Landlord and Tenant and Law Reform

Simon R. Fodden

Osgoode Hall Law School of York University, sfodden@osgoode.yorku.ca

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LANDLORD AND TENANT
AND
LAW REFORM

By SIMON R. FODDEN

In Ontario the law respecting residential tenancies was brought out of the sixteenth century by the addition of Part IV to The Landlord and Tenant Act in 1970. It would be natural to assume that after such a radical change the law could be left unattended for some time. However, it is the contention of this article that the reform process is not complete. What is required now is a serious attempt by the government to assess the efficacy of the legislative and administrative devices chosen to carry out the purposes of the reform. I shall argue that an efficacy study should follow any major effort in social law reform and that nothing excepts the case of these recent reforms from this general rule. In addition I shall present the results of a limited examination of how the reformed law respecting residential tenancies works in practice. The results of the investigation support the general argument for an efficacy study and suggest particular directions it might take.

Part I of the article contains the general argument for efficacy studies. In Part II I shall describe briefly the law reform process followed in the case of landlord and tenant law in order to illustrate a number of points made in the preceding general argument. Part III contains a description of the study I have carried out and an exposition of most of the data. While there is some analysis of the data in that Part, the major analysis of the results of the study will be found in Part IV.

PART I

EFFICACY STUDIES

To expect all provisions in a piece of social reform legislation to achieve the goals planned for them and to function smoothly in their original form is to expect too much. Most would agree that we know too little about how to direct complex social forces into desired channels. When carrying out the task of achieving certain goals through legislation, law-makers are regularly confronted with choices between various means of effectuating their purposes. What law-maker would declare that a particular legislative device chosen was

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1 R.S.O. 1970, c. 236, as am. by S.O. 1972, c. 123. All references in this article to "The Act" are references to The Landlord and Tenant Act.

2 For a statement of the goals of the reform, see the Ontario Law Reform Commission's Interim Report on Landlord and Tenant Law (Toronto: Ontario Department of the Attorney General, 1968), hereinafter referred to as the Interim Report. This report detailed the mischiefs in the unreformed law and made proposals for change which were enacted in Part IV of the Act.
to do the job in the manner desired? In short, it would seem reasonable to regard each piece of social reform legislation as containing an hypothesis about the control of human behaviour, an hypothesis which experience may prove wrong in varying degrees. An efficacy study, then, can be seen as a logical step in the reform process; it is an attempt to take the results of the "experiment" and to propose modifications in the law to account for un-anticipated malfunctions.

One would have thought that such propositions were far from contentious. Yet it seems that law reform generally proceeds without the benefit of a careful, rigorous evaluation of reform measures in the light of experience. This does not mean that all legislation lies unattended for inordinate periods of time. Some statutes deal with areas so clearly in flux that regular attention must be paid to them if they are not to become dysfunctional. Other statutes are designed from the outset to be "experimental" and may incorporate a trial period at the end of which parliamentary action is necessary for their continued operation.

However, much important reform legislation is left to operate without the necessary and timely review. A typical pattern of law reform might well be the following: a social problem is perceived; political pressure builds to have action taken; a more or less thorough study of the problem is undertaken, as a result of which proposals for legislative reform are made; legislation is passed; and the law-makers turn to the next pressing problem. It may be that the law-makers will have to return to their handiwork at a later stage, but typically in response to pressures created by the malfunctioning of some provision or other, and not as part of a planned review.

There are two points to be made about this responsive type of adjust-

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3 The general case for a greater emphasis on studying the efficacy of law reform measures is briefly but well put in Professor Harry W. Jones' *The Efficacy of Law*, (Evanston, Illinois: Northwestern University Press, 1969).

4 An exception may be found in the current work of the Federal Law Reform Commission, which in part involves an examination of the Divorce Act (R.S.C. 1970, c. D-8), originally enacted in 1968 after an intensive law reform study. It is doubtful whether such an "efficacy study" was originally planned when the Divorce Act was formulated.

5 Welfare assistance legislation is perhaps a good example of this. The legislation (particularly the Regulation thereunder) is altered with much greater frequency than is the case with most statutes. See, for example, *The General Welfare Assistance Act*, R.S.O. 1970, c. 192, the amendments made to it, and the Regulations promulgated under it since the consolidation in 1970.

6 An example might be the provisions in the Criminal Code restricting the death penalty; when introduced, the amendment was regarded as experimental and subject to review.

7 It may be, in Ontario at least, that there is insufficient liaison between the law reform recommendation stage (typically involving the Ontario Law Reform Commission) and the final drafting and enactment process. Clearly, political considerations intrude in this last stage more forcefully than they do in the preceding one; yet political judgment does not always seem to be a sufficient explanation for the discrepancies between proposals and the final form the legislation takes. See, for example, *infra*, p. 449 for such a discrepancy in the context of recent changes to the law of residential tenancies.
ment by the legislature. The first is that it relies upon the presence of groups or individuals capable of conveying to the law-makers their dissatisfaction with the operation of the law. Moreover, it is not enough that there be groups or individuals who have access to a forum where their views can be made known. Such critics must generally also be able to convey their dissatisfaction in a politically meaningful sense.

Such a reactive stance to legislation is perhaps appropriate when initially choosing between problem areas with law reform in mind. But once legislative action has been taken, the responsibility for active assessment of the efficacy of that legislation should remain with the law-makers. It ought to remain with them, not because of some moral norm, but because one cannot rely in all cases upon the presence of well-informed, articulate interest-groups to signal malfunctions. The aims of the legislation may be sophisticated enough to prevent any group or individual, acting out of self-interest alone, from perceiving the extent to which the legislation has failed. Or it may be that the mistakes in legislative design do not pinch the individual citizen sufficiently painfully to provoke any discernible political reaction. Yet the overall situation may be that the legislation has not eradicated the mischief which it was designed to correct to the degree that public silence might suggest.

The second observation which may be made about returning to reform legislation only in response to pressure is that in reacting to complaints the law-makers may neglect or be driven off the original purposes underlying the legislation. Pressures for "re-formulation" of the reform may not come evenly from all interested and affected parties and the temptation on the part of the legislators may be to quell the annoyance of the moment without regard to what was undoubtedly once a "grand scheme". Moreover, the law-makers may find that however conscientious they are about their efforts, until empirical data are obtained about the functioning of reform legislation no basis other than a political one will be available to them against which to test the validity of the complaints. Even if the complaints can be assessed as "valid", the appropriate remedial action may be difficult to devise without the basic general data an efficacy study would provide.

Most importantly, the resources and the mandate to do the evaluation lie with the law-makers. A properly conducted efficacy study of a complex piece of social reform legislation would be an expensive proposition, requiring the marshalling of talents and money perhaps beyond that which any citizens' group could command. Certainly, where the reform legislation was directed at rectifying problems suffered by lower-income groups the resources to conduct a proper study would not be available to affected citizens. The legislature has the means to make available the necessary resources, if it so chooses.

It is, of course, a matter of the law-makers' choosing to expend a portion of limited resources upon such a study rather than upon some other project. If, as I have argued, it is unlikely that the task will be performed

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8 By the term "law-makers" I mean to include not only legislators themselves, but their agents: committees, law reform commissions, Royal Commissions and the like.
by groups other than the government, it remains for them to decide whether an efficacy study is *sufficiently* worthwhile to be purchased. That is a matter which cannot be decided generally or even in a given case other than by legislative or executive action.

While I argue that a responsive review of legislation may prove too restricted to provide a sound basis for evaluation, I do not propose that each piece of social reform legislation ought to be re-opened to its core soon after it is passed. The argument is not that law reform studies should be more frequent, for the point is not simply one of timing. An efficacy study should be a task of a different character than the study which generally precedes social reform legislation. The essential difference is that in the original reform study not only is the efficacy of the then current law examined, but in addition the principles upon which that law is based are usually questioned and either re-affirmed or replaced with more modern social purposes. An efficacy study directs its attention not primarily to the principles behind the enactment but to the means chosen to give effect to those principles. It may be, of course, that when the information on the success or failure of the chosen devices is assessed, the goals of the reform will have to be altered.

Up to this point in the discussion the role of the courts in the law reform process has been ignored, and I do not intend to enter into a discussion here of the proper respective roles of the courts and legislatures in law reform. However, I suggest that it would be wrong to assume that courts can or will perform the necessary task of evaluation and reformulation. The major difficulty is the real institutional limitations which prevent their carrying out the kind of efficacy study argued for here:

Legislative action is fueled by departmental investigations, committee hearings, or even full-scale Royal Commission inquiries, in any of which expert knowledge of various kinds is brought to bear. Judges act, in a more or less passive fashion, in reliance on arguments made to them by lawyers, with largely the same background as their own. Legislatures often can make a preliminary legislative proposal, give it first reading, and then listen to the informal reaction of interested and affected groups. Judges are deprived of meaningful information feedback by the rules of finality and *functus officii* in the individual case and the episodic and sporadic quality of adjudication in the general area of any legal problem.

**PART II**

**THE REFORM OF THE LAW RESPECTING RESIDENTIAL TENANCIES**

A brief examination of the law reform process which produced the new law respecting residential tenancies illustrates a number of the points made generally in the preceding Part. First of all, the basic pattern of law reform obtained. The problems suffered by tenants labouring under the unrealistic

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8 For one of many good discussions of this problem, and one which reflects experience with the Canadian legal system, see Paul C. Weiler, *Legal Values and Judicial Decision Making* (1970), 48 Can. B. Rev. 1 at 5.

10 *Id.* at 7.
doctrines of feudal land law and freedom of contract had long been recognized as requiring reform. Finally they became sufficiently egregious to prompt government action and the Ontario Law Reform Commission was given the task of studying the situation and proposing reforms. In this case the study was thorough and based on a careful empirical examination of pertinent areas of reality. The Legislature adopted almost all of the Commission's recommendations in enacting Part IV of The Landlord and Tenant Act.

**Absence of an Efficacy Study**

Following the passing of the legislation nothing more was done with respect to the law of residential tenancies for two years. The failure to return to the legislation just enacted may have two causes, as was suggested in Part I. First is the press of other business. The Commission was charged with the reform of the law of property in general, and the scope of the report upon which Part IV of The Landlord and Tenant Act was based was restricted to residential tenancies only. If an evaluation were to await the completion of the Commission's review of property law, it would likely be more accurately described as another basic law reform study rather than an efficacy study, for by that time the principles upon which the reforms were based might no longer be appropriate. Were it to await a time when the Commission had nothing else to do, it would never be done.

The other reason for inaction with respect to evaluation is, of course, that no efficacy study was planned, and this lack of intention is posited in Part I to be typical of the law reform process. In this case it is somewhat difficult to assess from the Commission's report whether an efficacy study was envisioned as part of the reform process. While nowhere in the report is it specifically stated that such an evaluation was planned, there are indications that the Commission will return to the subject matter in the future. However, some references to future study suggest that it is the Commission's intention to deal at that time with aspects of landlord and tenant law not treated in the initial report:

*Continuing Study:* This interim report deals only with the most urgent problems in the law of landlord and tenant. It should be recognized that there is a need for further research and study. . . . In some important aspects residential and commercial tenancies require different legal treatment. This report is based on a study of residential tenancies. Commercial tenancies should be the subject of a separate examination.

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11 I shall not detail here the generally well known mischiefs which the reforms were designed to remedy. A sufficiently elaborate account of them may be found in the Ontario Law Reform Commission's *Interim Report* (supra, note 2).
14 R.S.O. 1970, c. 236.
15 The Committee still has to complete studies of the rest of landlord and tenant law, basic principles of property law, and the law of trusts. It has yet to embark on the planned studies of the law of mortgages and of conveyancing.
Other references indicate that future work will involve the reformulation of the whole law of landlord and tenant, catching up those aspects of residential tenancies already dealt with in a second, broader wave of reform:

Further reports on the law governing the relation of landlord and tenant will be submitted when research and study now in progress has been completed. It is hoped that it will be possible with further study to simplify, consolidate and possibly codify the law in this field. An important aim of such further study would be to express the law and leases made pursuant to it in simple, easily understood and modern terminology. A simple standard form of lease for ordinary use is most desirable.\footnote{Id. at 5.}

Such studies are indeed desirable, but they are not efficacy studies in the sense that the term is used here. They appear to concern the replacement of parts of the reformed law with new provisions based upon principles not yet tried in practice. An efficacy study directs its attention to principles put into operation and examines the effectiveness of the devices chosen to implement the principles. The distinction in this case is not mere cavil. If indeed it was the Commission's intention to recommend that the reformed law be replaced and had that been done quickly, there might have been no need to plan an evaluation of it. However, Part IV was enacted in 1970, and it becomes increasingly less easy to view its provisions as temporary and therefore inappropriate objects for careful evaluation. Moreover, it might still be suggested that any new scheme could benefit from a detailed study of the experience under the present laws.

The report does reveal the Commission's awareness that law reform is, to a degree, experimentation and that all might not go as planned. But it seems that while commendable stress was placed on careful judgment in the choice of devices based on empirical study, there is lacking the necessary equivalent emphasis on rigorous examination of the aftermath. In this regard it is worth setting out the first paragraph in the report's exposition of the assumptions and principles underlying the study:

Almost every contemplated change in the landlord and tenant laws must be fully examined in order to anticipate its total effects. There is a danger that any particular change could have harmful effects which would outweigh any possible benefits. Particular attention has been given to this problem. In each case where a change in existing laws is dealt with all the foreseeable consequences are set forth. Assistance in projecting the consequences has been obtained by studying the impact of similar changes in other jurisdictions. To the extent that the conditions in such jurisdictions differ from those existing in Ontario, similar consequences may not follow if the particular changes are made here. An attempt has been made to determine if different circumstances are sufficiently material to affect the use of experience outside Ontario.\footnote{Id. at 9.}

**Reactive Return to the Legislation**

Despite such careful groundwork, all did not go as anticipated after the passage of Part IV, and the Commission returned to its handiwork in 1972. The return was not part of any planned review, but was of the reactive
character described in Part I. The Commission's report on its "review" suggests the reactive nature of the study, when in the introduction it is stated that "[s]ince the enactment and proclamation of Part IV... representations have been made to the Attorney General... concerning alleged problems that have arisen out of the administration of the new provisions of the Act." This intimation is confirmed by observing that six sections of the Act were examined in the report; all were the subject of complaints; and in every case the provisions were being complained of by landlords.

One of the limitations in returning to legislation only in response to complaints (which was postulated in the first Part) is that it requires the presence of well-informed, articulate interest-groups with access to government. Landlords apparently meet that description. However, a related danger is that complaints may not come evenly from all affected groups. It appears that no tenants' complaints were before the Commission; and, indeed, no mention is made in the report of any submissions by tenants responding to the landlords' criticisms. This lack is important, as it affects the scope of the review. Since the Commission was responding to complaints and since the complaints made by landlords touched aspects of only six sections, the review was too narrow to be regarded as an efficacy study of Part IV of the Act. Yet the fact of the Commission's having undertaken such a "review of Part IV" may make it difficult for another to be successfully invoked by tenants for some time. That is, the narrow study may have a pre-emptive effect.

Another difficulty in the purely reactive approach to evaluation is the absence of objective data against which to take the measure of complaints and from which to draw guidance for solutions. It appears that when considering the landlords' complaints, the Commission instituted no empirical study of the kind included in the original report. Indeed, the review is somewhat cryptic about how the Commission was able to evaluate the criticisms. It is made clear at the outset of the report on the review that the Commission had not been gathering information on the operation of the reformed law. Nonetheless, at a number of points reference is made to "experience" with the way in which the reformed law is working out in practice. Yet, in contrast to the original report, there is never an explanation...
of exactly how such experience was obtained; nor is there any formal exposition of data. It is likely that the Commission was relying on the informal experience of its members\textsuperscript{26} and particularly on that of its research supervisor.\textsuperscript{29} In addition, the report on the review in at least one instance suggests that the Commission put the onus on the complaining landlords to present data to the Commission to support their submissions.\textsuperscript{27}

Further evidence of the reactive and narrow character of the government's review action may be found in the speed with which the process was carried out. When originally approaching the reform of residential landlord and tenant law, the Commission began work on July 31, 1967; it completed its report almost a year and a half later on December 10, 1968; legislation was finally proclaimed in force on January 1, 1970. In contrast, the Commission began work on the 1972 review of the legislation in October of 1971; it reported on March 31, 1972; first reading of the amendment bill occurred on June 16, 1972; and it became law thirteen days later, on June 29, 1972.

While the Commission was apparently without the benefit of formally obtained data, it did not respond favourably to any of the landlords' requests except the one concerning more expeditious procedures for obtaining judgments for termination and arrears of rent.\textsuperscript{28} In so responding it managed not to be driven off its original law reform aims, a danger inherent in the reactive stance suggested in the first Part of the article. Instead, it met the complaints with re-assertions of the validity of the principles laid out in its original report.

\textsuperscript{26}See, for example, \textit{Report on Review (supra, note 12 at 5)}, where the Commission notes that events since the reform in 1970 "have been followed with continuing interest by the members of the Commission individually and collectively."

\textsuperscript{29}Professor Morley R. Gorsky. Professor Gorsky, in responding to a brief from the Parkdale Tenants' Association to the Government of Ontario (submitted shortly after the 1972 amendments), dealt with the complaint that "no effort was made to hear the views of tenants" by pointing out that he has maintained close contact with both landlords' and tenants' organizations since the enactment of Part IV. (Gorsky, "Comments on the 'Submissions to the Government of Ontario on recent amendments to the Landlord and Tenant Act' made by the Parkdale Tenants' Association", unpublished and on file with the author of this article; hereinafter referred to as Gorsky, "Comments").

\textsuperscript{27}At page 25 of the \textit{Report on Review, supra, note 12} the Commission simply notes that "these representations were not supported by statistical data".

\textsuperscript{28}As a result of the Commission's recommendations, s. 106 of \textit{The Landlord and Tenant Act} was amended by S.O. 1972, c. 123. The gist of the reform is as follows. Under the old s. 106 a landlord could apply for an order declaring the tenancy agreement terminated and claim for arrears of rent and the tenant was given 15 days' notice of the hearing. The new s. 106 reduces the notice time to four clear days. It also, in part, requires the tenant who wishes to dispute the landlord's claim to file a written notice of dispute or appear before the County Court Clerk on the day appointed. Upon failure to do either, the Clerk may award the landlord the relief sought. Furthermore, the section now requires that a tenant who disputes a claim for arrears of rent on the ground that the landlord is in breach of a covenant must pay into court the amount of the arrears claimed. He is permitted to deduct from this, however, amounts paid for repairs and for which he alleges he is entitled to a set-off under s. 96, as well as amounts of rent which he alleges he has paid. In addition, s. 109 was amended at the same time to permit service of the tenant in certain circumstances by posting on the premises or by mailing the notice; however, the Commission did not recommend this particular change.
Finally, it seems that there may have been insufficient co-ordination between the Commission and those responsible for the actual formulation of the bill presented to the Legislature. Section 106, which was completely recast by the amendments, originally contained provision for a tenant, as well as a landlord, to bring a summary application for termination of the tenancy. Although it was not recommended by the Commission, the word "tenant" was omitted from the amended section, thus depriving tenants of "a vital right to relief in a proper case". There appears to be no reason why such a right should have been consciously denied to tenants, and it seems to have been an unintended error. It is perhaps worth noting that the lapse had not been rectified at the time of writing, some eighteen months after it occurred.

Role of the Courts

The reformed law gives an important role to the courts. One major thread running through the reforms is the removal of self-help and, consequently, the channelling of disputes through the court. Distress was abolished, requiring landlords to sue tenants for arrears of rent. Landlords were forbidden to take security deposits against injury to the premises and now must sue for costs of repairs necessitated by tenants' conduct. Unless the tenant has vacated or abandoned the premises, a landlord may only retake possession by obtaining a writ of possession from the court, and he may no longer evict with a bailiff nor change the locks.

In addition, other new rights given to the tenant, not resulting from abolition of self-help, are enforceable by court action. A number are enforceable by summary conviction procedure in Provincial Court (Criminal Division). Others give the tenant a right to apply in a summary fashion to the County Court. Still other sections create rights which would be justiciable before the court in the context of actions initiated under other provisions.

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30 The Commission's research supervisor for the landlord and tenant project, Prof. Gorsky, suggests that "it is most likely that this was an unfortunate oversight". (Supra, note 26, at 14.)
31 S. 86
32 S. 84
33 S. 107
34 S. 95
35 See s. 108.
36 S. 91 (5) re the right to assign or sub-let.
S. 96 (3) re the landlord's obligation to repair and maintain premises fit for habitation.
S. 97(2) re relief against acceleration clauses.
S. 106 (1) — until amended in July, 1972 by S.O. 1972, c. 123 — re right to have lease declared terminated (if proper cause existed).
37 The most important may be s. 88 (introducing the doctrine of frustration); s. 89 (making material covenants interdependent); and s. 107 (2) (permitting the judge to refuse to make an order for possession where the notice to quit was retaliatory).
Rather than creating an administrative tribunal or selecting the less formal Small Claims Court, the law-makers chose County Court as the primary adjudicative body. However, the formality involved in litigating in County Court was lessened somewhat by provision for summary procedures.

The law was judicialized in an additional sense by couching many of the sections in language which is not readily comprehensible by laymen. For example, section 88 simply states that "[t]he doctrine of frustration of contract applies to tenancy agreements;" section 89 invokes "the common law rules respecting the effect of the breach of a material convenant;" section 92 says that "the landlord's right to damages is subject to the same obligation to mitigate his damages as applies generally under the rule of law relating to breaches of contract." Such provisions require lawyers and courts for their application to disputes.

Finally, the law-makers relied, perhaps more than was necessary, on the courts to develop and refine the law. No statute can hope to be so specific that it anticipates and answers all disputes. However, law-makers are faced with a range of choices with respect to the amount of development left to the chosen tribunal. The choice made in the case of residential tenancies can be contrasted with a number of examples of detailed legislation, supplemented by even more detailed regulations, all administered by a bureaucracy. Even after having chosen to use courts rather than an administrative agency to effectuate the reforms, the law-makers need not have left matters as open to argument as they did. For example, the doctrines of frustration of contract and interdependency of material covenants could have been articulated rather than incorporated by reference to contract law. Furthermore, broad discretion was given to the court in some areas. Particularly notable in this respect is the provision in s. 96(3)(c), enabling the judge to "make such further or other orders as [he] considers appropriate" when dealing with a question of disrepair.

The extent to which the law-makers involved the courts in the effectuation of the reforms suggests a high degree of reliance on the courts to complete the law reform process. Professor Gorsky, the Commission's research supervisor in this area, views the legislative action as having "set the stage for a gradual case by case elaboration of the tenants' newly created rights" and notes that such a development will require "a high degree of confidence in the Courts as a vehicle of reform." 39

38 Although, as was just noted, some sections are to be enforced by the criminal process in Provincial Court. The legislation does not prevent suits for rent in Small Claims Court, or, indeed, in any court having the appropriate monetary jurisdiction.

39 M. Gorsky, The Landlord and Tenant Amendment Act, 1968-69 — Some Problems of Statutory Interpretation, [1970] Special Lectures of the Law Society of Upper Canada, Recent Developments in Real Estate Law, (Toronto: DeBoo, 1970) at 443. As it turns out, this case by case elaboration has not occurred. Partly because of the fact that the disputes arise in a summary procedure, there have been only eight reported cases on Part IV of the Act. See infra, note 108.
I undertook a very restricted study in order to begin the necessary examination of how well the reformed law operates in practice. Because of the major role which the Act gives the court, and because of the relative accessibility in court records of data covering the life of the reforms, I chose to examine the files of residential landlord and tenant cases tried in the County Court of the Judicial District of York. The aim of the reforms was to redress the imbalance in the law which had favoured the landlord, and the study attempts to discover how well the reformed law is achieving its goal through the agency of the court. I proposed to determine with what frequency tenants sought to exercise their newly created rights and how successful they were. In this regard it was important to know as well how often tenants were represented by lawyers and how the court resolved the difficult questions of statutory interpretation posed by the new legislation.

Accordingly, I examined the file of every residential landlord and tenant action initiated after January 1, 1970 (the date Part IV of the Act became effective) and before May 23, 1973. Only the files of those cases which proceeded to judgment yielded the required data, and from each such file I was able to obtain the following information: which party initiated the action; what relief was claimed; whether any written defence or counterclaim was filed; whether the tenant was represented by counsel; and what was the disposition of the matter.

It was generally not possible to discover from the files what arguments were made and whether the court gave oral reasons for judgment. The files

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40 See text, infra, at pp. 449-50. Note that the Act provides summary procedures for obtaining relief. It is these summary actions which I shall examine. I have not examined ordinary actions in the County Court, such as for damages for breach of covenant, many of which duplicate the summary action.

41 The Judicial District of York comprises Metropolitan Toronto and some of its environs.

42 No formal data were obtained showing how often the landlord was represented by a lawyer. However, it can be said with fair certainty that the landlord appeared through lawyers in the overwhelming majority of cases.

43 I decided to examine all files rather than a sample for two reasons: first, an initial sampling failed to disclose any actions initiated by tenants, while I felt it was important to obtain precise information on this point. Secondly, since one of the goals of the study was to discover how the law was being interpreted by the court, an examination of every file would disclose any written but unreported reasons for judgment. However, none was discovered.

44 With only one noteworthy exception, all cases initiated by May 22, 1973 were decided by June 7, 1973. The exception was an action begun by 33 tenants, with Parkdale Community Legal Services as counsel, to compel a landlord to repair the rental premises. The matter was adjourned until after the long vacation and thus beyond the time limits of the study. (See, infra, note 65, for further reference to this action).

45 It was also noted whether the tenant failed to appear at all and whether he or she appeared in person without counsel.
of those cases which did not proceed to judgment (that is, those which were adjourned *sine die* and were never brought back or which were withdrawn by the claimant) were used only in a limited fashion.48

The introductory and restricted nature of this study is clearly shown by noting some of its major limitations. First, it is readily acknowledged that a record of litigation provides only partial evidence of the impact of a law in society.47 This difficulty is exacerbated by confining the study primarily to those cases in which judgment was obtained. Second, the County Court is not the only court involved in the administration of the reformed residential landlord and tenant law. Some provisions in the Act are to be enforced primarily through the criminal process in the Provincial Court (Criminal Division).48 In addition, nearly all of those provisions of the Act which create rights justiciable before the County Court may also arise in the Small Claims Court by way of defence to actions for rent.49 Third, an examination of court files will only offer a limited view of how litigants fare in County Court; unrecorded and informal practices may have substantial impact. Finally, the geographical limitation must be noted. It is difficult to know to what extent the results of a study of Metropolitan Toronto are applicable to other areas of the province and particularly to rural areas. However, it might be worth pointing out that Metropolitan Toronto contains approximately 40 percent of all rental dwelling units in Ontario.50

Even with these limitations a study of landlord and tenant actions in the County Court, tapping as it does the major flow of litigation, will provide information useful as a basis for criticism of the present law and, more importantly, as a source of direction for further studies.

*Actions in the Court*

**Basic Data**

There are a number of different ways of coming to grips with the business of the court in this area. Because of the complex and continuing nature of the landlord and tenant relationship, a given lessor and lessee may be in contest before the court more than once during the life of the lease, and on any one occasion both may make a number of claims. Moreover, those claims may at times be inter-related and, at other times, discrete severable

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46 A sampling of such files was made in order to determine whether there were any significant differences between them and decided cases with respect to the identity of the plaintiff and the nature of relief sought. (See text, *infra* at pp. 458-59 for a discussion of the procedure used and the results).

47 I am most mindful of Prof. Jones' admonition that "the causes of a legal precept's efficacy or inefficacy are less likely to be found in the courtroom than in the world outside." (Jones, *supra*, note 3 at 12). The results of the study will point away from courts to other areas of reality which require examination.

48 See s. 108 of the Act.

49 See *Caithness Caledonia Ltd. v. Goss*, [1973] 2 O.R. 592 as an example of this. It is the only reported case from the Small Claims Court involving the reformed landlord and tenant law.

50 The 1971 Census of Canada records 349,210 rented dwelling units in Metropolitan Toronto and 825,145 in the whole Province.
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</table>

*obtained by dividing yearly figures by 12 and those for 1973 by 5.

issues. Therefore, it will be convenient initially to use the notion of an “action” to begin the description of the court’s work. An action, as it is used here, describes any grouping of issues between a landlord and tenant presented for resolution by the court in the same hearing.

In the period under examination a total of 7,187 residential landlord and tenant actions were begun in the court. As can be seen from Table 1, the number of actions commenced has increased every year, although the rate of increase seems to be falling. The large increase in 1971 may have been the result of landlords’ greater familiarity and comfort with the new law. The increase in 1972 appears in part to have been due to the introduction in July of that year of more expeditious procedures for landlords suing tenants.

Of the actions begun, 4,617 (64% of the total) proceeded to judgment, and, as was stated above, these will be the source for my data. The others were either adjourned sine die or were withdrawn by the plaintiff. Table 2 shows that the proportion of actions which proceeded to judgment increased significantly in the second half of 1972. Again, this is likely the result of the new procedures which first obtained during that period, and which were introduced to increase the effectiveness of the landlords’ use of the court. The existence of this same higher proportion of decided cases in that part of 1973 included in the study corroborates this supposition.

51 It is of course possible for a number of tenants to sue or be sued in the same proceedings. They may be co-tenants of the same premises or tenants of different premises with the same complaint against the landlord. A landlord who has the same complaint against a number of tenants, each in different premises, in practice brings a separate action against each, and I treat them as separate actions. Where there are co-tenants of one residential unit who are suing or being sued, I have treated it as one action. The case of a number of tenants of different premises joining to sue their common landlord in one proceeding did not arise within the period under examination. (See, however, infra, note 65).

52 Where the matter is adjourned and not dealt with in one uninterrupted hearing it is, of course, still regarded as one action.


54 See table 3, infra at p. 456.

55 See infra, note 28 for an explanation of these procedural changes.
TABLE 2

ACTIONS PROCEEDING TO JUDGMENT

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>number:</td>
<td>532</td>
<td>1021</td>
<td>1965</td>
<td>[745]</td>
<td>[1220]</td>
<td>1099</td>
<td>4617</td>
</tr>
<tr>
<td>as % of all actions begun during period:</td>
<td>56%</td>
<td>56%</td>
<td>68%</td>
<td>[61%]</td>
<td>[71%]</td>
<td>74%</td>
<td>64%</td>
</tr>
</tbody>
</table>

Identity of the Claimant

One factor in determining the effectiveness of tenants' use of their new rights is the extent to which they have taken the initiative in seeking redress in the court. But before I go to the data, it may be helpful to review the tenants' new rights in order to see which lend themselves to positive enforcement by summary procedure in County Court at the instance of the tenant. The act provides for application to the Court by the tenant in sections 91 (right to assign or sub-let), 96 (landlord to keep premises in good repair and fit for habitation), and 97 (relief against acceleration clauses). Until July of 1972 when the Act was amended, a tenant could apply under s. 106 for an order that the tenancy be terminated. In addition to permitting the court to resolve disputes about the effectiveness of notice to terminate a periodic tenancy, for example, it should also have been possible under this section for the tenant to argue that the tenancy was terminated because of breach by the landlord of a material covenant (s. 89) or because of frustration of contract (s. 88).

With one exception (s. 91), all of the rights just identified may also be raised by way of defence to an action brought by the landlord. It appears that since July 1972, as was noted, sections 88 and 89 may be used only in this way. Three other rights appear to depend primarily for their enforcement upon a defensive use by the tenant: the tenant's right to a copy of the lease; the landlord's obligation to mitigate damages upon abandonment by the tenant; and the tenant's right to be free from retaliatory eviction. This important defensive use of rights will be examined later.

---

60 S.O. 1972, c. 123, s. 3 amended s. 106 so that it now provides only for application to the court by the landlord. See text, supra at pp. 446-49 for a brief discussion of this change.
67 S. 83 provides that if a copy is not delivered to the tenant within three weeks, all obligations of the tenant under the lease cease until a copy is delivered.
68 S. 92.
69 S. 107 (2) permits a judge to refuse to make an order for possession if it appears that notice to quit was given because a tenant attempted to enforce his rights.
60 See text, supra at pp. 466-467.
either are enforceable in Provincial Court (Criminal Division)\(^{61}\) or have no clear mode of enforcement suggested by the Act.\(^{62}\)

Although the rights which can be enforced by a tenant through "offensive" summary action in County Court are few in number, they are important. The tenant's right to have premises in good repair and fit for habitation (s. 96) is arguably the most important right in the reforms, going as it does to the quality of the thing the tenant has bargained for. The right to have the lease declared terminated because of breach of a material covenant by the landlord (ss. 106 and 89) would seem to be an important one,\(^{63}\) interdependence of covenants in leases having long been argued for. This "offensive" right was available for two and a half years during the period studied. The right to assign or sub-let to a proper person (s. 91) is a useful and necessary one in our mobile society.

In order to get a fair picture of tenants' "offensive" use of rights, I determined not only who initiated each action but also whether the tenant made a formal counterclaim\(^{64}\) when sued by the landlord. The files revealed only those counterclaims made with a degree of formality — usually a written notice to the plaintiff accompanied by an affidavit setting out the facts relied upon. It was not possible to discover whether during hearings the court entertained oral submissions which amounted to counterclaims.\(^{65}\)

The data, set out in Table 3, show clearly that tenants have made almost no offensive use whatsoever of their rights. It can be said that tenants do not sue landlords to enforce their rights under the reformed legislation.\(^{66}\) In each year the number of actions initiated by tenants is less than 1% of all actions

---

\(^{61}\) Ss. 84, 85, 94, 95, 104, 107 (1) and (3).

\(^{62}\) S. 86 abolishes distress. It seems to have been envisaged that a tenant whose landlord wrongfully distrains his goods should resort to civil actions (replevin or conversion) or a criminal charge of theft. (Although, see text, infra at p. 456) S. 93 limits the landlord's right to enter the premises; presumably an action in trespass might be brought to enforce this.

\(^{63}\) The utility of such a right will of course depend upon what the courts are prepared to regard as material covenants. S. 96 would seem to cover most of the matters which one might easily regard as material and it contains its own provisions respecting enforcement, including a provision enabling the court to terminate the lease.

\(^{64}\) The distinction between a counterclaim and defensive use of a right by the tenant is at times nugatory. Victory by the tenant in either case may mean monetary loss by the landlord. However, since there is technically not the necessary relationship between a claim and counterclaim that there is between a claim and defence, I decided to treat counterclaims here.

\(^{65}\) It is likely that a claim made by the respondent during the hearing will be taken as a defence.

\(^{66}\) In Julian Martin et. al. v. Nittany Holdings Ltd. (Co. Ct. file #8448) (a case commenced prior to May 22, 1973 but undisposed of by June 7, 1973 and therefore lying outside our study) tenants of 33 apartments in one building joined in action against their common landlord in an attempt to compel him to repair. In the light of the record of the prior 3½ years such an action must be regarded as anomalous. However, it was brought with Parkdale Community Legal Services as counsel; and if this represents a change in their approach to tenant problems in Parkdale, it may be that poor tenants in that area will sue their landlords. None of the actions within the study was a group action.
TABLE 3
IDENTITY OF CLAIMANT
IN ACTIONS PROCEEDING TO JUDGMENT

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Number of actions initiated by landlords:</td>
<td>528</td>
<td>1018</td>
<td>1960</td>
<td>1097</td>
<td>4603</td>
</tr>
<tr>
<td>2. Number of actions initiated by tenants:</td>
<td>4</td>
<td>3</td>
<td>5</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>3. Number of actions in which counterclaim by landlord:</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>4. Number of actions in which counterclaim by tenant:</td>
<td>5</td>
<td>2</td>
<td>7</td>
<td>3</td>
<td>17</td>
</tr>
<tr>
<td>5. Total number of actions in which formal claim made by landlord:</td>
<td>528</td>
<td>1018</td>
<td>1961</td>
<td>1097</td>
<td>4604</td>
</tr>
<tr>
<td>6. Total number of actions in which formal claim made by tenant:</td>
<td>9</td>
<td>5</td>
<td>12</td>
<td>5</td>
<td>31</td>
</tr>
</tbody>
</table>

proceeding to judgment. Even after considering counterclaims, it remains the case that tenants have formally claimed from landlords in less than 1% of those actions which went to judgment, except for 1970, when the figure was 1.69%.

Nature of Claims by Tenants

The tenants' claims in 23 out of 31 cases were based on section 96 of the Act. In six of those cases the tenant was seeking an order terminating the tenancy because of the landlord's failure to repair. In 15 others the tenants sought monetary relief from the consequences of disrepair (e.g., payment to the tenant of costs of repairs done by him or reduction in the rent for the inconvenience of suffering disrepair). In two cases the tenant asked for an order requiring the landlord to repair.

Two of the tenants' claims were for orders permitting them to sublet. In two other cases tenants sought a declaration that the tenancy had been terminated by notice. The remaining four claims by tenants were as follows: a counterclaim for payment for services rendered by the tenant in his capacity as superintendent of an apartment house; a claim for the return of goods wrong-

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87 The claim was dismissed as having been brought in the wrong court; presumably it was a matter for Small Claims Court.
fully distrained by the landlord; a claim for the return of pre-paid rent and for payment of tenant's moving costs; an application by a sub-tenant to set aside an order for possession earlier obtained by the head lessor against his tenant.

There does not appear to be any significant difference between the types of claims made by tenants as plaintiffs or as counterclaimants.

Nature of Claims by Landlord

I shall not attempt here a full description of the types of claims made by landlords. However, it is important to note some characteristics of landlords' requests of the court. By far the most common action initiated by landlords combined a claim for arrears of rent and a claim for an order that the tenancy be terminated for non-payment of rent. Over the total period of time studied, 77% of landlord-initiated actions proceeding to judgment were of this kind. The next most common action was one for an order that the tenancy had been terminated by notice (9%), followed closely by the claim for an order that the tenancy be terminated for non-payment of rent (7%). Other combinations of these same claims (rent and termination by notice, rent alone, termination by notice and by non-payment of rent) account for another 6% of all landlord-initiated actions proceeding to judgment. In almost all of these cases, where a termination order was claimed, the landlord was ultimately seeking a writ of possession, which is required by the Act in order to oust a tenant; the only time one might not be sought is where the tenant has left the premises and the landlord is simply looking for a judicial sanctioning of his retaking of possession.

During the period studied there was really only one major change in the composition of landlords' actions. While landlords have always — and to the same extent — sought orders for possession based on termination by notice or non-payment of rent, they have increasingly taken to joining such claims with requests for judgments for arrears of rent. In particular, the following changes have occurred. As can be seen in Table 4, the combined claim for arrears of rent and an order terminating the tenancy for non-payment of rent has become more common in both absolute numbers and as a proportion of all landlords' actions. Concomitantly, the relative frequency of certain other claims has decreased over the period. Claims for orders of termination by notice or termination for non-payment of rent, when not

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68 Although s. 86 prohibits distress, it provides no remedy; the tenant in this case simply applied to the court by way of notice of motion. The court gave the order requested, without giving written reasons explaining how it was to be carried out.

69 If the tenant has "vacated or abandoned" the premises, the landlord under s. 107 of the Act may retake possession without a writ. However, should a landlord err in deciding that premises have been "vacated or abandoned", he may be liable to a penalty under s. 108 of the Act.
joined with claims for arrears of rent, have become less common in absolute as well as proportional terms. The only other claim made by landlords which increased both absolutely and relatively was again a combined claim for termination by notice and for arrears of rent.

<table>
<thead>
<tr>
<th>TABLE 4</th>
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<tbody>
<tr>
<td>NATURE OF LANDLORDS' CLAIMS</td>
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</tbody>
</table>

<table>
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</tr>
</thead>
<tbody>
<tr>
<td>(Jan. 1-May 22)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Actions in which claim for termination for non-payment of rent joined with claim for arrears of rent.</td>
<td>313</td>
<td>623</td>
<td>1617</td>
<td>988</td>
<td>3541</td>
</tr>
<tr>
<td>(a) number:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) as % of all landlords' actions during period:</td>
<td>59</td>
<td>61</td>
<td>83</td>
<td>90</td>
<td>77</td>
</tr>
<tr>
<td>2. Actions in which only claim for termination for non-payment of rent.</td>
<td>98</td>
<td>132</td>
<td>67</td>
<td>7</td>
<td>304</td>
</tr>
<tr>
<td>(a) number:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) as % of all landlords' actions during period:</td>
<td>19</td>
<td>13</td>
<td>3</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>3. Actions in which only claim for termination by notice.</td>
<td>69</td>
<td>175</td>
<td>127</td>
<td>32</td>
<td>403</td>
</tr>
<tr>
<td>(a) number:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) as % of all landlords' actions during period:</td>
<td>13</td>
<td>17</td>
<td>6</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>4. Actions in which claim for termination by notice joined with claim for arrears of rent.</td>
<td>7</td>
<td>7</td>
<td>66</td>
<td>41</td>
<td>121</td>
</tr>
<tr>
<td>(a) number:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) as % of all landlords' actions during period:</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

It is not possible to tell from this study whether in the earlier years landlords felt it less worthwhile to sue for rent at all or whether they took their claims for rent to Small Claims Court. Furthermore, it is not possible to say with certainty whether the introduction in July of 1972 of expeditious procedures for landlords' suits was a factor which increased the desire of landlords to sue for rent in County Court. In this regard, when the two halves of 1972 are compared, we do indeed find that under the new pro-
Landlord & Tenant

In the second half there was a markedly greater proportion of the combined suits just described. However, there was also a large increase proportionally in these same kinds of actions between the beginning of 1971 and the end of the first half of 1972. Therefore, it might be that because of unidentified factors a trend was occurring which would have continued even if novel procedures had not been introduced. Nonetheless, it seems reasonable to attribute some of the increased desire of landlords to sue for rent in County Court to the new procedures.

Comparison with Actions Not Proceeding to Judgment

Before turning to other issues, it is worth noting that what has been discovered thus far with respect to decided actions also holds generally true for actions not proceeding to judgment. A sampling was made of undecided actions initiated between January 1, 1973 and May 22, 1973. The sample comprised every fifth undecided action encountered in my examination of the files, and contained 77 actions (out of the total of 391 undecided actions over the period). Of these 77 files, ten were marked "adjourned sine die"; one was marked "adjourned to a new date" (which was never set); 16 were marked "nobody appearing, struck off list"; and 50 were marked "withdrawn".

As we have seen, 99% of all decided action in 1973 were initiated by landlords; in the sample, 97% of undecided actions initiated during the same period were begun by landlords. Again, as was described above, in 1973 90% of landlords' actions which proceeded to judgment were claims for both arrears of rent and an order for termination for non-payment of rent. In the sample of undecided actions, that same combined claim was made in 89% of suits initiated by landlords. There were no significant differences between the two sets of actions with respect to the types of claims made in the other 10% of landlords' actions.

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70 75% of all landlords' actions in the first half of 1972 compared to 92% of all landlords' actions in the second half.

71 In 1971 as a whole, actions combining claims for arrears of rent and for orders of termination based on notice or non-payment of rent formed 62% of all landlord-initiated actions. They represented 75% in the first half of 1972.

72 Actions are filed in County Court in chronological order by the date of the originating application. Files of actions which ultimately proceed to judgment remain intermixed with those of actions which are discontinued. I examined each file seriatim in this chronological order.

73 No record was kept of whether any of these disputes later reappeared as a new action (and, consequently, in a new file).

74 Two actions in the sample (3%) were initiated by tenants: one claim for a right to sub-lease and one claim for termination because of the landlord's breach of s. 96.
A demonstration that 99% of decided cases are initiated by landlords leaves open the possibility that tenants initiate a substantial number of actions and settle all but a few. The examination of undecided actions tends to negate this possibility. In addition, it seems that the nature of the claim made in an action is not a factor in determining whether or not the action will be settled out of court. The files of undecided cases do not contain data permitting comparisons to be drawn with respect to the issues discussed below.

Outcome of Actions

To know how often tenants won in court enables us to achieve three limited objectives. Firstly, a very high rate of success would have been strong evidence that tenants before the court were making effective use of the reformed law. Such a discovery might have weakened the argument that a general efficacy study is required. Since the data to confirm or negative this possibility were readily available, I felt it worthwhile to record and tabulate success rates. As we shall see below, it is not possible to regard the tenants' success rates as clear evidence of effective use of the reformed law.

Secondly, the data provide a basis for an impressionistic and tentative judgment about how well the reformed law is achieving its purposes through the agency of the court. The reason why no more than an impressionistic opinion can be ventured is that there is nothing which tells us how many tenants should win. That is, there are no data against which the effect of the reformed law can be measured. Absent such a basis for comparison, it is not possible to account for the effect of all those variables which bear upon whether cases are won or lost, variables which have nothing to do with the efficacy of the reformed law.

Finally, data on success rates provide a useful base against which the effect of certain known factors may be measured. Particularly, they will enable us to discover whether the introduction of new procedures in July 1972 harmed tenants' chances of success. With less certainty, they will permit us to draw conclusions about the value to the tenant of being represented by a lawyer. Such evaluations will be deferred until the section entitled "Analysis".76

Claims Made by Tenants

In the 31 actions where tenants made formal claims for relief,76 they won in 15 cases and lost in the other 16. The total number of cases in which formal claims were made is so small that little, if any, significance can be

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76 See text, infra at pp. 466-74.
76 See text, supra at p. 456.
drawn from an analysis of which actions were won and which lost. No significant pattern is suggested, success and failure being fairly evenly distributed over all the kinds of claims.

Claims Made by Landlords

It is more difficult to describe adequately the outcome of actions initiated by landlords. The difficulty is not merely one of numbers. In part it lies in the fact that landlords generally claim two things in one action — an order terminating the tenancy (or declaring that it has been terminated) and a judgment for arrears of rent. It is possible for a landlord to succeed on one claim and lose on the other. Some of such mixed result situations are instances in which the court granted relief against forfeiture,\(^7\) and it was generally possible to identify these from material in the files. In other cases, a landlord may have succeeded on his claim for an order of termination, but nothing appears in the record about his claim for arrears of rent. It was not always possible to tell whether the landlord had his claim for rent dismissed on the merits or whether he withdrew it or declined to press it in the face of evidence of the tenant's inability to pay. In either event, failure to secure a judgment for the claimed arrears of rent was regarded as a loss for the landlord.

Not only may a landlord have a split decision where he claims two things, he may achieve less than complete success on either claim. A landlord may have partial success in his claim for arrears of rent, getting judgment for something less than the amount he claimed. However, any substantial judgment for arrears of rent was recorded as a loss on this issue for the tenant. Although a landlord either succeeds or fails to get an order for termination, the execution of the writ of possession which generally accompanies it may be delayed by the court. Any order for termination was, however, regarded as a victory on this issue for the landlord.

One way of displaying data on success rates is to ignore the notion of an action and to treat each claim as if it were put separately. This enables us to cope with the fact of combined claims. Since landlords make three kinds of claims it is sensible to group together the claims according to category: termination, arrears of rent, and costs of repairs necessitated by tenants' conduct. This also permits us to see whether landlords have more difficulty succeeding on one particular kind of claim than they have on another. Table 5 takes this approach.

\(^7\) The right to forfeit the lease which is described here is that established under s. 18 (1) of the Act, which permits the landlord to “re-enter” the premises if the rent is fifteen days overdue. Re-entry must now, by s. 107, be by writ of possession. Relief against forfeiture is possible under s. 20 (1) of the Act.
### TABLE 5

**COURT DECISIONS* ON CLAIMS**

**BY LANDLORDS**

<table>
<thead>
<tr>
<th>Categories of Claims</th>
<th>LANDLORD SUCCEEDS</th>
<th>TENANT SUCCEEDS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Claims</td>
<td>Number of Claims</td>
</tr>
<tr>
<td><strong>1970</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims for termination:</td>
<td>426</td>
<td>79</td>
</tr>
<tr>
<td>Claims for rent:</td>
<td>214</td>
<td>137</td>
</tr>
<tr>
<td>Claims for cost of repairs:</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td><strong>1971</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims for termination:</td>
<td>921</td>
<td>50</td>
</tr>
<tr>
<td>Claims for rent:</td>
<td>637</td>
<td>33</td>
</tr>
<tr>
<td>Claims for cost of repairs:</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td><strong>1972</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims for termination:</td>
<td>1827</td>
<td>106</td>
</tr>
<tr>
<td>Claims for rent:</td>
<td>1600</td>
<td>125</td>
</tr>
<tr>
<td>Claims for cost of repairs:</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td><strong>1973</strong> (Jan. 1-May 22)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims for termination:</td>
<td>1039</td>
<td>46</td>
</tr>
<tr>
<td>Claims for rent:</td>
<td>985</td>
<td>62</td>
</tr>
<tr>
<td>Claims for cost of repairs:</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTAL PERIOD</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims for termination:</td>
<td>4213</td>
<td>281</td>
</tr>
<tr>
<td>Claims for rent:</td>
<td>3436</td>
<td>357</td>
</tr>
<tr>
<td>Claims for cost of repairs:</td>
<td>17</td>
<td>0</td>
</tr>
</tbody>
</table>

* The number of decisions in any time period will exceed the number of actions for the period, because of those actions where more than one type of claim is made.

** Where in an action termination is sought on more than one basis it is regarded as one claim for termination. It is not always possible to tell from the court file on which basis the landlord succeeded.

The main point to be made here is that the low success rate of tenants does not provide any clear evidence of effective use by tenants of their new rights. Note that the overall success rate includes figures for 1970 which are out of line with the figures for later years. No explanation is available from the material studied for the relatively high success rate tenants enjoyed in 1970. Whatever the causes, they apparently did not persist, and the low rate of success for tenants established in 1971 continued without much
fluctuation for the rest of the period studied. Apart from 1970, it does not appear that landlords met with appreciably greater difficulty in obtaining judgments for rent than they met obtaining orders for termination.

As Table 6 shows, a comparison of the first and second halves of 1972 does not reveal that the new procedures introduced July 1 greatly worsened the tenants' chances of winning. Although tenants in the second half defeated only 5% of claims for termination, as opposed to 6.4% in the first half, the figure for 1971 was 5.5%. It cannot be shown that the lower rate of success in the second half of 1972 was attributable to the new procedures and not to the same (but undetermined) factors which produced a similar low rate of success in 1971. On the other hand, it must be noted that the tenants' success in defeating claims for termination continued to decline in 1973 under the new procedures. And while the tenants' success rate rose from 1971 to the first half of 1972, it declined after that time.

Almost one third of the tenants' success against claims for termination is attributable to relief against forfeiture.78 Table 7 sets out the number of times such relief was granted in each time period and then takes this figure as a percentage of the total number of actions in which tenants succeeded

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78 See, supra, note 77.
against landlords’ claims for termination. These data will be dealt with more fully below in the section on Analysis.

<table>
<thead>
<tr>
<th>TABLE 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>RELIEF AGAINST FORFEITURE</td>
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</table>

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<tbody>
<tr>
<td>(Jan. 1-May 22)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Number of actions in which relief against forfeiture granted:</td>
<td>27</td>
<td>19</td>
<td>33</td>
<td>8</td>
<td>87</td>
</tr>
<tr>
<td>2. Number of actions in which landlords’ claim for termination failed:</td>
<td>79</td>
<td>50</td>
<td>106</td>
<td>46</td>
<td>281</td>
</tr>
<tr>
<td>3. Column 1 as percentage of Column 2:</td>
<td>34%</td>
<td>38%</td>
<td>31%</td>
<td>17%</td>
<td>31%</td>
</tr>
</tbody>
</table>

Finally, Table 8 incorporates the fact of mixed decisions and reveals that most of the tenants' successes occurred within the context of actions in which they also lost on one claim. Thus, even if we combine actions initiated by tenants\(^7\) with those begun by landlords, we find that tenants have won unmixed victories in only 175 of the 4,617 actions proceeding to judgment.

<table>
<thead>
<tr>
<th>TABLE 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>RESULTS IN ACTIONS INITIATED BY LANDLORDS</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
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<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>(Jan. 1-May 22)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Actions in which landlord succeeds on all claims made:</td>
<td>332</td>
<td>941</td>
<td>1774</td>
<td>1021</td>
</tr>
<tr>
<td>Actions in which mixed decision:</td>
<td>152</td>
<td>58</td>
<td>122</td>
<td>43</td>
</tr>
<tr>
<td>Actions in which tenant succeeds against all claims made:</td>
<td>44</td>
<td>19</td>
<td>64</td>
<td>33</td>
</tr>
</tbody>
</table>

\(^7\) These include counterclaims as well. Where the tenant won on the counterclaim but lost on the main claim (or vice versa), I have not considered this a mixed decision, but a clear victory for each party.
Representation for Tenants

It is important for the purposes of the analysis which will shortly follow that data concerning the representation of tenants before the court be set out here. The common assumption is that a litigant will be able to make the most effective use of his rights if he is represented by a lawyer; and further, if he appears on his own behalf without a lawyer, he will be in a better position than he would be if no one appeared on the matter at all. These assumptions will be tested, within the limits of the data, in a later section.

Table 9 records how often in actions initiated by landlords the tenant was represented by a lawyer; how often he appeared in his own behalf; and how frequently no one appeared at all. These figures are also taken as percentage of all decided actions initiated by landlords in the time period so that comparisons between periods may be made. I was not able to obtain from the files any reliable information on whether a tenant had received legal advice even though he was not represented by a lawyer at the hearing. Once again we find that 1970 was an atypical year, in that tenants were

<table>
<thead>
<tr>
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<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Number of actions in which tenant represented by lawyer:</td>
<td>42</td>
<td>35</td>
<td>92</td>
<td>36</td>
<td>205</td>
</tr>
<tr>
<td>as % of all actions in period:</td>
<td>8.0%</td>
<td>3.4%</td>
<td>4.7%</td>
<td>3.3%</td>
<td>4.5%</td>
</tr>
<tr>
<td>2. Number of actions in which tenant appeared for himself:</td>
<td>223</td>
<td>358</td>
<td>569</td>
<td>269</td>
<td>1419</td>
</tr>
<tr>
<td>as % of all actions in period:</td>
<td>42.2%</td>
<td>35.2%</td>
<td>29.0%</td>
<td>24.5%</td>
<td>30.8%</td>
</tr>
<tr>
<td>3. Number of actions in which no one appeared for tenant:</td>
<td>263</td>
<td>625</td>
<td>1299</td>
<td>792</td>
<td>2979</td>
</tr>
<tr>
<td>as % of all actions in period:</td>
<td>49.8%</td>
<td>61.4%</td>
<td>66.3%</td>
<td>72.2%</td>
<td>64.7%</td>
</tr>
</tbody>
</table>

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80 In a few cases (27 in 1970, one in 1971, 21 in 1972) the files did not make it clear whether anyone appeared. I have attributed these unclear cases to self-representation for two reasons: first, because when a lawyer appeared the records regularly and clearly reveal his presence; and secondly, because the tenant succeeded in these matters, it seemed unlikely that there was no one at all before the court in his behalf.
represented by lawyers nearly twice as often as was the case in later years. When not represented, tenants in that year appeared in their own behalf considerably more often than they did in the period following. But 1970 apart, the rate of representation by lawyers has remained at nearly the same low level. However, tenants have increasingly over the period allowed actions to proceed in their absence.

Tenants were represented by lawyers in each of the 14 actions they initiated.

PART IV
ANALYSIS

For one concerned about the effectiveness of the reforms in redressing the imbalance in the law which had favoured the landlord, there are two major results of the study which are disturbing. The discovery that tenants have initiated less than one percent of all actions raises the question of whether tenants are attempting to make any use at all of their new rights. Allied with this concern is the question of how effective any such attempts have been. No matter how the data are presented, tenants are seen to have a low rate of success before the court. As we have seen, they have prevailed against only 6% of all claims for possession made by landlords and 10% of all claims for arrears of rent. Currently tenants are faring even less well, succeeding against only 4% of claims for possession and 6% of claims for rent in 1973. Shortly put, the fact that tenants do not sue, and, when sued, lose in the vast majority of cases, does not inspire confidence that the new law is achieving its social aim through the agency of the court.

Such an observation does not, of course, end the matter. The data obtained from the study will support further examination of these basic questions. From such analysis it will be possible to refine these concerns, suggest areas for further study, and draw some conclusions about the operation of the reformed law in the context of actions in court.

Defensive Use of Rights by Tenants

One explanation for the low incidence of suits begun by tenants may be that tenants are using their rights defensively, raising them only when sued by landlords. The introduction of new procedures through amendments to the Act in July of 1972 offers a fortunate opportunity to determine the extent to which rights are being raised by way of defence. Section 106, as amended,\(^8\) requires tenants who dispute landlords' claims for rent or termination\(^2\) to file a written notice of dispute or to appear in person to dispute the claim. Failure to do either means that the Clerk of the court will sign,

\(^8\) S.O. 1972, c. 123, s. 3.
\(^2\) As was shown, such claims constitute all but a minor fraction of landlords' claims. See, for example, Table 5, supra at p. 462, which shows that only 17 claims during the period studied were for relief other than rent or termination.
the order or judgment sought by the landlord.\textsuperscript{83} The court files reveal which cases were “decided” by the Clerk, and consequently undisputed, and which were decided by a Judge, and therefore disputed. Thus, for a period of almost 11 months\textsuperscript{84} it is possible to determine to what extent tenants did not raise any defence at all, by noting the number of undisputed actions initiated by landlords.

Of the 2,317 actions initiated by landlords which proceeded to judgments during the period, 2,067 (89.3\%) were disputed. In only 250 actions (10.7\%) is it possible that the tenant used his new rights defensively. The files do not reveal whether the disputed actions actually raised issues under the reformed law. Since most disputes were not made in writing, it was generally not possible to note on what basis the tenant was defending. However, from an examination of those which were written it is likely that some merely disputed the landlord’s position on the facts and others had no arguable basis in law at all.

It is difficult to know to what extent these figures accurately reflect the position during the two and a half years prior to the introduction of new procedures. The only data at all indicative are those concerning the tenants’ record of success before the court\textsuperscript{85} and these data suggest that the new procedures had little or no effect on tenants.\textsuperscript{86}

Thus, it seems that in slightly over 11\% of all actions, combining those few initiated by tenants with those begun by landlords, tenants attempted to use their rights. This presents a better picture than that suggested by looking at the identity of plaintiffs alone. I submit, however, that it is not a sufficiently high percentage to remove all concern that tenants are not adequately informed of their rights under the new law. Moreover, to know enough to raise a defence is only a first step; to be able to prosecute it effectively is an equally important factor. It is to this concern that I shall now turn.

\textit{Tenants’ Success Before the Court}

As I have already noted\textsuperscript{87} it is difficult to obtain from the court records a sufficiently precise notion of how effectively tenants pressed their rights. Success in an action is dependent not only upon raising rights and arguing persuasively but also, of course, on having enough of the facts in your favour. And it is information on this last element which the files do not contain. Nonetheless, an examination of the results of actions may enable us to draw certain tentative conclusions which, in turn, may prompt further study.

\begin{table}[h!]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Year} & \textbf{Cases} & \textbf{Success} \\
\hline
1972-1973 & 1,000 & 500 \\
\hline
1973-1974 & 1,500 & 750 \\
\hline
\end{tabular}
\caption{Success Rates Before the Court}
\end{table}

\textsuperscript{83} S. 106(5), as amended.
\textsuperscript{84} July 1, 1972 through May 22, 1973.
\textsuperscript{85} If the new procedures had enhanced or diminished the likelihood of tenants raising defences, it is possible that this would be reflected in a direct modification of success rates, presuming that the chances of a tenant’s winning are increased if he defends.
\textsuperscript{86} See Table 6, supra at p. 463.
\textsuperscript{87} See text, supra at p. 460.
Having just identified those actions in which defences were raised, I shall examine first the effectiveness of tenants’ disputes in these cases. Tenants’ failure in all other actions during this period is attributable to no defence at all being raised and is, therefore, irrelevant to our present interest. Table 10 records the number of those 250 disputed actions in which tenants achieved any success. Tenants’ victories are divided into those actions where they successfully defeated all claims raised by the landlord and those in which they won only one of the claims made. These “mixed” victories are broken down in the Table to show how many were successes against claims for termination (the tenant losing on the issue of rent), or claims for arrears of rent (the tenant losing on the issue of termination), or finally, as a distinct category, how many were the result of relief against forfeiture.

TABLE 10
NUMBER AND NATURE OF TENANT SUCCESSES IN DISPUTED ACTIONS

<table>
<thead>
<tr>
<th>Actions in which success on all claims raised</th>
<th>Actions in which success on only one of claims raised</th>
<th>termination</th>
<th>rent</th>
<th>relief against forfeiture</th>
</tr>
</thead>
<tbody>
<tr>
<td>number:</td>
<td></td>
<td>(5)</td>
<td>(25)</td>
<td>(18)</td>
</tr>
<tr>
<td>As % of all (250) disputed actions:</td>
<td></td>
<td>(2.0%)</td>
<td>(10.0%)</td>
<td>(7.2%)</td>
</tr>
<tr>
<td>10.4%</td>
<td>19.2%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The 30% rate of some success in those actions where a defence is raised suggests that the main difficulty facing tenants under the reformed law is not so much making an effective use of the new rights as it is knowing enough to raise a defence in the first place. However, it may be argued that in two categories at least success is due not to the use of new rights, whether effectively presented or not, but rather to other factors. Relief against forfeiture depends upon the discretion of the court and is not a new “right”, having been available to tenants prior to the enactment of Part IV of the Act. Further, although I was not able to obtain accurate data, the files revealed in many instances that landlords, faced with impoverished tenants, abandoned claims for rent, and thus the tenant did not “win” on the claim through the exercise of any new rights.

Therefore, when the instances of relief against forfeiture (7%) and the instances where landlords abandoned claims for rent (conservatively esti-

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88 In which case the tenant would be required to pay the rent owing but be entitled to continue in possession. The court may award such relief under s. 20 (1) and, in a proper case, s. 96 (3) (a) of the Act.

89 Although it must be acknowledged that under the reformed law the landlord must come to court to oust a tenant and thus bring the dispute into a forum where relief may be granted. Under the old law a tenant could have been evicted by self-help and then be unable to secure relief after the determination of the tenancy by the eviction. See s. 20 of the Act.
mated at 3%) are deducted from the total rate of tenants' success, a figure of 20% is arrived at which, I believe, more accurately describes the proportion of disputed cases in which tenants may be said to have effectively benefitted from the reformed law.

One final observation remains to be made with respect to success rates. There is some utility in looking at general success rates even though we are unable for most of the period studied to distinguish those cases in which defences were made from actions in which no defence was raised. It was seen in Part III\(^0\) that 1970 was a year in which tenants fared markedly better than in any succeeding period. They successfully defended against 15% of all claims for termination and 39% of all claims for rent\(^1\) as compared to an average in later years of around 5% of all claims for termination and 6% of all claims for rent. The modest point to be drawn from this comparison is that it is not unreasonable to expect a higher success rate than that which currently obtains when within the data there is evidence that tenants once derived a greater benefit from the reformed law than they now do. We have now no way of telling to what extent that was because they more often advanced defences or because they more effectively prosecuted those defences which were raised. It is unlikely, however, that the character of tenants and landlords has altered since 1970; and thus the decline might well be due to factors susceptible of control or alteration by a government concerned with the efficacy of its reformed law.

The points made thus far in the analysis may be summarized as follows. While tenants do not take the initiative in enforcing their rights, they do in one out of ten cases raise defences to actions brought by landlords. Where a defence is raised, tenants succeed under the reformed law against at least one claim made in somewhere between 20 to 30% of the cases. The low success rate for tenants generally seems, therefore, to be primarily a result of their failure to raise defences. Finally, the tenants' general rate of success is too low to enable us to be assured on that basis alone that tenants are deriving all the benefits from the reformed law which are intended for them. This skeptical position is reinforced when the success rates in 1970 are seen to be atypically high.

**The Role of the Lawyer**

The availability to tenants of legal advice and advocacy is one factor which bears upon their effectiveness under the reformed law. In addition to being useful to tenants as advocates in a litigated matter, lawyers are also potentially valuable sources of information about tenants' rights under the reformed law. Indeed, I suggest that in many cases a lawyer's\(^2\) assistance

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\(^0\) See Table 5, *supra* at p. 462.

\(^1\) Note, however, with respect to rent the possibility that landlords were at this time proceeding with actions for rent in Small Claims Court more frequently than in later years and consequently, were more prepared to abandon the claim in County Court. See text, *supra* at p. 458.

\(^2\) Here I include not only members of the Bar and law students, but also lay persons trained in landlord and tenant law.
is essential in order for the tenant to know where he stands under the re-
formed law. As has already been noted,93 many important sections in the
Act are worded in language impenetrable by the layman. The tenant’s de-
pendence upon lawyers is increased in the context of litigation in the County
Court, for there tenants are required to meet arguments made by landlords’
counsel in a formal, unfamiliar setting. Moreover, by placing landlord and
tenant disputes in the County Court, the Act denies the tenant recourse to
assistance at the hearing from persons other than lawyers. Unlike the case
with Small Claims Court and some actions in Provincial Court, for example,
the parties to an action in County Court may not be represented by an
agent.94 Thus, law students — potentially a sizable body of helpful advocates
— are precluded from appearing for tenants.

Despite the importance of legal assistance, in only 5% of the actions
during the period examined was the tenant represented at the hearing by a
lawyer.95 There may be many cases in which it would do a tenant no good
at all to have legal representation, the facts and the law being against him.
But it is too much to believe that in over 95% of all actions the tenant’s
case was so “hopeless”. If we look at the data concerning the number of
tenants who appear in their own behalf,96 we may surmise that of that sub-
stantial number, some, at least, were not appearing simply in response to a
document, but came to try to protect an interest. This is easier to see when
we examine those actions in which disputes were filed under the new proce-
dures. There, at least in the tenant’s view, a case could be made that the
landlord’s action was ill-founded.97 Yet, in only 27% of the 250 disputed
cases did the tenant appear with a lawyer.

Why tenants fail to obtain lawyers for hearings is not revealed by this
study and should be a matter of concern to those who further examine the
operations of the reformed law. It is, however, possible to speculate and to
derive some support for speculation from readily obtainable data. The first
and perhaps most likely possibility is that tenants cannot afford lawyers. In
addition to those tenants who lack the funds to hire a lawyer for any pur-
pose, there are those who will judge that the amount of money at stake is
not worth the expense of hiring a lawyer. The role played by the Parkdale
Community Legal Services Office98 in Toronto suggests that when free legal
assistance is available to those who could not otherwise afford it, tenants
secure representation more frequently. In a disproportionately large per-

93 See text, supra at p. 450.
94 Law Society Act, R.S.O. 1970, c. 238, s. 50 (1).
95 See Table 9, supra at 465. By 1973 tenants had lawyers in only 3.3% of actions.
96 Table 9, supra at p. 465. Tenants appeared in their own behalf in 30% of all
actions proceeding to judgment.
97 Indeed in a good number of those disputed cases, where a written dispute was
entered and the tenant was unrepresented, I judged that if the facts alleged by the
tenant were true (generally this involves his word against the landlord’s), the tenant
should have been granted the relief he in fact failed to obtain.
98 A project of Osgoode Hall Law School of York University offering free legal
services to the Toronto community known as Parkdale.
percentage of cases, lawyers appearing on behalf of tenants in 1972 and 1973 were from the Parkdale Office.\(^9\)

It hardly needs to be pointed out that where legal assistance is not available to tenants who have no resources to hire lawyers on their own, injustice may well be done. It is well beyond the purview of this paper to explore the role which the Ontario Legal Aid Plan plays in this regard. However, a brief examination of one month's\(^{10}\) operations of the York Area Legal Aid Office\(^11\) revealed that only 11 certificates were granted to tenants in that month. It would be worthwhile to explore the question of whether that is sufficient to meet the needs of poor tenants before the court.

An examination of the number of lawyers who appeared in court for tenants does not tell us how often tenants were able to obtain legal advice. It may be the case that tenants have sufficient access to lawyers to enable them to assess their legal position under the reformed law although the matters just discussed make this an uncertain supposition. Again it would be a valuable object for a study to determine how accessible lawyers are to tenants at all levels of a landlord and tenant dispute.

As a final point on the role of lawyers, it may be useful to examine the assumption upon which most of the foregoing discussion has proceeded. Is it the case that it is helpful to a tenant's cause for him to be represented by a lawyer at the hearing? The data do not permit us to do more than demonstrate that there is a higher success rate for tenants represented by lawyers than for tenants who appear in their own behalf. Taking again those 250 actions in 1972 and 1973 in which tenants filed disputes, we find that in those cases where there was a lawyer present tenants succeeded against all claims raised by landlords in 18% of the actions; they succeeded on one claim and lost on another in 28% of the actions; and lost on all claims made by the landlord in 54% of the actions. Where tenants appeared without lawyers, however, they succeeded against all claims in only 9% of the actions; they won mixed victories in 19% of the actions; and lost on all claims made by the landlord in 73% of the actions. Such results do not take into account the possibility that tenants sought and were able to secure representation more easily in those cases which they were more likely to win on the facts or the law.

Factors Outside the Court Context

Although this study has been focussed on actions proceeding to judgment in County Court, it is necessary to address briefly certain matters which lie outside the court context. I have already suggested that the availability of lawyers to tenants may be an important factor in assessing the degree to which the law has achieved its broad aim of enhancing the tenant's legal position. It would also be necessary in order fully to assess the efficacy of

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\(^9\) 18% of actions in 1972 and 1973 in which lawyers appeared. Parkdale does not contain 18% of Metropolitan Toronto's rented dwelling units.

\(^{10}\) January, 1973.

\(^{11}\) The "York Area" is co-terminous with the jurisdiction of the County Court examined in this study.
the reformed law to know to what extent tenants were securing their rights through mechanisms other than the court. Put another way, there may well be explanations for the rather infrequent use of rights by tenants in the court; tenants may be choosing not to use courts because they are obtaining satisfaction elsewhere.

I shall only attempt here to suggest certain obvious avenues of exploration which further studies might pursue. The first possibility is one which has been raised a number of times already. It is likely that a number of landlord and tenant disputes are settled without the parties having to resort to the judgment of the court. Some small evidence of this was obtained from a cursory examination of Legal Aid files in which certificates were granted to tenants. Of the 11 cases in which certificates were granted in January, 1973, four went to judgment in the County Court and five were settled by the lawyer for the tenant. On the other hand we saw in Part III that over the period studied an increasingly greater proportion of actions initiated in the court proceeded to judgment, until in 1973 only one quarter of all actions initiated were settled. This does not tell us to what extent matters are settled before one party initiates an action in the court. It does suggest, however, that in general the number of settled disputes may be declining.

Moreover, the fact that disputes may be settled out of court says nothing about whether tenants are effectively securing their rights through such settlements. Again because of the structure of the law and the fact that landlords tend to negotiate through lawyers, it becomes important to discover what access tenants have to lawyers.

Apart from private negotiation, tenants may take their complaints to the municipal Landlord and Tenant Advisory Bureau envisaged by the Act. This Bureau has as part of its function the giving of advice to landlords and tenants and the mediation of disputes between them. Such readily accessible data as exist indicate a high degree of use of this Bureau by tenants. This in turn makes an assessment of the work of the Bureau mandatory for anyone conducting a general efficacy study of the reformed law.

Finally, the possibility should be noted that tenants may take complaints about disrepair to municipal authorities responsible for the enforcement of housing standards by-laws. No data at all were obtained on this avenue of redress.

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102 See text, supra at p. 471. I examined the files of those cases in which Legal Aid certificates were granted by the York Area Legal Aid Office in the month of January 1973.
103 The remaining two were cases in which the tenant did not use the certificate at all.
104 See Table 2, supra at p. 454.
105 See s. 110 of the Act. Not every municipality has created such a Bureau.
106 Memorandum from the Municipality of Metropolitan Toronto Department of Housing to the Social Services and Housing Committee, “Re: Landlord and Tenant Advisory Bureau”, February 10, 1972.
107 In 1971 the Bureau received 1,178 written complaints from tenants, the vast majority of which were “acted upon and closed”.
Criticisms and Conclusions

In this paper I have attempted to make one point: a general efficacy study of the reformed law respecting residential tenancies is required. This is so as a matter of good law reform policy. Further, the results of my restricted study of actions in County Court do not speak against the necessity of the kind of broad, rigorous assessment argued for. On the contrary, the lack of substantial evidence of vigorous and effective use by tenants of their new rights in the court context increases the need to evaluate the workings of the law from other points of view.108

However, not all constructive criticism needs to await the outcome of further studies. I suggest that the results of even the limited study I performed indicate that insofar as the reforms aimed at redressing the imbalance in the law (which had favoured 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.

Not only were courts chosen, but the County Court in particular was selected. This in turn necessitated the involvement of lawyers rather than agents, should the tenant feel he needed assistance at the hearing. Moreover the way in which the law was drafted only served to increase the tenant’s dependence upon lawyers to secure his rights. Lawyers are expensive and many tenants cannot afford to purchase the required assistance. Even those who can may feel it is not worth the expense to enforce their rights under the law in the court. A right too expensive to use is no right at all.

Further acting to discourage tenants from making effective use of their rights is the fact that many persons find it intimidating to appear in the formal setting of County Court. To this may be added the disincentive that

108 One by-product and perhaps a symptom of the lack of forceful presentation of tenants’ positions is the dearth of reported cases interpreting the difficult sections of the Act. At the time of writing there have been only eight reported cases from the whole of Ontario:

Re Ontario Housing Corp and Carson, [1970] 1 O.R. 470 (C.A.)
Breglia Investments Ltd. v. Rock, [1972] 1 O.R. 728 (Co. Ct.)
Re Claydon and Quann Agencies Ltd., [1972] 2 O.R. 405 (Co. Ct.)
Re Ontario Housing Corp. and Dingle, [1972] 3 O.R. 123 (Co. Ct.)
Re Meridian Property Management and Lanteigne, [1973] 1 O.R. 341 (Divisional Ct.)

And of these only four really deal with issues of importance:
Claydon, Cunningham, Lanteigne, Caithness, supra.
(Carson had been superseded by the 1972 amendments).
the courts do not sit at hours convenient to the great majority of citizens, and to appear on a case may mean the loss of a day's pay for the tenant.

Such "over-judicialization" spells the inaccessibility to tenants of the law's remedies. Rather than constructing a readily comprehensible law and a people's court, the reforms appear to have built on a landlordly scale. What is needed now is a "re-formulation" of the reforms, in the light of this and other efficacy studies, to forestall the possibility that the reformed law is becoming only "paper rules".\textsuperscript{100}

\textsuperscript{100} The phrase is Llewellyn's, \textit{A Realistic Jurisprudence — The Next Step} (1930), 30 Colum. L. Rev. 431 at 449.