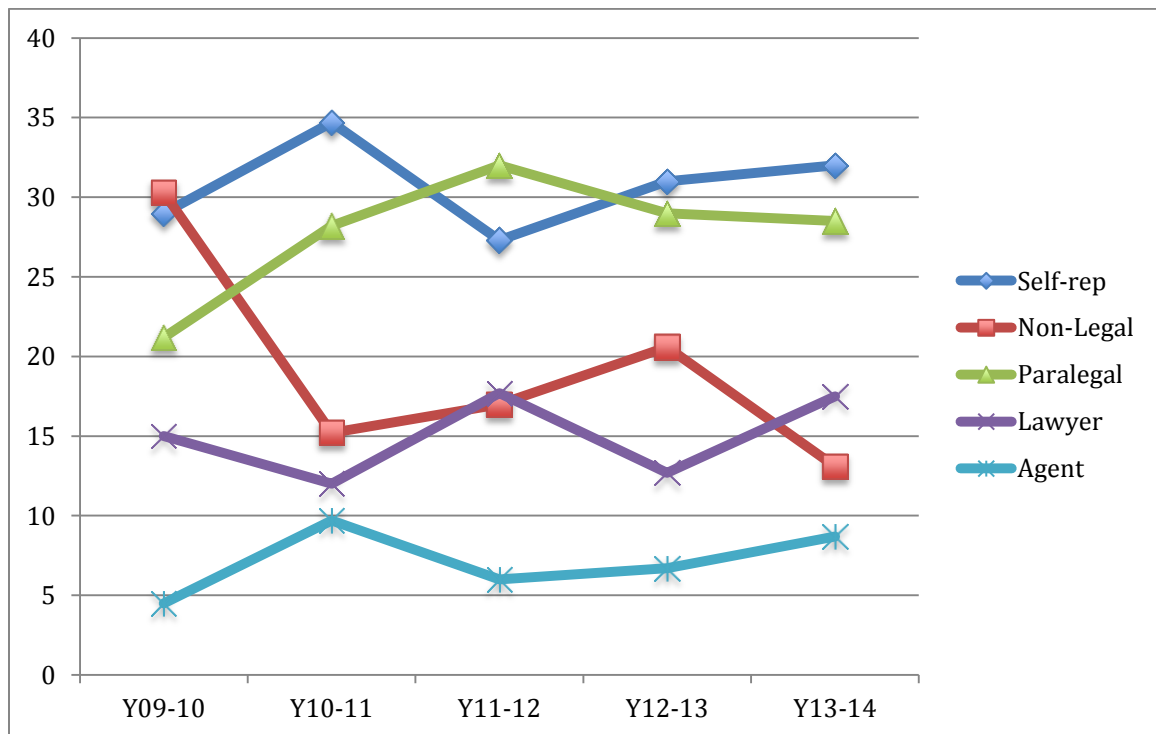
In terms of the specific research question of the extent to which paralegals play a role in tenant representation and access to justice in the Eastern Region of the LTB, analysis of this data continues to indicate that paralegals play virtually no role.

As for landlords, the next table reports on landlord representation over the 5 years and, again, the fifth and final year of data reflects the relative prevalence of the different types of representation established from the second year in the series. Throughout the 5-year period, landlord self-representation has remained constant at around 30%. The second year (2010-11) is noteworthy for indicating a significant switch from the use of non-legal representatives (who are typically employees or agents of corporate landlords) to paralegals. The use of paralegals rose from 21% in 2009-10 to 28% in 2010-11, and has remained at around that level since, whereas the use of non-legal representations declined from 30% in 2009-10 to 15% in 2010-11, and has remained well below 30%, although fluctuating significantly, in subsequent years.

Prevalence of Different Types of Landlord Representation at Ontario LTB, Eastern Region (2009-10 to 2013-14)										
Landlord Rep'n	Y09-10 (n=155)		Y10-11 (n=216)		Y11-12 (n=118)		Y12-13 (n=344)		Y13-14 (n=91)	
	%	R#	%	R#	%	R#	%	R#	%	R#
Self	29	2	34.7	1	27.3	2	31	1	32	1
Non-legal	30.3	1	15.2	3	17	4	20.6	3	13.1	4
Paralegal	21.2	3	28.2	2	32	1	29	2	28.5	2
Lawyer	15	4	12	4	17.7	3	12.7	4	17.5	3
Agent	4.5	5	9.7	5	6	5	6.7	5	8.7	5

In terms of the specific research question then, analysis of this data continues to indicate that paralegals have established a significant role in landlord representation and access to justice in the Eastern Region of the LTB. Since non-legal representatives are typically employees or agents of corporate landlord entities, this suggests that corporate landlords are the main beneficiaries of the increased prevalence of paralegals in the residential tenancy dispute system

The following chart offers a visual depiction of the relative prevalence of the different types of landlord representation over the period.



**Chart 2: Prevalence of Different Types of Landlord Representation
at Ontario LTB, Eastern Region (2009-10 to 2013-14)**

While it is still important to emphasize that this analysis is preliminary, the extra year of data appears only to reinforce the troubling tentative conclusions about the relationship between paralegals and access to justice, at least in the context of residential tenancy disputes, that were offered in the interim research update. Specifically:

- It would appear that paralegals are not sufficiently affordable or accessible to be a viable option for tenants and so offer no direct access to justice improvements to tenants;
- It would appear that paralegals are sufficiently affordable or accessible and, presumably, are also sufficiently effective, to be an increasingly attractive option for meeting the legal needs of corporate landlords BUT it is not clear that this counts as a meaningful improvement in access to justice, because it might be doubted whether corporate landlords were suffering any particular deficits in access to justice or, at least, whether they were suffering any particularly pressing deficits;
- To the extent that corporate landlords may be benefitting from increased use of paralegals, there is the danger that this may be coming at the direct cost of tenants who, whether represented or not, may be facing more effective opponents. Any such detriment to tenants may amount to a decrease in their access to justice.

Prevalence of Different Head-to-Head Representation Dynamics

One way to begin to investigate the concern about a detrimental impact on tenants from the one-sided prevalence of paralegals is to analyze the prevalence of the different types of head-to-head representation dynamics that are produced across the data set. A preliminary analysis to that end (which, for this purpose, includes the small set of cases available for 2014-15) has now been conducted and reveals the following selected results.

The most prevalent head-to-head representation dynamic is when both the landlord and tenant are self-representing, which occurred in 22.5% of cases. The next most prevalent, at 15.5%, was when the landlord is represented by a paralegal and the tenant is self-represented. That was followed by non-legal representation for the landlord against a self-represented tenant, at 11.8%, and then lawyer-for-landlord v self-represented tenant, at 8.1%. All told, 65% of self-represented tenants faced a represented landlord. In contrast, only 39% of self-representing landlords faced a represented tenant. By the same token, of the situations where self-represented landlords faced represented tenants, 71% of the tenant representatives were lawyers (including duty counsel). In contrast, of the situations where self-represented tenants faced a represented landlord, only 20% of the representatives were lawyers (with 39% being paralegals, 30% being non-legal and 10% being agents).

Given that the general prevalence of self-representation among tenants (around 60%) is consistently twice that of landlords (around 30%), it is not surprising that tenants more often find themselves in a one-sided representation dynamic where they are self-representing against a represented landlord. The information provided in the case decisions that constitute the data set is not sufficient to make a meaningful assessment of the particular relationship between one-sided representation and fairness of process or outcome, but it seems reasonable to say that there is at least a possibility the mere fact of being on the unrepresented side of a one-sided representation dynamic is an unfair disadvantage and that, in turn, tenants are bearing a heavier burden of that disadvantage.

One basis for a potential disadvantage of a one-sided lack of representation is a difference in capacity to effectively manage and participate in the hearing itself. But another potential disadvantage exists in the recognition that, generally speaking, it could be expected that a represented party will be better prepared for a dispute resolution process than a self-represented party. Moreover, relative differences in degrees of preparation may also be a factor in other types of head-to-head representation dynamics that, on their face, do not seem so potentially unfair to tenants. For instance, the data reveals that, of the 70% of cases where a landlord was represented, 20% of tenants were represented by duty counsel. On its face, the presence of duty counsel would be expected to contribute to leveling the playing field for the tenant. However, it is important to recognize that duty counsel is often only involved at the 11th hour of disputation. The last-minute involvement of duty counsel is no doubt significant and valuable, but there is only so much that duty counsel can do to compensate for any lack of preparation by tenants who, until the day of their hearing (and contact with duty counsel), will often have been managing the matter, for better or worse, on their own.

By the same token, it must be acknowledged that there are other forms of assistance available to tenants aside from day-of-hearing representation. In particular, community legal clinics in the Eastern Region, as well as other community-oriented organizations like Ottawa Housing Help and the Housing Justice Project, regularly provide summary advice to tenants on residential tenancy disputes and so a proportion of tenants who are self-represented at the LTB, as well as some who have duty counsel assistance, will nevertheless have had the benefit of a certain level of pre-hearing advice. In turn, that advice may enable some tenants to more meaningfully prepare for and participate in a hearing (and related processes, such as mediation).

Next Steps

This preliminary analysis, now spanning a fifth year of data, and the tentative conclusions it suggests, raise concerns about the broader impact of paralegals and the emphasis on access to justice associated with them. As stated in the interim research update, to the extent that paralegals are presented as a means for access to justice in residential tenancy disputes, this preliminary analysis indicates a need to more fully explore and assess *who* provides legal services, *whose* legal needs are met

by those services, and *whether*, or to what extent, meeting those needs counts as meaningfully improving access to justice.

At this point, this research project is focusing on a deeper analysis of the data and to consideration of other sources of information that can assist in developing as clear a picture as possible of not only the role of paralegals but also other aspects of access to justice in the residential tenancy dispute system. This further analysis includes an exploration of the results of the Cost of Justice project [survey of everyday legal problems](#).

David Wiseman is a Cost of Justice Research Alliance member and an Assistant Professor in the Faculty of Law, University of Ottawa. Find out more about the Cost of Justice Project here: <http://www.cfcj-fcjc.org/cost-of-justice>