

CITATION: CROSKERY v. POMEROY, 2025 ONSC 4528
COURT FILE NO.: CV-24-95012
DATE: 20250805

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MICHAEL CROSKERY, Plaintiff

- And -

GRAHAM STANLEY POMEROY, Defendant

BEFORE: Associate Justice Kamal

COUNSEL: C. Ryan Bodnar, for the Plaintiff, Michael Crosker

HEARD: August 5, 2025, in writing

ENDORSEMENT

1. The plaintiff, Michael Croskery, brings a motion in writing seeking leave to issue a Writ of Possession, pursuant to Rules 60.03 and 60.10 (1) and (2) of the *Rules of Civil Procedure*.
2. The Plaintiff is the second mortgagee for the property known municipally as 513 Lyon Street North, Ottawa, ON K1R 5X8 (the “Mortgaged Property”).
3. These motions are often dealt with in writing, without notice, as long as the materials satisfy the requirements to grant the order requested.
4. However, the plaintiff, Michael Croskery, also seeks an order that the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17 does not apply to the Mortgaged Property as a result of section 5(i) of the *Residential Tenancies Act*.
5. For the reasons that follow, I am not prepared to make an order pursuant to section 5(i) of the *Residential Tenancies Act* in writing, based on the evidence before me. Therefore, I am also not able to grant leave to issue a Writ of Possession.

Background

6. The Defendant defaulted under the mortgage, and an Order was obtained on July 24, 2024, for the balance owing under the mortgage and possession of the Mortgaged Property.

7. There are numerous people living at the Mortgaged Property, who are purported to be tenants.
8. On November 8, 2023, one of the occupants advised the Plaintiff's inspector that there are three persons living in the Mortgaged Property. The occupant advised that one of the people who resides at the property is the mortgagor, who resides there fifty percent of the time.
9. On November 5, 2024, the same occupant stated there are five persons living at the premises, each of whom has their own room but share one bathroom and the kitchen. On that date, the same occupant advised that the mortgagor does not occupy the Mortgaged Property.
10. On January 22, 2025, the mortgagor contacted the Plaintiff's lawyer's office via email and confirmed that he does reside at the Mortgaged Property and that he also has a cottage.

Jurisdiction

11. I have considered my jurisdiction in deciding the request relating to section 5(i) of the *Residential Tenancies Act* ("RTA").
12. [Section 168\(2\)](#) of the RTA states:
The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.
13. When considering if the Board has jurisdiction over a matter, courts have identified the "essential character of the dispute" as being the proper criteria to be applied. See [Mackie v. Toronto \(City\) and Toronto Community Housing Corporation, 2010 ONSC 3801](#), at [para. 44](#).
14. Section 9 states as follows:
9(1) A landlord or a tenant may apply to the Board for an order determining,
(a) whether this Act or any provision of it applies to a particular rental unit or residential complex;
(b) Any other prescribed matter.
(2) On the application, the Board shall make findings on the issue as prescribed and shall make the appropriate order.
15. The language of s. 9(1) allows, but does not require, anyone to make an application for a determination under the RTA. Subsection 9(2) requires that the LTB make findings and an order on any such application, but does not create an obligation on a party to bring an application.

16. In my view, the LTB does not have exclusive jurisdiction to decide whether s. 5(i) applies, and therefore, where the *RTA* applies. The Superior Court of Justice has jurisdiction to decide this issue.
17. Pursuant to Rule 37.02(2), an Associate Judge has jurisdiction to hear any motion in a proceeding, and all the jurisdiction of a judge in respect of a motion except where the power to grant the relief sought is conferred expressly on a judge by a statute or rule: Rule 37.02(2)(a). This exception does not apply.
18. Similarly, the other exceptions in Rule 37.02(2)(b)-(g) do not apply.
19. Accordingly, I am satisfied that I have jurisdiction to determine this motion.

Law and Analysis

20. Before I determine the request for leave to issue a Writ of Possession, I must first consider whether the *RTA* applies to this property.
21. Section 5 of the *RTA* states:
Exemptions from Act
5 This Act does not apply with respect to:
 - (i) living accommodation whose occupant or occupants are required to share a bathroom or kitchen facility with the owner, the owner's spouse, child or parent or the spouse's child or parent, and where the owner, spouse, child or parent lives in the building in which the living accommodation is located;
22. Section 1 of the *RTA* states that the "purposes of the Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions... to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes."
23. The reason these sections of the *RTA* are important is because section 48 of the *Mortgages Act* states that no person exercising rights under a mortgage may obtain possession of a rental unit from the mortgagor's tenant except in accordance with the *RTA*.
24. In determining whether the *RTA* applies to the Mortgaged Property, as it relates to the request for leave to issue a writ of possession, I must consider the purposes of the *RTA*.
25. The purposes of the *RTA* specifically includes protection for residential tenants from unlawful evictions. If I find the *RTA* does not apply, this finding may have the effect of precluding the owner of the property or any of the residents from seeking relief from the Landlord and Tenant Board. See section 1 of the *RTA*.

26. The court considered the proper interpretation of s. 5(i) in [Cowie v. Bindlish, 2010 ONSC 2628 \(Div. Ct.\)](#), and stated as follows:

17 Any interpretation of section 5 (i) of the Act that would permit the respondent to unilaterally cause the board to be deprived of its jurisdiction to hear the appellant's application by forming an intention in her own mind without communicating it to the appellant or by moving into the house at a later time would be contrary to the language of the section and the intention of the Legislature and would be grossly unfair. It would also effectively result in an unwarranted revision of the tenancy agreement that the parties had made.

18 Any such interpretation would also, in my view, be inconsistent with the objectives of the Act as reflected in sections 1 and 3 (1) of the Act.

27. In [SWL-17145-18, 2018 CanLII 88667 \(ON LTB\)](#), the landlord and tenant initially shared the kitchen and bathroom, until the landlord moved to a new residence with his spouse and baby. The LTB found that the *RTA* applied from the date the landlord vacated the premises. The LTB found that, while the landlord's departure was a unilateral action that would affect the tenancy, its finding was nonetheless consistent with this court's holding in *Cowie v. Bindlish* because the unilateral act would cause the *RTA* to apply, rather than to cause the *RTA* to cease to apply.
28. In a case where the LTB found that Act applied as the occasional use of the second-floor bathroom did not make it "required" within the meaning of s. 5(i) of the Act. The Divisional Court upheld its finding. See [Fisher v. Michel, 2022 ONSC 6558](#). The Court and the LTB also found that the *RTA* grants the Board authority to look beyond the external appearance of the agreement and look at its substance.
29. In [TET-87517-18-IN, 2018 CanLII 42846 \(ON LTB\)](#), in considering section 5(i), the LTB found that the Act did apply because the landlord actually resided in a separate unit and "staged" his living situation to evade the application of the *RTA*.
30. In [TET-79055-17-RV, 2017 CanLII 60359 \(ON LTB\)](#), the LTB found that the s. 5(i) exemption applied because it was clear at the outset of the tenancy that the landlord's daughter would be moving into the premises and that the kitchen and bathroom would be shared. The daughter's delay in moving in did not cause the *RTA* to apply.
31. In the case before me, the Plaintiff submits that the authorities and legislation are straightforward; where it is found that the owner shares the kitchen or bathrooms with the other occupants, the *RTA* will be found not to apply. I do not agree.
32. What the above cases demonstrate is that the application of the s. 5(i) exemption very much turns on the facts in evidence in a particular case. The question of whether or not section 5(i) of the *RTA* applies so as to exclude the application of the *RTA* turns on the facts of each case. See [McKnight v. Kirk, 2022 ONSC 3617](#).

33. I must have a full understanding of the circumstances of the living arrangements in the property including, for example, when the owner began residing at the property, whether the owner lives in a separate unit, and any other relevant information.
34. Another important question is whether the owner resided in the property at the beginning of the tenancy, or later on? See [Quin v McCaughey, 2016 ONSC 7921](#), at [paras. 20 and 21](#) and [Azevedo v. Lograsso, 2019 ONSC 4267](#), at [para. 23](#).
35. In my view, the evidence placed before me is not sufficient for me to determine whether s. 5(i) applies, which would have the effect of ousting the ability for either the occupants or the owner to pursue a remedy from the Landlord and Tenant Board for any issue. The evidence does not provide me with enough information to grant the order requested. It contains conflicting evidence, some of which is dated. Moreover, it does not provide me with the complete picture of the circumstances including the living arrangements and tenancy relationships. Therefore, I am unable to grant the order requested based on the record before me.
36. In [Haventree Bank v. Lording, 2023 ONSC 1077](#), Justice Kurz stated: “Here, I am being asked to make an order for possession that will effectively evict a person (or persons) from their home based on improper materials. If the court is going to make such an order, it should not be too much to ask of counsel and the financial institution they represent that they provide the court with proper materials to substantiate their request.”
37. In the present case, the issue is even more serious. I am being asked to effectively evict a person (or persons) from their home and determine whether the *RTA* applies, which may result in cutting the landlord and/or tenants off of their rights under the *RTA*. Such determinations have a greater impact than just obtaining leave for a writ of possession. Such determinations affect more than just the mortgagor and mortgagee.
38. If I determine that the *RTA* does not apply to the owner and the tenants for the purpose of this request for leave to issue a writ of possession, such finding will prejudice the owner and tenants from seeking recourse in any aspect of the *RTA* and from the Landlord and Tenant Board. When the *RTA* does not apply, certain tenant rights might be more limited. This includes protections regarding eviction, rent increases, maintenance issues, and other rights and protections under the *RTA*. Similarly, the landlord is entitled to protections under the *RTA*, including on-time payment of rent.
39. A finding that the *RTA* does not apply should not be made without sufficient evidence about the specifics of the living arrangements and an understanding of the relationship between the owner and tenants. For example, whether the owner resided in the property during the entirety of the tenancy, when the owner moved in (or moved out), and whether the owner is residing in the same unit.

40. Furthermore, such a finding should not be made without the opportunity for the owner and tenants to provide submissions. In my view, before making a finding that the *RTA* does not apply, notice needs to be given to the owner and the tenants. The owner and tenants need notice that the Plaintiff is specifically seeking an order that *RTA* does not apply because it affects their rights beyond the issues in this action. Accordingly, the owner shall serve the motion record on the Defendant and the tenants by personal service.
41. I acknowledge that Rule 60.10 states that leave for a writ of possession *may* be obtained on motion without notice. However, based on the overall request made and the facts of this case, in my view, it is in the interests of justice that notice be given.

Conclusion

42. This motion is adjourned to a date to be scheduled for oral submissions, subject to the following next steps:
- a. The Plaintiff shall serve the motion record on the owner and the tenants.
 - b. The Plaintiff may serve and file additional evidence.
 - c. The owner and tenants may serve and file any materials (including affidavit evidence and/or a factum) in this motion within 20 days of being served with the motion record.
 - d. The Plaintiff shall contact the Office of the Associate Judges to schedule a date for oral submissions for a maximum of one (1) hour before me.

Associate Justice Kamal

DATE: August 5, 2025