

Amended Order
Order under Section 100
Residential Tenancies Act, 2006
And section 21.1 of the Statutory Powers Procedure Act

File Number: TSL-16165-AM

In the matter of: [Address removed]

Between: [Landlord's name removed] Landlord

and

[Tenant's name removed] Tenant

and

[Occupant(1)'s name removed] Occupants
[Occupant(2)'s name removed]

[Landlord's name removed] (the 'Landlord') applied for an order to terminate the tenancy of [Tenant's name removed] (the 'Tenant') and to evict [Occupant(1)'s name removed] and [Occupant(2)'s name removed] (the 'Occupants'), unauthorized persons occupying the rental unit, and for compensation for the use of the rental unit.

This application was heard in Toronto on October 28, 2008 and January 28, 2009.

The Landlord's personal representative, [Landlord personal Representative's name removed], the Tenant and the Occupants attended the hearing. The Landlord was represented by [Landlord Representative's name removed]. The **Tenant** was represented by [Tenant Representative's name removed]. The Landlord called as witnesses the Landlord's personal representative and the superintendent, [Superintendent's name removed] (the 'Landlord's Witness'). The Tenant testified on his own behalf and also called as a witness his sister, [Occupant(1)'s name removed] (the 'Female Occupant').

This amended order is issued to correct a clerical error in the original order issued March 11, 2009.

Determinations:

1. The Tenant transferred the occupancy of the rental unit to the Female Occupant in a manner that was not authorized by the *Residential Tenancies Act, 2006* (the 'Act'). The Landlord did not enter into a tenancy agreement with this person.
2. The Female Occupant was in possession of the rental unit on the date the application was filed.

3. The Landlord is not estopped by law from bringing this application.
4. The Landlord is entitled to compensation for the use and occupation of the rental unit by the Occupant for the period commencing April 1, 2009.
5. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the Act, and find that it would be unfair to grant relief from eviction pursuant to subsection 83(1) of the Act.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated as of March 31, 2009.
2. The Occupants shall move out of the rental unit on or before March 31, 2009.
3. The Occupants shall pay to the Landlord \$11.49 per day for compensation for the use of the unit from April 1, 2009 to the date they move out of the unit.
4. The Occupants shall also pay the Landlord \$150.00 for the cost of filing the application.
5. The Occupants shall pay the Landlord the full amount owing by March 22, 2009.
6. If the Occupants do not pay the Landlord the full amount owing by March 22, 2009 they will owe interest. This will be simple interest calculated from March 23, 2009 at 4.00% on the outstanding balance.
7. If the unit is not vacated by March 31, 2009, then starting April 1, 2009, the Landlord may file this order with the Court Enforcement Office (the Sheriff), so that the eviction may be enforced.
8. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord after April 1, 2009.

March 11, 2009
Date Issued

Ruth Carey
Member, Landlord and Tenant Board

March 27, 2009
Date Amended

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on September 30, 2009 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.

REASONS

In the matter of: [Address removed]

Between: [Landlord's name removed] Landlord

and

[Tenant's name removed] Tenant

and

[Occupant(1)'s name removed] Occupants
[Occupant(2)'s name removed]

Reasons to Order TSL-16165 issued on March 11, 2009 by Ruth Carey.

The Landlord applied for an order to terminate the tenancy of the Tenant and to evict [Occupant(1)'s name removed] and [Occupant(2)'s name removed], as unauthorized persons occupying the rental unit, and for compensation for the use of the rental unit.

This application was heard in Toronto on October 28, 2008 and January 28, 2009.

The Landlord's personal representative, [Landlord personal Representative's name removed], the Tenant and the Occupants attended the hearing. The Landlord was represented by [Landlord Representative's name removed]. The **Tenant** was represented by [Tenant Representative's name removed]. The Landlord called as witnesses the Landlord's personal representative and the superintendent, [Superintendent's name removed] (the 'Landlord's Witness'). The Tenant testified on his own behalf and also called as a witness his sister, [Occupant(1)'s name removed] (the 'Female Occupant').

REASONS

The Facts

1. It was the evidence before me that the Landlord purchased the residential complex in which the rental unit is located in 1994 through power of sale. The residential complex is one of two related apartment towers, separated by a common courtyard, near the intersection of Eglinton Avenue and Yonge Street in downtown Toronto. The Tenant moved into the rental unit in 1991 and is the son of the developer who originally built the residential complex. The Occupants are his sister and her husband.

2. After the current Landlord purchased the building it discovered that there was a lease for the rental unit between the Tenant and the previous landlord which it had not known about prior to the sale closing. The lease set the total monthly rent for the rental unit with two parking spots at \$214.00, which was well below fair market value. When the Landlord discovered the existence of this lease it brought application to the appropriate court in an attempt to have the lease set aside. The litigation involving the lease lasted for a number of years and eventually, the Court of Appeal held that the lease was a valid lease and binding on the successor Landlord. This litigation between the parties seems to have resulted in a somewhat adversarial relationship and both the Landlord and Tenant before me took the position that the history of their relationship was important to understanding the application before me. As a result, that history is relayed in these reasons.
3. Over the years the Landlord has consistently served notices of rent increase annually on the Tenant raising the rent by the guideline amount. As of September 1, 2008 the monthly rent became \$354.35 which is still considerably below fair market value.
4. In 2002 the Landlord changed access to the residential complex from a key system to an electronic fob and key card access system. It sent out a form to all the tenants requesting information about how many of the new fobs and cards would be required. The Tenant returned the form indicating that he needed fobs and cards for himself and his sister who he listed as an occupant on the form. According to the Landlord's personal representative, this form was how the Landlord discovered the Tenant had someone else living in the rental unit with him. According to the Tenant, he has often had roommates over the years which the Landlord knew, or ought to have known about, as his rental unit is a two bedroom unit and physically located next to the unit occupied by the superintendent of the building.
5. Between 1995 and 1998 the Landlord brought approximately ten separate applications or actions against the Tenant, many of which were for termination based on arrears of rent. Presumably these applications were all dismissed or the Tenant paid the rental arrears owing. In the spring of 2002 the Landlord filed an application with the Ontario Rental Housing Tribunal pursuant to sections 78 and 81 of the *Tenant Protection Act, 1997* (the 'TPA'). The application alleged two things: that the Tenant had transferred occupancy of the rental unit to his sister; and that the Tenant had abandoned the rental unit. By way of Order TSL-40789 issued on July 29, 2003 the Tribunal dismissed the Landlord's application. The Order states that the application concerning the transfer of occupancy was dismissed as being out of time on the basis that such an application had to be filed within sixty days of the date the Landlord discovered the unauthorized occupant pursuant to subsection 81(2) of the TPA. The Order refers to the application as "void" and I believe that what the Member meant by that was that the Tribunal had no jurisdiction to consider the merits of the application because of the late filing. With respect to the allegation that the Tenant had abandoned the rental unit, the Tribunal dismissed it on the grounds that the application "discloses no reasonable cause of action considering the outcome of the unauthorized occupant application". The Landlord subsequently filed a request for review of that decision which was denied by way of Order TSL-40789RV issued on August 27, 2003 but appealed no further.

6. The Landlord entered into evidence a letter from the Tenant which was sent to the Landlord after the application discussed above in paragraph 4 was filed, but before it was finally disposed of. The letter is primarily about the Tenant's difficulty in enforcing the lease provision which gave him two parking spaces and his difficulty in obtaining access cards for his sister to use. However, it says in part: "I have not subletted [sic] nor have I assigned the unit to my sister...I reside in the unit. I sleep in the unit. My furniture is in the unit. All of my personal possessions are in the unit. I have one mailing address and that being [Address removed]."
7. In January of 2003 the Tenant filed an application against the Landlord. It alleged that the Landlord was in breach of the TPA by refusing to honour the lease provision which gave the Tenant two parking spaces, by refusing to provide a second electronic access key for his sister, and by filing numerous frivolous applications against him. That application was resolved by way of Order TST-05482 issued on December 1, 2003. The Tribunal found that the Landlord had harassed the Tenant and substantially interfered with his reasonable enjoyment by refusing to provide the second parking space, refusing to provide a second key card and because of its "past and recent applications for terminations" even though only one of those applications was within the limitation period set out in subsection 32(2) of the TPA. The Tribunal ordered the Landlord to provide an access card for the Tenant's sister, return the second parking space to the Tenant, pay a rebate of the rent, and "refrain from harassing the Tenant by issuing groundless applications".
8. Order TST-05482 also states that at the hearing of the Tenant's application, the Landlord argued that the Tenant had assigned the rental unit to his sister. As a result, the Landlord took the position that the Female Occupant should be named as the sole tenant for the purposes of any application to the Tribunal. In other words, the Landlord argued that the Tenant was no longer a tenant under the TPA by virtue of having transferred occupancy to his sister. The Landlord's argument was based on subsection 125(4) of the TPA which stated that: "A person's occupation of a rental unit shall be deemed to be an assignment of the rental unit with the consent of the landlord as of the date the unauthorized occupancy began" where no new tenancy agreement had been negotiated with the occupant, and no application had been brought to evict the unauthorized occupant within sixty days of the landlord discovering the unauthorized occupancy. The Tribunal rejected the Landlord's argument and found the Tenant to be a tenant as defined under the TPA. The Order states: "Although the Tenant stays at his girlfriend's apartment regularly, he rarely frequents his own unit because it is so inconvenient sharing one pass between himself and his occupant. He needs to have a card because his mail is directed to his unit and his belongings are in the unit." Order TST-05482 was never appealed or subject to review by either party.
9. The Tenant subsequently filed a second application against the Landlord based on the mistaken belief that the Landlord had failed to comply with Order TST-05482. When it was discovered that the Landlord had complied with the Order but that the Tenant's counsel had not communicated that to the Tenant, the application was dismissed by way of Order TST-06592 issued on February 4, 2004.

10. After that there was no more litigation between the parties until this application was filed on July 24, 2008. In fact there was very little contact between the parties at all. Correspondence was entered into evidence indicating that the Landlord consistently insisted that the Tenant's sister not communicate with the Landlord on behalf of her brother, and that only the Tenant could request repairs and replacement fobs and key cards. Correspondence was also filed between the Landlord and the Female Occupant concerning an incident in 2007 when sparklers on a birthday cake set off the fire alarm.
11. On June 12, 2008 the Tenant wrote a note to the Landlord stating that he had lost the two pass cards and needed replacements. The Landlord cancelled the old cards and prepared two new ones for the Tenant to pick up. However, the Tenant did not pick up the pass cards for some time. On July 8, 2008 he went to get them but the superintendent was on vacation so he had to go to the neighbouring building to pick them up there. He was asked to sign for them and produced identification which the superintendent photocopied. The photocopied identification was a driver's license which listed as the Tenant's address an address other than the rental unit. The Landlord immediately wrote to the Tenant stating: "your driver's license...clearly indicates that you do not reside [in the rental unit]... Although your sister is residing there, she is not an authorized tenant and it also seems that she has brought in another unauthorized occupant."
12. This reference to another unauthorized occupant is to the Female Occupant's spouse who is the second named Occupant to this application. They were married in late June of 2008 and he moved into the rental unit just prior to the wedding.
13. According to the Landlord's personal representative, it was only when he saw the driver's license on July 8, 2008 that he became aware that the Tenant had moved out of the rental unit. However, the Landlord's Witness, the superintendent of the residential complex, testified that the Female Occupant orally told her sometime in June 2008 that the Tenant had moved out. The Female Tenant acknowledged that she may have done so but could not remember when it was that she told the Landlord's Witness the Tenant had moved out.
14. The Tenant testified that he moved out of the rental unit sometime in 2004 and moved in with his girlfriend whom he married in 2005. The Tenant never informed the Landlord that he had moved out but indicated that he assumed that the Landlord knew because of the close proximity of his rental unit to that of the superintendent's. The Landlord entered into evidence the parcel register for the address on the Tenant's driver's license showing that there was an inter-spousal transfer of the property from the Tenant's wife to herself and the Tenant as joint tenants in 2006. The Tenant has not slept in the rental unit since he moved out, although he has some possessions including clothes there and uses the second parking space on a regular basis as it is conveniently located next to his gym club which he visits almost daily. He also has showered occasionally at the rental unit rather than at the club but the evidence seemed to indicate he has not done so since his sister married. The Female Occupant testified that the second bedroom in the rental unit contains a desk, some books and stored items and that the bed she sleeps on actually belongs to the Tenant as do various other furnishings which the Tenant left behind for her to use when he moved out. The Tenant entered into evidence documents that show he

continues to use the address of the rental unit as his address for cable services, for some of his bank accounts, and for correspondence with the City of Toronto.

15. There was conflicting evidence with respect to who actually pays the rent. According to the Tenant, he paid the rent exclusively until sometime after 2004; and after that it would vary between himself and his sister. The Female Occupant testified that she paid the rent exclusively for the eighteen month period prior to the last date of the hearing and that the Tenant last paid rent sometime in 2007. Given the vagueness of the Tenant's evidence and the specificity of the Female Occupant's on this point, I prefer her evidence over the Tenant's and find that the Tenant has not paid the rent for the rental unit since sometime in 2007.

The Issues

16. The legal issues that arise on this application may be summarised as follows:

- Did the Landlord file this application within sixty days of discovering the unauthorized occupancy as required by subsection 100(2) of the *Residential Tenancies Act, 2006* (the 'Act')?
- If the Landlord's application is within the time limit, did the Tenant transfer occupancy of the rental unit as contemplated in subsection 100(1) of the Act?
- If the Tenant did transfer occupancy as contemplated by subsection 100(1) of the Act, should the Landlord's application be dismissed as *res judicata* or through some other form of issue estoppel?
- If the Tenant did transfer occupancy and the application is not estopped by operation of law, should the Tenant be granted relief from eviction pursuant to section 83 of the Act?

Issue # 1: Did the Landlord file this application within sixty days of discovering the unauthorized occupancy as required by subsection 100(2) of the *Residential Tenancies Act, 2006* (the 'Act')?

17. The written submissions of the Tenant filed with the Board on this application put forward the proposition that the current application was not filed within 60 days of the Landlord learning that the Female Occupant was living in the rental unit. Those submissions correctly point out that the Landlord has known for several years that the Female Occupant was living in the rental unit and argue that: "The Landlord did not bring an application within 60 days of this knowledge". With all due respect to the Tenant's solicitor, it is irrelevant when the Landlord knew that the Female Occupant was living in the rental unit. Subsection 100(2) states: "An application under subsection (1) must be made no later than 60 days after the landlord discovers the **unauthorized occupancy**." [Emphasis added.] It is trite law that tenants are allowed to have guests and roommates so the mere presence of a roommate, guest or under-tenant in a rental unit is not the triggering event for the running of the time period set out in subsection 100(2). Rather, a roommate's occupancy only becomes "unauthorized" when a tenant "transfers occupancy" in a manner other than under sections 95 or 97 of the Act as set out in subsection 100(1).

18. There was ample evidence before me to indicate that the Landlord **believed** the Tenant moved out and transferred occupancy years before this application was brought. That is why it made the application alleging the Tenant abandoned the rental unit in 2002 and transferred the tenancy to his sister. When that application was dismissed the Tenant could have taken the position that he was no longer the tenant of the unit but that he had transferred his tenancy to his sister, the Female Occupant. This is because under section 17 of the TPA, when a transfer of occupancy occurs the occupant becomes the lawful tenant and the previous tenancy essentially ends as against the original tenant but continues on the same terms against the new tenant, the former occupant. As the Landlord's application was dismissed, the Tenant could have relied on section 17 to say his sister was now the tenant but he did not. Rather he continued to take the position he was in possession of the rental unit and the Tribunal accepted that as a fact in Order TST-05482 issued on December 1, 2003. According to the evidence of the Landlord's personal representative, the Landlord accepted the Board's finding that the Tenant was still in possession and his sister was still a mere occupant rather than a tenant.
19. The Tenant testified that he moved out sometime in 2004 but that he did not inform the Landlord that he had done so. The only evidence before me that the Tenant moved out earlier than 2004 was in the form of a request for a summons in this application that was filed by the Tenant that he completed himself. It says in part: "During a conversation with the ... [L]andlord... on July 24, 2003... [the Tenant's former solicitor] will be able to testify that the ... [L]andlord had knowledge the [T]enant had clearly abandoned the unit. The evidence from ... [the Tenant's former solicitor] will help demonstrate that the ... [L]andlord had knowledge of the abandonment more than six (6) years before the date of the new application..."
20. The reason this is important is because if the Tenant moved out prior to July 24, 2003 and the Landlord knew that fact, then the current application must be dismissed on the basis that it was not brought within 60 days of the Landlord discovering the unauthorized occupancy as required by subsection 100(2). However, when I asked the Tenant to explain his wording in the summons request he stated that he was merely repeating the views expressed by the Landlord on July 24, 2003 which were not in fact his views. In other words, the Tenant denied he had moved out prior to July 24, 2003 despite the clear wording to the contrary in his request for a summons, and maintained he had not moved out until some time in 2004. It seems to me that the wording in the summons request that the Landlord "had knowledge" the Tenant "clearly" abandoned the unit supports the proposition that the Tenant moved out prior to July 24, 2003 and raises questions about the Tenant's credibility. However, given that the Tenant's oral testimony in this regard is clearly against his interest on this application, and given that there is no other evidence to the contrary, I accept that the Tenant moved out of the rental unit sometime in 2004.
21. The only evidence before me with respect to when the Landlord learned the Tenant had moved out was the evidence that the Female Occupant told the Landlord's Witness about it sometime in June 2008, and the discovery of the different address on the Tenant's driver's license on July 8, 2008. The Tenant speculated that the Landlord must have known before that because the superintendent's apartment is close to his. In her submissions, the Tenant's solicitor stated that it belies credibility to say that the Landlord has never once noticed the Tenant was not sleeping in the rental unit over the last five

years. I disagree. It seems to me that even if the apartments are next to one another, it does not necessarily follow that the superintendent is sufficiently aware of the comings and goings of everyone in the rental unit to know for a fact who is and who is not living in the rental unit. This is particularly true as those comings and goings could be expected to happen early in the morning and sometime in the evening. In addition, it was the Landlord's Witness's evidence that as far as she knew, the Tenant was living in the rental unit up until the conversation where she was told otherwise by the Female Occupant sometime in June of 2008 and that evidence was not undermined through cross-examination in any way. As a result, I am satisfied that the Landlord discovered the Tenant had moved out sometime in June or July of 2008. I am also satisfied the Landlord discovered the presence of the Male Occupant shortly after he moved in near the end of June 2008 as reflected in its correspondence of July 8, 2008. As this application was filed on July 24, 2008 I find that the Landlord filed this application within sixty days of discovering the unauthorized occupancy as required by subsection 100(2) of the Act.

Issue # 2: If the Landlord's application is within the time limit, did the Tenant transfer occupancy of the rental unit as contemplated in subsection 100(1) of the Act?

22. Subsection 100(1) of the Act states: "If a tenant transfers the occupancy of a rental unit to a person in a manner other than by an assignment authorized under section 95 or a subletting authorized under section 97, the landlord may apply to the Board for an order terminating the tenancy and evicting the tenant and the person to whom occupancy of the rental unit was transferred." There was no dispute between the parties that at no time did the Tenant request consent to assignment or approval of a subtenant.
23. Both parties before me seemed to believe that the Landlord's consent was necessary before any legal sublet or assignment could occur. I would point out that a careful reading of paragraph 95(3)(c) contrasted with section 97 indicates that a landlord can refuse a tenant the right to assign a rental unit but it cannot refuse the right to sublet. Rather, with respect to subletting, the only right a landlord has is to refuse consent to the specific person who will be the subtenant and that consent cannot be unreasonably withheld. In other words, under the current Act, if the Tenant had said he wanted to sublet the rental unit for a fixed term to his sister the Landlord could only have refused if there was some rational reason that the Female Occupant was not an eligible candidate for a subtenancy.
24. In any case, the legal issue for the purposes of this application is what is the meaning of the phrase "transfers the occupancy of a rental unit" found in subsection 100(1)?
25. The Tenant's solicitor correctly pointed out that subsection 2(3) of the Act states that a tenant cannot be found to have abandoned the rental unit if there are no arrears of rent and the Tenant is not currently in arrears of rent. However, subsection 100(1) does not state that it only applies where "a tenant abandons a rental unit and transfers occupancy"; only a transfer of occupancy is mentioned and abandonment does not appear as a requirement in section 100. I am of the view that if the legislature intended for section 100 to only apply where a tenant could be said to have abandoned a rental unit, it would have done so. This was also the conclusion of the Ontario Court of Appeal with respect to the same phrase "transfers the occupancy of a rent unit" in section 81 of the TPA in *Samuel*

Property Management Ltd. v. Nicholson and Federation of Metropolitan Toronto Tenants' Association, [2002] Docket No. C37636. At paragraph 17 of that decision, the Court of Appeal stated: "Abandonment cannot be the test of whether a transfer of occupancy has occurred."

26. The Tenant's solicitor also correctly stated that the definition of "tenant" in the Act includes a person who pays rent for the right to occupy. Given the Female Occupant's evidence that she has paid the rent continuously since sometime in 2007 I am satisfied that the Tenant in fact no longer pays the rent. However, I do not believe this issue has any bearing on the outcome of this application as the definition of "rent" in the Act clearly includes money "paid on behalf of a tenant" as well as money paid directly by a tenant.
27. The Tenant also argued that a tenant is entitled to have guests and submitted *McLean v. Leisureland Community Co-operative Ltd.*, 2002 SKCA 108 and the Board's decision in SOT-00022 issued March 26, 2007 as support for that proposition. *McLean* is a decision of the Saskatchewan Court of Appeal and concerns a very different statutory scheme regulating landlord and tenant relations. The Tenant's written submissions also argued that as the spouse of the Female Occupant (who is described in those submissions as an "authorized occupant"), the Male Occupant is also permitted to live in the rental unit and cites SOT-00022 as support for that proposition as well. As a decision of a fellow Member of the Board, SOT-00022 is not binding on me and involves a situation where a tenant married and the landlord took the position his spouse could not move in because he had not approved her as a tenant. However, the point is non-controversial between the parties: tenants are obviously permitted to have guests and roommates subject to any municipal overcrowding by-laws. However, the issue here is not the Tenant's right to have overnight guests or roommates; rather the issue is whether or not the Tenant has transferred occupancy of the rental unit as contemplated by section 100 of the Act.
28. Essentially, it was the Tenant's position that there is no obligation in the Act requiring a tenant to occupy his or her own rental unit. In fact subsection 13(2) says that a tenancy begins on the date set for it to begin regardless of whether or not the tenant actually has moved in. As a result, the Tenant argued that whether or not a tenant actually lives in the rental unit cannot be the triggering event for a finding that there has been a transfer of occupancy.
29. Both parties seemed to take the position that the triggering event for a transfer of occupancy should be when a tenant was no longer a tenant "in possession" as that phrase has been interpreted by the Courts. The phrase "in possession" appears multiple times in the Act for both tenants and subtenants but it does not appear in section 100. It seems to me that the phrase "transfers occupancy" in subsection 100(1) should be given its plain and obvious meaning unless the rest of the Act indicates the phrase should be interpreted differently. I am of the view that the plain meaning of the phrase "transfers occupancy" is that it refers to the situation where a tenant stops being an occupant of a rental unit and lets someone else either remain in the rental unit as an occupant or move in after the tenant has moved out. That situation is in contrast to the situation where a tenant has multiple residences and lives elsewhere much of the year or simply does not live in the unit at all. In other words, while it is true that the Act does not require a tenant to live in a vacant rental unit, section 100 does require a tenant to live in the rental unit if

someone else is living there, unless the tenancy has been assigned or an approved sublet is in place pursuant to sections 95 and 97.

30. That being said, as the Tenant's solicitor pointed out, there is no definition of "occupant" or "occupancy" in the Act. Black's Law Dictionary defines "occupant" as a "person in possession...who can control what goes on on premises. One who has actual use, possession or control of a thing." As a result, it seems to me that the jurisprudence regarding the meaning of the phrase "in possession" can essentially be relied on in consideration of the meaning of "occupancy" in section 100 even though the phrase "tenant in possession" does not appear in that provision.
31. Both parties relied on the Court of Appeal's decision in *1162994 Ontario Inc. v. Bakker*, [2004] O.J. No. 2656 as the leading case on the meaning of the phrase "tenant in possession". In *Bakker* four tenants signed a lease and three had permanently vacated years prior to the application being brought. At issue was whether or not the Ontario Rental Housing Tribunal had the jurisdiction to make an order against the three tenants who moved out under section 87 of the TPA as that section stated that a landlord could only apply to the Tribunal if the "tenant is in possession of the rental unit". At paragraph 13 of the decision the Court of Appeal stated that whether or not a tenant was in possession was a different question distinct from the issue of whether or not the tenant was liable for rent arrears under a lease. At paragraph 6 it stated that tenants in possession were a subset of all tenants under the Act. In paragraph 20 of *Bakker* the Court of Appeal stated: "possession of a rental unit refers to some form of control over that unit as demonstrated by factors such as access to, use of, or occupation of the unit." In the end result, the Court of Appeal held that Mr. Bakker was no longer a tenant in possession as he had relinquished all control over the rental unit several years prior to the application being brought.
32. Although I am satisfied that *Bakker* stands for the relevant proposition that whether or not a tenant is in possession is a finding of fact, I am of the view that the Court of Appeal's decision in *Nicholson* is more directly on point. In *Nicholson*, cited above, the tenant had moved out of the rental unit into a house with his family and permitted two friends to move in. It was the evidence before the Tribunal that Mr. Nicholson still had keys to the rental unit and a parking permit, and would sleep in the rental unit occasionally when he had business in Toronto. He had constructed an additional bedroom in the basement for his own use and kept some clothes and furniture there. In considering whether or not Mr. Nicholson had transferred occupancy to his two friends the Court of Appeal stated:

"Although Nicholson could take on a roommate without transferring occupancy of the unit, that is not what happened here, as the Tribunal recognized. Nicholson and his family have a home elsewhere. When he moved into that home, he handed over to his two friends – without the knowledge or consent of the [Landlord] – the day-to-day occupancy of the rental unit."
33. The Court of Appeal concluded that Mr. Nicholson had transferred occupancy of the rental unit within the meaning of section 81 of the TPA and stated such a finding was consistent with the purpose of the provision which was "to protect the landlord's

expectation that the person with whom it contracted has a sufficient level of interest in the rental unit and the landlord's right to approve of anyone else who wishes to take over the unit."

34. I can see no reason to distinguish between the instant case and that of *Nicholson* as the wording of the phrase "If a tenant transfers the occupancy of a rental unit to a person" in subsection 81(1) of the TPA is identical to the wording under consideration here and as found in section 100 of the Act. Clearly the Tenant retains some connection to the rental unit in that he occasionally showers there, uses the parking regularly, keeps some possessions there, and receives some of his mail there. That was also the case in *Nicholson*. In fact Mr. Nicholson had a greater connection to his unit than the Tenant does in that Mr. Nicholson kept a bedroom for his exclusive use and actually slept there on occasion. As a result, if Mr. Nicholson's connection to his rental unit was such that he was found to have transferred occupancy by the Court of Appeal, then I believe it is reasonable for me to conclude that the Tenant in this case has also transferred occupancy of his rental unit within the meaning of section 100 of the Act.
35. The Landlord's representative filed a number of other cases with the Board concerning this issue but none of them are from the Court of Appeal or higher or more directly on point than *Nicholson*. As a result, I do not consider them to be particularly relevant.

Issue # 3: If the Tenant did transfer occupancy as contemplated by subsection 100(1) of the Act, should the Landlord's application be dismissed as *res judicata* or through some other form of issue estoppel?

36. In the Tenant's written submission and at the hearing before me, the Tenant's solicitor raised the argument that the Landlord's application should be dismissed by application of the doctrines of *res judicata* or some other form of issue or action estoppel. As I stated at the hearing, the Board is not a court of equity or common law. The Board's authority lies strictly in its constituent statute. As a result, the Board is not required to strictly apply common law or equitable doctrines that apply to court proceedings. However, subsection 23(1) of the *Statutory Powers Procedure Act* (the 'SPPA') states: "A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes." The SPPA clearly applies to proceedings before the Board and I believe that subsection 23(1) is intended to give an administrative tribunal the power to consider issues of abuse of process. I am of the view that the doctrines of *res judicata* and estoppel were specifically developed by the courts to prevent abuses or process and as a result, the case law concerning those doctrines is relevant to the proceedings before the Board pursuant to subsection 23(1) of the SPPA. In addition, section 83 of the Act specifically states that the Board may refuse an application for eviction, even where a landlord has established it is entitled to termination of the tenancy, unless it would be unfair to do so. Finally, the Tenant filed with the Board the Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328. That decision does not discuss why a labour arbitrator has the jurisdiction to apply equitable or common law doctrines, but clearly indicates the Court was of the view the law was applicable to proceedings before an arbitrator. As a result, I am satisfied I have the jurisdiction to hear the Tenant's argument on this point and I permitted both parties to make post hearing submissions concerning the estoppel argument.

37. The Tenant's position is that the Landlord's application in the spring of 2002 alleging that the Tenant had transferred occupancy of the rental unit to his sister and that the Tenant had abandoned the rental unit gives rise to issue estoppel or cause of action estoppel. This is because the application in Board file TSL-40789 was between the same parties and put forward the same ground for eviction as in this application, namely that the Tenant had transferred occupancy to his sister in a manner not authorized by the legislation in force at the time.
38. The Tenant filed an interesting article from December 1990 by Gary D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality", *Canadian Bar Review*, 69(4), 623 – 668. Most of the article is not relevant to the application before me as it deals with whether or not mutuality is a requirement for the application of the estoppel doctrines which is not an issue in this application. However, it does provide at pages 626 to 627 useful explanations of the various terms in this area as follows:

Res Judicata is a form of estoppel and operates through the application of two doctrines or species: cause of action estoppel... and issue estoppel... Cause of action estoppel simply means that where the legal claims and liabilities of two parties have been determined in a prior action, the *claims* may not be relitigated. If the cause of action was determined to exist, it is said to be *merged* in the judgment. If it was determined not to exist any subsequent action is barred.

Issue estoppel is an extension of the same rule of public policy, but it focuses not on claims or causes of action, but on *issues*. It precludes relitigation of issues that a court has decided in a prior suit. If the cause of action involved in a subsequent proceeding is a separate and distinct one, cause of action estoppel will not apply...

For issue estoppel to apply, certain requirements must be met...: (1) the same issue must be involved in the initial and subsequent litigation; (2) the issue must have been actually litigated and determined in the first suit and its determination must have been necessary to the result in the litigation; and (3) the decision on the issue in question must have been final.

39. I believe that excerpt from the article provided is essentially consistent with all of the case law presented by the Tenant.
40. The Tenant also provided the case of *Smith Estate v. National Money Mart Co.* (2008) 92 O.R. (3d) 641 (O.C.A.) which basically stands for the proposition that a change in the applicable law may give rise to a party having the right to re-litigate an issue but it is within the discretion of the court to ensure that the finality principle is applied in a matter consistent with the principles of fundamental justice. The reason this is relevant is because the Landlord's prior application was brought under the TPA whereas the current one is brought under the current Act. I am of the view that the key issue in an application under section 100 is whether or not the tenant transferred occupancy of the rental unit in

a manner not authorized by the Act. As the exact same wording was used in the TPA, I do not believe this would be an appropriate case in which to say the Landlord is entitled to re-litigate based on a change in legislation. I say that because the major change between the two pieces of legislation was the remedy that a landlord could obtain and not the grounds of the application.

41. The difficulty I have with the Tenant's submission is that it assumes that the **grounds** cited for the previous application is the same thing as the **issue** in the previous application. In other words the Tenant is essentially taking the position that as the Landlord brought one application alleging he transferred his tenancy improperly then it can never bring another application alleging a transfer of the tenancy. This misconstrues the requirement as set out in the Watson article for issue estoppel that the same **issue** must have been litigated. In the application that was filed in 2002, the issue was whether or not the Tenant had moved out prior to that application being brought and relinquished control of the rental unit to his sister. The issue in this application is whether or not the Tenant moved out after the first application and left his sister in control of the rental unit. Based on the Tenant's evidence and for the reasons stated above, I have found the Tenant moved out sometime in 2004 after all of the previous litigation. That is a substantial and material change in circumstances.
42. It is very commonplace for landlords to bring multiple applications against a tenant during the course of a tenancy for rent arrears. In fact, that happened between these parties with respect to this tenancy. Each arrears application is based on a different period of time so the **issue** is different because the arrears sought are different, but the **grounds** for termination and the remedy sought is the same. If I accepted the Tenant's proposition with respect to this application then I would essentially be saying that once a landlord has brought application for arrears once, it is forever barred from bringing another arrears application against the same tenant even where new arrears have arisen. Such a result would be an absurdity and as I result, I am of the view that where an application is brought based on a transfer of occupancy after the tenant moves out, a previous application brought **before** the tenant actually moved out cannot bar the second application as the issue is different due to the material change in circumstances. Therefore, I do not believe the doctrine of issue estoppel applies to bar the Landlord from making this application.

Issue # 4: If the Tenant did transfer occupancy and the application is not estopped by operation of law, should the Tenant be granted relief from eviction pursuant to section 83 of the Act?

43. The Tenant's solicitor submitted in her oral argument that the Landlord's conduct over the course of the tenancy was such that it might be characterised as acting in bad faith because of the extensive history of litigation between the parties. The Landlord pointed out that the Tenant had also exercised his legal rights and brought applications against the Landlord, one of which was granted and one of which was not.
44. The Female Occupant and the Tenant also stated in their evidence that in their view the Landlord was "playing games" with them. For example, the Landlord flatly refused to deal with the Female Occupant as the Tenant's agent and insisted that any request for repairs come from the Tenant. The Landlord took the position it had the right to insist on dealing

directly with the Tenant. It is not clear to me that the Landlord actually had the right to do that with respect to repair issues as a landlord's obligation under section 20 of the Act is to repair premises regardless of how the knowledge of disrepair comes to it.

45. As a result, I accept the premise that this Landlord has not always behaved towards the Tenant and the Female Occupant in the most rational and professional manner. However, I believe the Tenant's behaviour has not always been exemplary either. It seems to me that the Tenant knew or ought to have known that whether or not he was living in the rental unit was of relevant legal concern to the Landlord because of the litigation between them; but he made no effort to inform the Landlord he had moved, and made no effort to obtain consent to assignment or consent to subletting to his sister when he moved out. According to him he did so because the Landlord would never have consented, but if that were the case then the Tenant would have had the right to make application to the then Tribunal under section 33 of the TPA for an order authorizing the assignment or sub-tenancy.
46. As a result, I do not believe the behaviour of either of the parties over the course of the tenancy is sufficient to justify refusing the Landlord's application.
47. The Tenant obviously does not need the rental unit in order to have a home and the evidence indicated the Occupants have sufficient means to find alternative housing. Based on all of the evidence before me and as discussed above, I find that it would be unfair to grant relief from eviction pursuant to subsection 83(1) of the Act. Therefore an order will go terminating the tenancy and evicting the unauthorized Occupants.
48. The Landlord's application also requested daily compensation but the evidence before me was that all of the rent owing had been received by the Landlord up to the date of the hearing before me. As a result, an order will go for daily compensation effective April 1, 2009 and up until the Landlord regains possession of the rental unit.

March 11, 2009

Date Issued

March 27, 2009

Date Amended

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

Ruth Carey

Member, Landlord and Tenant Board