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PAYMENT INTO COURT UNDER SECTION 113(6) OF THE LANDLORD AND TENANT ACT

Jack Fleming*

1. INTRODUCTION

1.1 THE ISSUE
This article will discuss payment into Court pursuant to subsection 113(6) of the Landlord and Tenant Act. The subsection provides for payment of rent arrears into court pending the hearing of a landlord’s application. The payment into court issue will be examined in the specific situation of a tenant disputing the landlord’s application on the basis of the landlord’s failure to keep the premises in a good state of repair. The writer will argue that payment into court is not required in such cases.

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* Jack Fleming is co-director of Community Legal Services (Ottawa-Carleton, Ottawa, Ontario) and teaches residential tenancies law at Queen's University Faculty of Law. He is also managing editor of the Landlord and Tenant Case Index.

1. R.S.O. 1990 c. L. 7 [formerly R.S.O. 1980 c. 232] [hereinafter the Act].
It should be noted that it is generally a good tactical move to make payment into Court when that can be done. It may help to demonstrate the sincerity of the tenant’s defence, while still withholding the rent from the landlord. However, sometimes it is either not possible or not desirable to make payment into court.

1.2 THE FACT SITUATION
The fact situation considered in this paper is a common one: a tenant withholds rent due to a landlord’s failure to make repairs, and the landlord serves notice of termination and brings an application to terminate the tenancy. If the tenant simply retains the rent money, it can be paid into court on commencement of the court application. However, the withheld rent is often spent before a court application is brought.

In some cases, the financial hardship of living on a welfare allowance makes it simply too difficult not to spend the money when the children are hungry or another emergency arises. In other cases, the money is spent on items relating to the repair issues, but for which receipts have not been retained. For example: the rent money was used to pay the heat, which was abnormally high due to holes in the wall; or food costs have escalated due to the broken refrigerator; or medicine expenses have been incurred due to the failure to properly heat the premises; or repair parts have been purchased. If receipts are kept for any of these items, they could be filed in lieu of payment into court, but tenants often realize that only after they get legal advice—when it is too late, and they no longer have the receipts.

As well, the tenants in these cases will generally be claiming an abatement of rent for the discomfort which they have lived through. It may be that the rent withheld will equal the abatement eventually ordered. Tenants often consider it unfair that they should have to make payment into court, when no requirement is imposed on the landlord to make interim repairs or to pay the estimated cost of repairs into court.

2. LEGISLATIVE FRAMEWORK
Section 113(6) of the Landlord and Tenant Act requires a tenant who is disputing a claim for arrears of rent to, in certain circumstances, pay the alleged arrears into the Court’s bank account less certain items which may be set off. The tenant’s dispute cannot be heard without this payment into Court. The wording of the subsection s. 113(6) is as follows:
No dispute to a claim for arrears of rent or compensation under section 112 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 local registrar the amount of the rent and compensation claimed to be in arrears less,

(a) amounts paid by the tenant for which the tenant alleges he or she is entitled to set-off under clause 94(4)(b), as substantiated by receipts filed; and

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

Where a landlord brings an application under s. 113, the tenant may dispute, pursuant to subsection 113(5), either by appearing on the return date of the application or by filing a written dispute. The “compensation” referred to in s. 113(6) is simply rent calculated on a daily basis after the termination date; accordingly, for simplicity’s sake, this paper will just refer to “rent”, encompassing both “rent” and “compensation” in that term.

Given that only four days notice is required for an application under s. 113 (which means, for example, that notice can be served late on Friday for a court appearance on the Tuesday after a long weekend), a tenant is not given much time to pull together these receipts and affidavits, or come up with the money for payment into court.

Section 94(1) (formerly s. 96(1)) of the Act requires landlords to maintain premises in a good state of repair, fit for habitation, and in compliance with health, safety and housing laws. Subsection 94(4) provides remedies, including termination and a general provision of “such further and other order as the judge considers appropriate”. This latter provision can include abatement of rent and damages. Subsection 94(4)(b), referred to in s. 113(6), reads as follows:

... the judge may, ...

(b) authorize any repair that has been or is to be made and order the cost thereof to be paid by the person responsible to make the repair, such cost to be recovered by due process or by set-off;

Section 121(3)(a) of the Act provides that:

2. 574127 Ontario Inc. v. Boucher (1985), 1 W.D.C.P. 278 (Ont. Dist. Ct.) [unreported]: the four days service provided for in s. 113 is not four clear days.
... the judge shall refuse to grant the application [for termination of the tenancy] where he or she is satisfied that,

(a) the landlord is in breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement. [emphasis added]

Therefore, a finding that the landlord is in breach of his or her s. 94 responsibilities not only provides the basis for an application by the tenant for repairs, abatement or damages; it also provides an absolute shield against an eviction application brought by the landlord. The section is mandatory, and leaves no discretion to the judge.

Section 87 of the Act (formerly s. 89) provides that the common law rules as to breach of a material covenant apply to tenancy contracts. This removes the historical independence of covenants in tenancy agreements.

To summarize the relevant statutory provisions:

- the common law rules of breach of a material covenant apply (i.e. covenants are no longer independent)
- Section 94 imposes a duty to repair on the landlord.
- If the landlord is in breach of the duty to repair, the landlord cannot obtain an order terminating the tenancy, due to s. 121(3)(a).
- A landlord's application for arrears of rent and termination is brought under s. 113(4), with a minimum of four days notice.
- Subsection 113(5) sets out the provisions for a tenant's dispute.
- Subsection 113(6) requires a tenant to make payment into court, or file receipts for the cost of repairs already paid for by the tenant, as a condition precedent to filing a dispute to the landlord's claim for arrears of rent on the basis of the landlord's breach of covenant.

3. OUTLINE OF ARGUMENTS

Two arguments will be offered to avoid payment into court in the fact situation of a dispute based on the landlord’s failure to meet the landlord’s duties under s. 94(1).

1. The subsection does not prevent a dispute based on breach of s. 94 (repairs obligations) as s. 94 is a statutory duty, rather than an express or implied covenant.

2. The subsection does not prevent dispute of a claim for termination of a tenancy, only dispute of a claim for rent arrears. The claim for termination can be disputed without payment into court, and the order for arrears off-set by a counter application for abatement of rent.

The first argument is the subject of conflicting Divisional Court authority, but the more recent Divisional Court decision is contrary to the position taken in this paper. Thus, this argument could only be advanced by a litigant prepared to proceed to the Divisional Court. The second argument is supported by Divisional Court authority.5

This paper will consider the applicable principles of statutory interpretation, and apply them to s. 113(6). This mostly relates to the first argument listed above. The caselaw dealing with payment into court will then be reviewed. The paper will then offer a concluding opinion on the first argument (part 6 of this paper), and then go on to describe in more detail how the second argument would work. The paper concludes by noting that the first argument (that s. 113(6) does not apply to breach of statutory duty) could be accepted by a trial judge (given conflicting Divisional Court authority), but is unlikely to be accepted at that level. The conclusion also notes that the second technique for avoiding payment into court should be completely successful.

4. INTERPRETATIVE PRINCIPLES

The proper interpretation of s. 113(6) is important for the argument that the subsection does not require payment into court for a dispute based on breach of statutory duty, as opposed to breach of covenant. The statutory construction is fairly straightforward for the argument based on challenging termination only, and using a s. 94 application to counter the arrears order.

5. For an example of a case where this technique was used, see Re Choi and Duke, ibid.
4.1 GENERAL PRINCIPLES

4.1.1 Object of the Act

The overall object and purpose of legislation must be considered in interpreting any part of it. Section 10 of the Interpretation Act provides that every Act is to be deemed remedial and "... shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." However, the "meaning and spirit" of the Act is expressed by its wording, and the wording cannot be varied to suit a presumed object of the legislation.

It is also worth bearing in mind that the "intention of the legislature" is often really the intention of the drafters, who create the final expression of what is agreed to by the majority of the legislature. As stated by Lord Reid:

"... we are in effect searching for the intention of the draftsman rather than the intention of Parliament. And then it becomes very relevant to ask—could any competent draftsman have adopted this form of drafting if he had intended the result for which the appellant contends?"

4.1.2 Literal Interpretation

The prevailing doctrine of statutory construction remains that of "literal" interpretation but tempered by consideration of the "intent and purpose" of the legislation. As stated by E.A. Dreidger, "Today's doctrine is therefore still a doctrine of "literal" construction, but literal in total context and not, as formerly, literal in partial context only." Words are to be given their ordinary and grammatical meaning, but in the context in which they are found.

If the words of the legislation are ambiguous, it may be necessary to go beyond the ordinary meaning of the words, particularly to avoid conflict with other provisions of the legislation. However, "[i]f the meaning is clear, the consequences of the application of the words to specific facts are immaterial." Judges are not to re-write legislation to obtain what they believe to be a more "reasonable" result.

9. Ibid. at 86.
4.1.3. Commission Reports
The reports of commissions of inquiry can be highly relevant in demonstrating the intent of the legislature.\footnote{Supra note 8 at 153, citing \textit{Eastman Photographic Materials Co. Ltd. v. Comptroller General of Patents}, [1898] A.C. 571 (H.L.).} In the case of the \textit{Landlord and Tenant Act}, the Ontario Law Reform Commission inquiry and the legislative reforms were closely linked. However, Lord Denning's comment on such reports is useful to keep in mind:

"It is legitimate to look at the report of such a committee, so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief."\footnote{\textit{Letang v. Cooper}, [1965] 1 Q.B. 232 at 240, cited in Dreidger, \textit{ibid.} at 154.}

4.1.4. Uniformity of Expression
Another guide to interpretation is that \textit{"... the same words should have the same meaning, and conversely, different words should have different meanings."}\footnote{\textit{Supra}, note 8 at 93. As stated in Pierre-André Côté, \textit{The Interpretation of Legislation in Canada}, 2d ed. (Cowansville, Quebec: Les Editions Yvon Blais Inc., 1991) at 279 (footnotes excluded): "Legislative drafters are supposed to respect the principle of uniformity of expression. Each term should have one and only one meaning, wherever it appears in the statute or regulation. An idea should be expressed in the same terms throughout the enactment. This rule of drafting leads to a principle of interpretation deeming a word to maintain the same meaning throughout. Similarly, a different expression implies a different concept: different terms, different meanings."}
4.1.5. Giving Meaning to All Parts of the Act
A construction which leaves some wording of the legislation without any effect or meaning should be avoided. It is assumed that every part of the enactment is there for a purpose.14

4.2 LEGISLATIVE HISTORY OF THE LANDLORD AND TENANT ACT
At common law, covenants in a lease were independent. For example, the obligation to pay rent continued even though the landlord failed to provide heat, or even if the premises were destroyed. For residential tenancies, this was cured by the introduction of s. 88 (now s. 87) in the 1969 amendments to the Landlord and Tenant Act. This amendment followed recommendations contained in the Interim Report of the Ontario Law Reform Commission on Landlord and Tenant Law Applicable to Residential Tenancies in 196815

In the 1972 report of the Ontario Law Reform Commission (hereinafter referred to as the OLRC), reviewing Part IV of the Landlord and Tenant Act, the Commission noted that some landlords' organizations had made representations that this interdependency of covenants would "... enable tenants to withhold payment of rent with impunity on some pretext that the landlord is in breach of some obligation on his part."16 The Commission noted that the common law rules respecting breach of a material covenant would prevent rent withholding for minor transgressions on the part of the landlord, and stated "... [i]n the final analysis it is the adjudication by the judge of what is a substantial breach of a material covenant which will govern and not the caprice or whim of one of the parties."17 The report also stated that "... [t]here is no evidence before the Commission of actual abuse arising out of the enactment of section 89 nor are we persuaded that such abuse is threatened so long as the landlord can recover rent improperly withheld."18

However, the Commission went on to note that being found right in the end was cold comfort for a landlord where a tenant has improperly withheld rent

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15. (Toronto: Dept. of the Attorney General, 1968.)
17. Ibid. at 23.
18. Ibid.
and at trial either cannot be found or is judgment proof. The commission recommended that where "... a tenant claims to be entitled to withhold rent on the ground of an alleged breach of an express covenant or one implied under the provisions of Part IV ...", the tenant be required to pay the rent to the Sheriff (to avoid the formal procedures of payment into court). Such payment was to be "... a condition precedent to the tenant being allowed to file a dispute to the landlord's claim under the provisions of section 106." The commission also recommended the two exceptions which are now found in subsections (a) and (b) of s. 113(6).19

Contrary to the OLRC recommendation, the subsection20 provides for payment into court, rather than payment to the Sheriff. As well, the legislation speaks of a dispute based on "... breach of an express or implied covenant ...", rather than "... breach of an express covenant or one implied under the provisions of Part IV ...".

The actual legislation also varies from the OLRC wording in that it specifically states that no "dispute to a claim for arrears of rent or compensation ..." may be made, rather than prohibiting any dispute by the tenant without payment into court. These changes, particularly the latter, suggest that the drafters considered the potential "mischief" raised by the OLRC report, but "... decide[d] to do something different to cure the mischief".21 The OLRC intended that a tenant who did not make payment into court would be evicted promptly, addressing the potential problem of staying in possession pending a hearing, while rent remained unpaid. The legislature considered the OLRC recommendations and chose a less draconian approach to the potential problem.

In short, the legislative history suggests that the legislature decided to provide a limited response to concerns about rent withholding, providing a mechanism for payment into court in such cases, with a limited penalty for failure to make payment into court. Given the specific differences between the

19. Ibid. at 24.

20. Introduced in S.O. 1972, c. 123, s. 3(1) which replaced the previous content of s. 106 and now included the payment into court provision as s. 106(4). The wording has remained substantially unchanged since then, although "as substantiated by receipts filed or verified by affidavit" was added to subsection (b) in the 1975 amendments.

OLRC wording and the actual legislation, the wording should be considered to have been deliberately and specifically chosen by the drafters.

With respect to the interpretation of s. 121(3)(a), which provides that a judge shall refuse the landlord's application when the landlord is in breach of the landlord's obligations, the wording initially proposed by the government was "may", rather than "shall". The import of the choice between these two words was specifically discussed by the House in committee, so the use of the word "shall" was deliberate. This is also demonstrated by reference to s. 121(2), where the word "may" is used.

4.3 REMEDIAL LEGISLATION FOR THE PROTECTION OF TENANTS

Part IV of the Landlord and Tenant Act is clearly remedial legislation aimed at increasing the legal protection of tenants. Three successive Ontario Law Reform Commission reports dealt with needed reforms of the law dealing with residential tenancies. The Law Reform Commission began studying this area of law in 1967, and the Interim Report of the Ontario Law Reform Commission on Landlord and Tenant Law Applicable to Residential Tenancies was released in 1968 to deal with pressing problems requiring immediate attention pending more comprehensive reform. Following that, Part IV of the Landlord and Tenant Act was enacted in S.O. 1968-69 c. 58 (implementing most of the suggestions of the OLRC). Part IV was enacted to deal solely with residential tenancies.

The second report of the Law Reform Commission was in 1972 and reviewed the reforms brought about by the introduction of Part IV. This lead to further reforms to the Act in S.O. 1972, c. 123. The third report of the Ontario Law Reform Commission, in 1976, dealt with both commercial and residential tenancies. Many of the problems addressed in that report were anticipated in reforms brought about in S.O. 1975, c. 13.

As stated in the introduction to the 1976 report:

22. Ontario Legislature, Hansard pp. 1883-1884, (17 December 1975); Ontario Legislature, Hansard at 1956 (18 December 1975); Ontario Legislature, Bill 26, 30th Legislature, as amended.


24. Supra, note 16.

"The concern of the commission was to redress the imbalance which existed in the law in favour of landlords, an imbalance resulting from the law's pre-occupation with rigid property principles of feudal origin and the failure of the common law of landlord and tenant over the centuries to develop a legal philosophy based on a theory of vital interests."\textsuperscript{26}

Two major aspects of the reforms were the provision of security of tenure and the imposition of a broad duty of repair on landlords. These were cornerstones of the legislative changes redressing "... the imbalance which existed in the law in favour of landlords ...". The Attorney General at the time (the Honourable Roy McMurtry) stated that the amendments about to be introduced (in 1975) were intended to "... ensure security of tenure."\textsuperscript{27}

Many landlord and tenant decisions have referred to the remedial nature of the legislation. In Re Baker and Hayward (1977), 16 O.R. (2d) 695 (C.A.), Wilson J.A. (as she then was), noted (at 699) that: "... one of the reasons for the revision of the Act in 1969 was to rectify the imbalance deemed to exist in favour of landlords." In Re Boyd and Earl & Jennie Lohn Ltd. (1984), 47 O.R. (2d) 111 (H.C.J.), Mr. Justice Potts observed (at 123):

> "Part IV of the Landlord and Tenant Act is clearly remedial legislation. It was enacted after an in-depth study by the Ontario Law Reform Commission of the common law and statute law in this and many other jurisdictions. Many of their recommendations were incorporated into the legislation. When Part IV came into force on January 1, 1970, it significantly altered and, in some respects, negated most of the rules which had long applied at common law. Distress was abolished as was the doctrine of interesse termini. Tenants were given significant security in their tenure and could not be required to surrender possession in the absence of a court order or writ."

In Re Bruns and Fancher (1977), 16 O.R. (2d) 781 at 784 (Div. Ct.) the court stated:

> "It is clear that Part IV of the Landlord and Tenant Act, as it now stands, provides a code that not only governs the relationship between landlords and tenants of residential premises, but provides a shield for the often helpless tenant."

In Re Kasprzycki and Abel (1986), 55 O.R. (2d) 536 (L.I.S.C.), Carnwath, J. stated (at 542): "I find the Landlord and Tenant Act to be, in large measure, created for the protection of tenants." Recovery of excess rent paid under a mutual mistake of law was ordered.

\textsuperscript{26} Ibid.

\textsuperscript{27} Ontario Legislature, Hansard, at 295 (6 November 1975).
As legislation established for the protection of tenants, where there is any lack of clarity in the wording, it should be interpreted in the tenant’s favour, in order to best express the purpose and intent of the legislation.

### 4.4 STRICT INTERPRETATION

The wording of the *Landlord and Tenant Act* has generally been interpreted strictly, without implying anything which is not clearly there. For example, in *Re Metzendorf and Thomas* (1980), 29 O.R. (2d) 286, the Divisional Court, in interpreting section 121(3)(c) of the *Act*, held that a Writ of Possession may not issue where a reason for termination is that the tenant was attempting to enforce his or her legal rights. The Court made it clear that a landlord could have a valid reason for termination but the application still must be dismissed if a reason for bringing the application (not necessarily the reason) was the tenant’s attempt to enforce his or her rights. No test of reasonableness or proportionality was implied by the Divisional Court in that case. The subsection uses the word “a”, not “the”, and it was not open to the court to vary that wording.

Apart from the general principle of strict interpretation, the *Metzendorf* case is useful when looking at the impact of s. 121(3)(a), as the case dealt with another subsection of s. 121(3). The decision highlights the mandatory nature of s. 121(3).

In *Re Bianchi and Aguanno* (1983), 42 O.R. (2d) 76 (Div. Ct.), where the landlord gave a tenant an extra day on a Notice of Termination, the notice was found to be void as the *Act* states that it must specify the last day of the month. The Divisional Court felt constrained to follow the clear language of the statute.

The strict interpretation of the wording of the *Act* reflects the principle of construction that words in an enactment are to be given their ordinary meaning. If that meaning is plain, then the legislative intent must rule.

### 4.5 LANGUAGE USED IN S. 113(6)

An essential issue in interpreting s. 113(6) is whether the phrase “breach of an express or implied covenant” is intended to cover breach of statutory duty. The word “covenant” is defined in Black’s Law Dictionary as:

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"An agreement, convention, or promise of two or more parties, by deed in writing, signed, and delivered, by which either of the parties pledges himself to the other that something is either done, or shall be done, or shall not be done, or stipulates the truth of certain facts. At common law, such agreements were required to be under seal. The term is currently used primarily with respect to promises in conveyances or other instruments relating to real estate.
In its broadest usage, means any contract.

... Express or implied. The former being those which are created by the express words of the parties to the deed declaratory of their intention, while implied covenants are those which are inferred by the law from certain words in a deed which imply (though they do not express) them. An implied covenant is one which may reasonably be inferred from whole agreement and circumstances attending its execution."

The essence of the definition is that a covenant is an agreement between the parties, not a duty imposed by statute. To define the words “covenant” or “implied covenant” to include a statutory duty is to change the ordinary meaning of the words. A change in the ordinary meaning of the words should not be construed unless the legislation clearly expresses an intention to do so. Contrast, for example, s. 23 of the Conveyancing and Law of Property Act29 which speaks directly of covenants which are to be “implied” into conveyances. This language was not used in the Landlord and Tenant Act.

As noted above (in part 4.2), the wording used is different from the wording proposed by the Ontario Law Reform Commission, which would have more clearly encompassed statutory duties. It may be that the wording is deliberately different, an interpretation supported by reference to other differences between the OLRC wording and the actual subsection (see “Legislative History”, above). Conversely, it may be that the drafters simply assumed that the statutory obligations were “implied covenants” and that further elaboration was unnecessary.

Of assistance here is the principle of uniformity of construction throughout a statute. The same wording is expected to have the same meaning, and when different wording is chosen, that is assumed to be deliberate.

Section 113(6) could have used the OLRC phrasing, or could have included the words “or breach of responsibilities under this Act”. That language was

29. R.S.O. 1990, c. C.34.
used in s. 121(3)(a) where the Act speaks of the landlord being "in breach of the landlord's responsibilities under this Act or of any material covenant" (emphasis added). Both subsections deal with the same subject matter—the responsibilities of a landlord—yet use different language. Subsection 121(3)(a) distinguishes between statutory duties and covenants, indicating that the drafters turned their minds to this distinction, and suggesting that the reference solely to covenants in s. 113(6) is deliberate. This comparison is particularly effective when one considers the interaction between the two subsections, which presumably would have lead to them being considered jointly by the drafters.

One can also look to s. 94 on this point. Section 94(4) uses the wording "the obligations imposed under this section" not "the covenant implied by this section". On the other hand, s. 113(6)(a) specifically provides for the filing of receipts for items claimed as a set-off under s. 94(4)(b). This would seem to suggest that a dispute based on the landlord's breach of s. 94 is covered by the provisions of s. 113(6). This was considered by Borins, J. in one case, where he commented that:

"In my respectful opinion, s. 106(6) [now s. 113(6)] is difficult to reconcile with s. 96(3)(b) [now s. 94(4)(b)] and is, in some respects, possibly misleading and requires legislative clarification."

### 4.6 UNUSUAL AND INEQUITABLE PROVISION

It is also submitted that a mandatory provision for payment into court prior to defending an action is so unusual, and contrary to the usual principles of our legal system, that the provision should be very narrowly interpreted. This is a form of judgment before trial, without even the opportunity to make submissions on the interim issue. As such, it is an unusual and inequitable provision.

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30. Of application here is the principle of construction that every word in the statute is to be considered to have a meaning (see Part 4.1.5 of this paper).


32. As stated by Borins, C.C.J., in *Tucker v. Scott*, *ibid.* at 285:

"I know of no other statutory requirement which makes payment into court by a defendant of part or all of the amount claimed by a plaintiff a condition precedent to the right of a defendant to defend."
4.7 SUMMARY OF INTERPRETATION ISSUES
The following points support the interpretation that the phrase "breach of an express or implied covenant" does not include breach of the landlord's duties under s. 94(1).

1. To construe the word "covenant" to include a statutory duty is to change the normal meaning of the word. The drafters could have phrased the legislation to clearly imply covenants into tenancy agreements, but did not do so.

2. The language of the OLRC, which specifically referred to covenants implied by Part IV of the Act and would have more clearly included s. 94(1) duties, was not employed.

3. Contrary to the OLRC recommendation, payment into court was only made a condition precedent to disputing arrears, not disputing termination. This demonstrates a choice of a more restrained approach to the problem than that proposed by the OLRC. The adoption of a more restrained response, in turn, suggests that the choice of wording "breach of an express or implied covenant" was also deliberate, and was intended to exclude breach of statutory duty.

4. In s. 121(3)(a) the phrase "breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement" was used, suggesting that the drafters were differentiating between statutory duties and covenants, yet the phrase "responsibilities under this Act" was not used in s. 113(6).

5. Similarly, s. 94 uses the language "the obligations imposed under this section" rather than "the covenant implied by this section".

6. The severe consequences of any breach of the landlord's duties which is imposed by s. 121(3)(a) (termination of the tenancy cannot be obtained) indicates the high value which the legislature placed on compliance. The interpretation of s. 113(6) argued for here is consistent with the intent expressed in s. 121(3)(a).

7. The legislation is remedial legislation intended for the protection of tenants, and therefore any ambiguities should be resolved in favour of tenants.

8. The wording of Part IV has been strictly interpreted, and in accordance with that principle the exact wording of s. 113(6) should be followed:

33. For example, as in the Conveyancing and Law of Property Act, supra, note 29.
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applying only to disputes based on breach of covenant, not to disputes based on breach of statutory duty.

9. Making payment into court a condition precedent to filing a dispute is a very unusual and inequitable provision, and as such should be narrowly construed.

The following points support the interpretation that the phrase “breach of an express or implied covenant” does include breach of the landlord’s duties under s. 94(1).

1. The drafters may have simply used the phrase “express or implied covenant” on the assumption that the responsibilities set out under the Act were implied covenants, as described by the OLRC wording. (This does not explain the difference in wording in s. 121(3)(a).)

2. Subsection 113(6)(a) specifically refers to receipts for set-offs claimed under s. 94(4)(b). Why would that reference be needed if s. 113(6) did not apply to disputes based upon breach of s. 94 obligations?

4.8 CONCLUSION ON INTERPRETATION OF THE SUBSECTION

The interpretation that s. 113(6) only requires payment into court where the dispute is based on breach of covenant, not on breach of statutory duty, is consistent with the legislative intent as evidenced by the language of the legislation and the legislative history (both detailed above). The OLRC wanted to avoid the possibility of tenants withholding rent due to minor breaches of covenant, and the landlord then having to wait until the hearing date to be vindicated. The drafters chose not to adopt the solution proposed by the OLRC, but instead chose wording which requires payment into court where the dispute is based on breach of covenant. This would serve to eliminate rent withholding for breach of minor covenants in a lease. The drafters did not include breach of statutory duty, presumably because the duties set forth in the statute (such as the duty to repair) are important responsibilities which warrant rent withholding; or at least important enough that the landlord should not be able to avoid a hearing when payment into court has not been made.

This interpretation is also supported by the fact that Part IV of the Act is legislation enacted primarily for the protection of tenants. More specifically, it is supported by the high standard placed upon the landlord by s. 121(3)(a). This subsection requires a landlord to come to court with absolutely clean hands: if the landlord is “… in breach of the landlord’s responsibilities under this Act or of any material covenant in the tenancy agreement” then an order
for termination of the tenancy cannot be obtained. This evidences the very high obligation placed on the landlord with regard to the landlord's obligations. It is an expression of the same legislative intent that governed the wording of s. 113(6), which provides only a limited response to the potential "mischief" of rent withholding.

The one obstacle to this interpretation is the reference in s. 113(6)(a) to s. 94(4)(b). That reference cannot be satisfactorily explained unless a dispute based on s. 94 is encompassed by s. 113(6). It could be interpreted simply as a convenient way to file receipts for s. 94(4)(b) set-offs, on the theory that these are likely to be a common cause for rent withholding, without requiring payment into court for a dispute based on s. 94. This is a possible, but not very satisfactory, explanation. One can also simply treat s. 113(6)(a) as bad drafting, and ignore it where it conflicts with other provisions in Part IV.

On the other hand, construing s. 113(6) as including disputes based on breach of s. 94 leaves no satisfactory explanation for the discrepancy in wording between that subsection and s. 121(3)(a). The drafters distinguished between statutory duties and covenants in s. 121(3)(a); how then can the word "covenants" in s. 113(6) be taken to include both?

In short, either construction of s. 113(6) leaves some part of the Act with an interpretation which does not fit the "ordinary and grammatical meaning" of the words. Since, in either case, a meaning other than the usual one must be found, it is submitted that the interpretation which best expresses the purpose and intent of the Act, and of the particular subsection, should be adopted. As outlined above, that would be the interpretation that s. 113(6) does not apply to disputes based on breach of s. 94.

5. CASE LAW

Many cases have considered the application of section 113(6). This review is divided into cases which oppose the requirement to pay into court where the tenant's dispute is based on lack of repairs by the landlord, and those which support payment into court in that situation. The three Divisional Court cases dealing with the issue are Re Meridian Property Management and Lanteigne (1972), [1973] 1 O.R. 541, Greenwin Property Management v. McCormick (1982), 26 O.R. (2d) 161, and Re Arthurs and Storey (1990), 23 A.C.W.S. (3d) 383 [unreported].

34. Supra, note 31 at 283-287.
5.1 AGAINST PAYING INTO COURT


In this case, the landlord opposed the hearing of the appeal on the ground that the tenant should have made payment into court pending the appeal, pursuant to s. 106a(2) (now s. 116). This section provides that where payment into court has been made, it must continue to be made while the matter is under appeal. Divisional Court noted that payment into court was not required at the first level in this case, and therefore was not required on appeal. The court stated (at 545):

"... this is not a case under which it was necessary to dispute a claim for arrears of rent or compensation as Miss Ramsay's only desire was to dispute the right to possession.

The landlord in his notice of motion claimed, as he was entitled to claim, three different types of relief, namely, an order that the tenancy was terminated, that the landlord was entitled to possession, and a sum of money for compensation and costs of the application. No dispute to a claim for compensation was made and hence the provisions of s. 106(4) that made payment a condition precedent had no application, so that s. 106a(2) in its turn does not come into play."


His Honour Judge Borins held that s. 96 (now s. 94) created a statutory duty, not an implied covenant, and therefore there was no need to make payment into Court. He also held the corollary, that there was no justification for a tenant to deduct rent based on breach of an implied (by s. 96, now s. 94) material covenant. The decision examines carefully (and critically) the language of the subsection.


The tenant's claim was based on a number of issues, some of which involved breach of covenant and others of which involved breach of statutory duty. The Divisional Court held that the District Court Judge was correct in not hearing the claims based upon breach of covenant without payment into Court, but that he erred in not dealing with the matter on the basis of the other disputes, those based on breach of statutory duty. It is not known if s. 96 (now s. 94) was one of the grounds for dispute, as it is not specifically referred to in the judgment.
Re Bellanada Holdings and Barnaby (1982), 1 T.L.L.R. 101 (Ont. Co. Ct.)
His Honour Judge Gibson applied the Greenwin reasoning to a dispute based upon s. 96 (now s. 94).

Re McFarlane and LaHaise (19 May 1987), Halton DCOM 1943/87, (Ont. Co. Ct.) [unreported]
His Honour Judge Carnwath held that s. 96 (now s. 94) is a statutory duty and therefore s. 113(6) does not apply when the tenant's dispute is based upon breach of s. 96 by the landlord. As in Re Bellanada, the Greenwin reasoning was applied.

Re Elieff Investments and Johnson (29 July 1987), (Ont. Dist. Ct.) [unreported]
His Honour Judge J.F. McCort held that payment into Court is not required under s. 113(6) when the tenant's dispute is based upon breach of the statutory duty contained in s. 96 (now s. 94), as opposed to breach of covenant.

Re Choi and Duke (2 December 1987), Halton DCOM2330/87, DCOM2444/87 (Ont. Dist. Ct.) [unreported]
This decision is an example of the interaction of s. 113(6) with s. 94 and s. 121(3)(a). In this case, the tenant owed $2,750.00 in rent. The tenant had withheld rent due to substantial repair problems, but had unfortunately spent the withheld rent before contacting a legal clinic. The tenant's defence was lack of repairs by the landlord, relying upon s. 121(3)(a) of the Act. Carnwath, D.C.J. rejected the landlord's argument that payment into Court should have been made, and the tenant's cross-application for repairs and abatement was successful. The net result was that there was an order for repairs to be made (within a set time period) and arrears still owing (after abatement) of $1,400.00, with only $550.00 having been paid into court. The tenant was then in a position to pay off the remaining arrears of $850.00 over time, with no danger of eviction.

5.2 CASES FAVOURING PAYMENT INTO COURT
Re Victoria Park Community Homes and Buzza (1975), 10 O.R. (2d) 251 (Co. Ct.)
This was an application by a landlord and the tenant had paid the money claimed into Court. The issue was not payment into Court, it was whether s. 96 (now s. 94) could be a defence to a landlord's application, rather than proceeding with a separate s. 96 (now s. 94) application. The decision states that it can be a defence provided that the tenant has paid the arrears claimed
into Court (at 254). This was an *obiter* remark: payment into Court was not an issue in that case.

*Re Bramalea Ltd. and Williams (1979), 23 O.R. (2d) 509 at 512 (Co. Ct.)*

The tenant disputed on the basis that damages suffered from a plumbing problem exceeded the amount of arrears. The Court looked at s. 106(6) (now s. 113(6)) and stated that the application could not be disputed as there was no payment into Court, and also that damages could not be obtained under s. 96 (now s. 94). This latter point is no longer the case: *Re Shaw and Pajelle (1985), 11 O.A.C. 70 (Ont. Div. Ct.)*. The case is prior to *Greenwin* and does not address the argument raised in that case.

*Re Santini and Miller (1985), 2 T.L.L.R. 233 (Co. Ct.)*

This decision states that the tenant’s affidavit alleged breach of covenant, including water seepage. His Honour Judge Sullivan stated that he disagreed with the conclusion in *Bellanada Holdings*. However, His Honour consistently referred to breach of covenant, so it is not clear that s. 96 (now s. 94) was raised as a defence. It is clear from the decision that no application was made by the tenant under s. 96 (now s. 94).

*Re Arthurs and Storey (1990), 24 A.C.W.S. (3d) 383 (Ont. Div. Ct.)*

[unreported]

Mr. Justice O’Leary, in a dissenting opinion, stated that the repair obligation of the landlord under s. 96 (now s. 94) creates an implied covenant, and therefore the provisions of s. 113(6) do apply, requiring payment into court. The majority decision, given by Mr. Justice Southey, states:

> "Even though the tenant’s claim under s. 96 is for breach of a statutory duty, rather than the breach of an express or implied covenant, the clear implication of s. 113(6)(a) is that a claim by the tenant under s. 96 is a defence only to the extent to which the tenant alleges he is entitled to a set-off in respect of amounts paid by him."

It is interesting that this decision distinguishes statutory duty from breach of covenant (unlike O’Leary, J.’s “implied covenant” analysis) yet applies s. 113(6). The court held that the trial judge had erred, however, in refusing to hear the section 96 applications of the tenants, holding that those claims should have been dealt with as “swords” even though they could not function as “shields”. The decision also states that “I do not think it should make any difference whether the landlord or tenant acted first to enforce his rights.”

The majority decision expressly does not deal with the application of s. 121(3)(a), stating:
“The right to possession was never in issue in Bresso v. Scruton and had become moot in Storey v. Arthurs before that case came before us. It is, therefore, unnecessary to decide whether Tobias J. was obliged under s. 121(3) to deal with the tenants' allegations under s. 96 before granting a writ of possession.”

Mr. Justice Southey does state that “I would not interfere with the orders below for payment of arrears of rent, for declarations that the tenancy agreements were terminated, and for costs.” However, this is not a statement condoning termination due to failure to pay into court, given the later comment (cited above) that the right to possession was not in issue, and the fact that the effect of s. 121(3)(a) was expressly not dealt with. There is no reference in this decision to the Greenwin case, or any other caselaw. However, the decision does clearly deal with the issue raised in Greenwin, that of the distinction between statutory duty and breach of covenant. As Greenwin was not overruled, there is now conflicting Divisional Court caselaw on this point.

5.3 IMPLIED COVENANT
A number of cases which do not deal at all with s. 113(6) have held that the duty to repair contained in s. 96 (now s. 94) is an implied covenant. Thus, these cases could be used to support the application of s. 113(6) in the fact situation under consideration. However, while the “implied covenant” approach was adopted by O'Leary, J. in Re Arthurs and Storey, it was not accepted in the majority decision.

6. CONCLUSION ON BREACH OF STATUTORY DUTY
This argument is simply that s. 113(6) only requires payment into court when the dispute is based on the landlord's breach of a covenant. A dispute based on s. 94 repair problems is based on breach of statutory duty, and therefore s. 113(6) does not apply.

This argument is unlikely to be successful at the trial level. Since there is conflicting Divisional Court authority on the point, a trial level judge could

35. Re Claydon and Quann, [1972] 2 O.R. 405 (Co. Ct.) (obiter, nothing turned on whether s. 96 (now s. 94) was a statutory duty or implied covenant); Re Quann and Pajelle (1975), 7 O.R. (2d) 769 (Co. Ct.) (s. 96 found to be an implied covenant so as to uphold the tenants' right to withhold rent due to the interdependency of covenants); Re Balmy Beach Investments and Prefontaine (6 October 1978), (Ont. Co. Ct.) [unreported] (again, implied covenant found to justify withholding of rent by tenants); Re Temlas and Desloges (1980), 20 O.R. (2d) 30 (Div. Ct.) (obiter).
chose to accept the earlier decision. Both cases deal with the identical issue and address the identical argument (covenant vs. statutory duty). The earlier decision is *per curiam*, whereas the later is not, and the more recent decision does not refer to, or over-rule, the earlier decision. However, such a decision at the trial level is unlikely. The most recent decision is more likely to be followed, particularly since the earlier authority does not make specific reference to s. 94 whereas the most recent authority does specifically address this argument in the context of a dispute based on s. 94. It is the writer's position that the *Arthurs* decision is wrong, for the reasons set out in this paper, but that argument will probably have to be dealt with at the Divisional Court level, or higher, to be successful.

7 DISPUTING TERMINATION, NOT ARREARS

7.1 OUTLINE OF THE PROCEDURE
Section 113(6) states that a tenant cannot dispute a "claim for arrears of rent or compensation" without payment into Court. Normally, a landlord will be claiming those two items and also termination of the tenancy and a Writ of Possession. These are all separate claims allowed under s. 113(1) and are contained in a single Court application. A tenant can dispute claims for termination and a Writ of Possession without payment into Court: *Re Meridian Property and Lanteigne* (1972), [1973] 1 O.R. 541 (Div. Ct.).

Thus, a tenant can dispute the claim for termination and for a Writ of Possession without payment into Court (the dispute being based on s. 121(3)(a)), and deal with any abatement of the rent claim through commencement of a s. 94 application which may be heard at the same time. In *Re Arthurs and Storey*, the dissenting opinion expressly opposed this procedure, and the majority decision expressly stated that failure to make payment into court should not block the hearing of the s. 96 (now s. 94) application of the tenant. The decision expressly made no comment on the application of s. 121(3)(a) to the claim for termination.

To give an example, a tenant who owes rent but is claiming that the landlord has (and continues) to breach s. 94 could concede that the arrears are owed (not disputing the arrears, as payment into court is not being made). However, the tenant would challenge termination by relying on s. 121(3)(a). This could result

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in an immediate order for the arrears owed and would cause the setting of a trial date for the termination issue. The tenant can then start a s. 94 (or s. 113(1)(f)) application for abatement and arrange for that to be heard at the same time. At trial, the arrears could not be contested—an order would go for that—but termination could be, and the tenant's s. 94 application could lead to an order for abatement to set off against the order for arrears. If breach of s. 94 by the landlord is made out, then no order for termination could be made, even though there may still be outstanding arrears after set-off of the abatement.

The landlord would get an order for rent owed, but it would not be accompanied by an order for termination, nor could there be an order for termination in the event that the arrears adjudged are not paid (due to s. 121(3)(a)). The landlord would be in the same position as any other judgment creditor. In the s. 94 (or s. 113(1)(f)) application, the tenant could then obtain an order for money owed by the landlord for abatement of rent, which could be set-off against the order for rent arrears.

7.2 DISPUTING TERMINATION ON RETURN OF THE APPLICATION

In some areas, the local registrar has signed judgment terminating a tenancy, where the tenant has failed to make payment into court. There is no jurisdiction for such an order. The registrar has no inherent jurisdiction, and the power granted by s. 113 is simply to set a date for a hearing if the tenant disputes the application (either in writing or by appearing), or to sign default judgment when the claim is not disputed.

Pursuant to s. 113(6), where payment into court is not made, “no dispute to a claim for arrears of rent ... may be made by the tenant under subsection (5)

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37. Re Rocca and Rouselle, Re Kralik and DeDecius, and Re Choi and Duke, supra, note 4.

38. In one bizarre case, a landlord gave notice of termination due to damage to the property and applied to court for possession. There was no claim for rent arrears, yet the landlord wanted payment into court. Incredibly, the District Court Judge agreed that failure to pay the alleged cost of the damage into court disentitled the tenants from proceeding with their dispute. This was overturned by the Divisional Court: Re Temple and Hussain (1989), 16 A.C.W.S. (3d) 86 [unreported].

39. The tenant's s. 94 application can be brought simply by disputing the landlord's application, and this is a common practice. For a judicial comment on this, see Re Victoria Park Community Homes Inc. and Buzza (1975), 10 O.R. (2d) 251 (Co. Ct.). Contrast, however, Tucker v. Scott, supra, note 31 at 288.
...". Thus, in that case it would appear that even if the tenant has appeared (which constitutes a "dispute" under subsection (5)), there is no dispute to the claim for arrears and therefore default judgment for arrears could be issued under s. 113(7).

However, this would only apply to the claim for rent—not the claim for termination. Normally the tenant will still want to dispute termination, on the basis of repair problems and s. 121(3)(a), or at least on the basis of relief from forfeiture. Unless the tenant expressly states that she or he is not disputing termination, the registrar only has the jurisdiction to set a hearing date on the issue of termination.

In some cases, a registrar has sent the matter directly to a judge, who has ordered that payment into court be made or an order will go terminating the tenancy. It is submitted that there is no jurisdiction for such an order by a judge. There is no provision in Part IV for interim orders, but the court’s inherent jurisdiction to control its own process would provide authority for interim orders. However, that inherent jurisdiction to control process should not be used to counter a direct statutory provision. Section 113(6) specifically deals with the issue of payment into court, and does not make payment in a condition precedent to disputing termination. This clear statutory provision has been confirmed by the Divisional Court.

For a judge to order payment into court as a condition precedent to disputing termination is in direct contravention of both the statute and appeal court authority.

The only way in which a judge could deal with this, and remain in compliance with s. 113, would be to hear the case forthwith. If the sole defence of the tenant is relief from forfeiture, this may be realistic. However, in the fact situation considered in this paper—a dispute based upon repair problems—it would be unrealistic to expect a tenant to proceed immediately to trial, on the first appearance, on four days notice (not even four clear days) and probably not yet having obtained legal advice. In all but the most simple cases, it is submitted that to proceed immediately with a hearing would be to provide ample grounds for overturning the decision on appeal. However, it would be


proper to set an early hearing date (depending on the complexity of the case) where no payment into court is made.

8 CONCLUSION
At the trial level, a judge faced with the argument that s. 113(6) does not apply as s. 94 is a statutory duty, rather than a covenant, is unlikely to accept that argument, due to the decision in ReArthurs and Storey. It could be argued that there is conflicting Divisional Court authority and that the trial judge should follow the Greenwin decision, but a tenant wishing to argue this point will probably have to be prepared to take the issue to Divisional Court.

Since the Arthurs decision, the best way to avoid payment into court is through the method outlined just above: dispute the termination and not the arrears. This approach is supported by Arthurs and Storey. That decision expressly holds that the trial judge was not justified in refusing to hear the s. 96 (now s. 94) applications because payment into court had not been made. Further, the decision notes that the right to possession was not in issue and it was “therefore, unnecessary to decide whether Tobias J. was obliged under s. 121(3) to deal with the tenants’ allegations under s. 96 before granting a writ of possession.”

Thus, in its most recent decision on s. 113(6), the Divisional Court has expressly confirmed the ability of a tenant to bring a counter application for abatement under s. 94 and have it heard concurrently with the landlord’s application, even if payment into court has not been made. In that same decision, the court has expressly not commented on the effect of s. 121(3)(a) on a landlord’s application for termination in these circumstances. The existing caselaw on s. 121(3)(a), and the plain language of the subsection, indicate that termination of the tenancy could not be obtained where the landlord is in breach of the s. 94 duties.