Order under Section 16.1 of the Statutory Powers Procedure Act and the Residential Tenancies Act, 2006

Citation: Thorpe v Brantwood Residential Development Centre Inc., 2024 ONLTB 79521
Date: 2024-10-25
File Number: LTB-T-003029-24-IN &
LTB-L-029353-24-IN &
LTB-L-037507-24

In the matter of: 21 KERR SHAVER TERR
BRANTFORD ON N3T6H7

Between:	Heather Thorpe	Tenant
	Shelley Thorpe	Agent of Tenant
	And	
	Brantwood Residential Development Centre Inc.	Landlord

I hereby certify this is a true copy of an Order dated
OCT 25, 2024
Nancy Mavis
Landlord and Tenant Board

INTERIM ORDER

Heather Thorpe and Shelley Thorpe (the 'Tenants') applied for an order determining that Brantwood Residential Development Centre Inc. and Brigette O'Neill (the 'Landlords') substantially interfered with the reasonable enjoyment of the rental unit or residential complex for all usual purposes by the tenant or a member of their household;

The Landlord applied for an order to terminate the tenancy and evict the Tenant because:

- the Tenant, another occupant of the rental unit or someone the Tenant permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant;
- the Tenant, another occupant of the rental unit or a person the Tenant permitted in the residential complex has seriously impaired the safety of any person and the act or omission occurred in the residential complex.

The Landlord also applied for an order to transfer the Tenant to a different care home.

This application was heard by videoconference on September 24, 2024.

The Tenant’s agent, S. Thorpe, the Tenant’s legal representative, S. Harvey, the Landlord’s agent, B. O’Neill, and the Landlord’s legal representatives, M. Lee and C. Corsetti, attended the hearing.

Determinations:

The hearing consisted of arguments on a number of preliminary issues raised by both the Tenant and the Landlord as follows.

Background, Appropriate Named Parties and Consideration whether a Litigation Guardian is required:

1. The Tenant, H. Thorpe (HT), filed an application, together with her mother, S. Thorpe (ST). Both of them were named Tenants on the application. The application was filed with the Board, and signed, by the Tenant's legal representative.

2. The Landlord repeatedly objected to ST being a named Tenant in this application, as well as objected to ST being called a "personal representative" in this application.

3. The undisputed facts are that only HT, not ST, lives in the rental unit in the Landlord's care home. HT moved into the rental unit in March 2015, and the monthly rent is $1,143.00. HT is a 28 year old female diagnosed with cerebral palsy, and she is non-verbal. There was no dispute that HT lacks capacity to bring the application on her own, and her mother ST acts as the Tenant's agent or representative for the purposes of the Tenant's care services and for this application.

4. Consequently, I find that the application is validly before the Board with HT as the named Tenant. The application named HT as a Tenant, and it was filed by HT's legal representative with the help of HT's mother and representative, ST. As a result, ST is removed from the application as a named Tenant.

5. ST is, in fact, validly the agent or representative of HT in this matter. This is in line with subsection 30(5) of By Law 4 under section 62 of the *Law Society Act, R.S.O. 1990* (LSO), which provides the rules about who may, without a licence, provide legal services before the Board. Therefore, ST is entitled to represent her daughter HT before the Board, even without a legal representative. ST is also her daughter's representative or agent with respect to HT's tenancy in the care home. HT is non-verbal and not capable of advocating for her own interests. That fact was not disputed by the Landlord prior to 2022 when the issues between the parties arose. Until that point nobody disputed that ST was the appropriate liaison with the Landlord when it came to HT's tenancy and care. HT was never capable of making her own decisions, and therefore never had the power to confer a formal power of attorney. The Ontario guidelines on mental capacity foresee that in some health care situations a family member may be able to make a decision without any kind of formal appointment. This, I find, is clearly one of those situations.

6. The Landlord, it appears, did not require an official power of attorney document from ST when she sought to place HT in the rental unit, nor did they require one prior to the issues arising between the parties. I find, in addition, that there is no need for an official power of attorney document for ST for the purpose of hearing HT's application. No one seriously disputes that HT is non-verbal, that ST is HT's mother, and that ST advocates for HT's care, and that ST is the appropriate person to represent HT's interests.

7. The Landlord strenuously objected to ST's participation in HT's Tenant application, alleging that HT has no official litigation guardian pursuant to section A10.4 of the Common Rules of Procedure. The Landlord also alleges that ST is not the appropriate litigation guardian for this application because she has not filed a "signed declaration in the form designated by the tribunal".

8. I find there is no need for an official litigation guardian for the Tenant's application, as foreseen in section A10.4 of the Common Rules for the reasons that follow. The Tenant's application is validly before the Board as noted above, because it named HT as the Tenant, and it was filed by a licensee in good standing before the Board. That licensee was satisfied that ST was the appropriate person to advocate for her daughter's interests with respect to HT's tenancy and, as mentioned above, there is no need for a formal power of attorney in situations such as this one. ST is HT's mother, and her closest relative. ST is permitted to act as representative of her daughter before the Board pursuant to By Law 4 of the LSO, and she is particularly needed to participate here, because HT is non-verbal and lacks capacity to represent herself.

9. Perhaps had HT been without a close personal relative to advocate and represent her interests, it might have been appropriate to ensure that HT had an official litigation guardian as outlined in Section A10.4 of the Common Rules. But in this case, there is no need for an official litigation guardian.

10. The Tenant named Brigette O'Neill (BO) as a Landlord, but it is undisputed that she is a full time employee of the Landlord, and therefore an agent of the Landlord. There is no specific remedy sought by the Tenant against BO. Consequently, BO is excluded as a named Landlord.

Validity of Landlord's L7 Application:

11. The Landlord filed an L7 application, to transfer a care home tenant, LTB-L-037507-24. The Landlord ticked the box for Reason 2, alleging that the Tenant requires a higher level of care than the care home can provide, even with additional care services available from service providers in the community.

12. I find that the Landlord's L7 application is invalid for the reasons that follow.

13. The Landlord's explanation for ticking the box for Reason 2 does not provide even a *prima facie* case for explaining why the Landlord has alleged that it is unable to provide a higher level of care than the care home can provide. The explanation the Landlord provides states that it is ST's allegedly abusive behaviour towards the Landlord's employees that makes it impossible to provide HT with the required care. That explanation, on its face, does not align with the allegation that the Tenant requires a higher level of care than the care home can provide. Instead, it is an allegation that someone is impeding the Landlord from providing the level of care that the Landlord is, in fact, capable of providing. Therefore, I find that the Landlord's filing of an L7 application is completely inappropriate.

14. The Landlord has also filed an L2 application based on both N5 and N7 notices of termination, alleging ST's abusive behaviour to the Landlord's employees. The Landlord's L7 is, in fact, a duplication of the Landlord's L2 application, and therefore unnecessary and redundant.

15. Further, I find that the Landlord's L7 application is invalid pursuant to subsection 148(2)(a) of the *Residential Tenancies Act, 2006* (the 'Act'). Pursuant to that provision, the Board may issue an order in an L7 application "only if it is satisfied that appropriate alternate accommodation is available for the tenant…."

16. When the Landlord's agents were canvassed about appropriate alternate accommodation, they were unable to provide a clear response at the hearing. They were provided a further week to disclose a post-hearing submission about alternate accommodation, which they did, in fact, provide.

17. The Landlord's post-hearing submission provided a long explanation about the process of finding alternative accommodation for a person with HT's condition. Essentially, it is Developmental Services Ontario ("DSO") which is the access point for all services funded by the Ministry of Children, Community and Social Services ("MCSS"), which is the ministry that funds the Landlord. The Landlord explains that when individuals are to be transferred to a different MCSS-funded facility, the DSO requires consent of both parties, and ST has "remained steadfast in refusing to consent to triggering the DSO process".

18. I find the Landlord's explanation above, in paragraph #17, illustrative of why an L7 is not an appropriate or valid application in this situation. Firstly, it indicates that the Landlord does not have an alternative accommodation ready for the Tenant, and it would therefore be impossible to issue an order granting the Landlord's application, pursuant to subsection 148(2)(a) of the Act, even if I were to hold a hearing on the merits of the application. Secondly, it indicates that a transfer of tenancy due to a Tenant's need for a higher level of care than that available at the Tenant's current care home, would normally be an agreed-upon necessity by both parties, and this is evidenced by the fact that the DSO requires the consent of both parties to trigger such a transfer. That requirement implies that transfer should be a non-conflictual process because the Tenant, whose consent is required by the DSO, agrees that their current home no longer provides the necessary level of care. Finally, the Landlord's explanation confirms my finding above, that the Landlord's main issue with the Tenant is the behaviour and actions of her mother ST, and that issue is already captured in the Landlord's L2 application.

19. As a consequence of my finding above, the Landlord's L7 application will be dismissed.

Tenant's Request for an *In Camera* Hearing and an order Redacting the name of the Tenant:

20. The Tenant's legal representative requested that the hearing of the Tenant's application exclude access by the public, and he also requested that the parties' names be redacted from the order.

21. The Tenant's legal representative said that the primary reason for the request is that there is significant medical and personal information involved in the application, and the Tenant, HT, is a vulnerable person without legal capacity.

22. I denied the Tenant's request for the reasons that follow.

23. When asked what risks exist in this matter with regard to either permitting access to the hearing to the public, or in publishing the name of the Tenant, the Tenant's legal representative was unable to provide any.

24. Hearings before the Board are generally open to the public in accordance with section 9 of the *Statutory Powers Procedure Act* ("SPPA"), and the open court principle. Excluding the public from a hearing is only done under exceptional conditions. In general, this may be done when there is potential disclosure of a) matters involving public security, b) intimate financial or personal matters, the exposure of which outweigh the desirability of adhering to the principle that hearings be open to the public. The person seeking to restrict access to an open hearing has the onus of proving that it is appropriate to displace the general rule of openness.

25. The Tenant's legal representative has not raised any reason to displace the principle of openness for this particular Tenant, based on any of the exceptional conditions. There is no public security risk suggested by having an open hearing, nor are there any intimate financial or personal matters that may be disclosed, other than the fact that the Tenant is a vulnerable individual who lacks legal capacity. Vulnerable individuals who lack legal capacity, or their agents and representatives, come before the Board all the time in open hearings.

26. The same principles and considerations apply for anonymization of the parties. No serious grounds have been raised by the Tenant to anonymize the names of the parties.

27. Consequently, the request to restrict access of the public to the hearing, and the request to redact the names of the parties, are both denied.

Whether Care Homes can issue a notice of termination:

28. The Tenant submits that a care home is not entitled to issue a notice of termination on the basis of a finding in a 2023 decision of the Board, *Johnston v. The Wexford Residence Inc., 2023 ONLTB 79729* ("*Johnston*"). Therefore, the Tenant submits that the Landlord's L2 application should be dismissed.

29. I find that a care home is entitled to serve a notice of termination on a Tenant for the reasons that follow.

30. I am not bound by the *Johnston* decision, nor do I find the reasoning persuasive. That case essentially finds that the only way to terminate a tenancy in a care home is through

section 148 of the Act, or an L7 application. That is patently not true (see my discussion of section 146 of the Act below).

31. Further, a care home is expressly defined in subsection 2(1) of the Act to be a "residential complex", and a rental unit expressly includes a unit in a care home (subsection 2(1)). There are no special rules relating to care homes exempting them from any provisions of the Act such as there are, for example, for non-profit housing co-operatives. Any rules or provisions specifically relating to care homes, as opposed to any other residential complexes or tenancies under the Act, are contained in Part IX of the Act, and there is no provision that states that a care home may not serve a notice of termination. In fact, the contrary is true, as subsection 146(1) of the Act, contained in Part IX of the Act relating to care homes, expressly mentions care homes serving a notice of termination under section 50 of the Act.

32. Consequently, I find that a care home Landlord may serve a Tenant with a notice of termination under the Act, and the merits hearing will include hearing the Landlord's L2 application.

Validity of Landlord's "No Trespass" order against Tenant's mother:

33. The Tenant's legal representative sought an interim order determining that the Landlord's issuance of a "no trespass" order against ST was unlawful under the Act.

34. This issue forms part of the Tenant's application, and such a determination requires the consideration of all the evidence. As such, I cannot make such a determination in this interim order after a hearing of only preliminary issues raised by the parties' legal representatives. I have not yet heard any testimony nor have I heard the evidence of the parties. Such a determination can only issue after the consideration of evidence of the parties at a merits hearing.

It is ordered that:

1. The application is amended to name only Heather Thorpe as Tenant. Shelly Thorpe is no longer a named Tenant, but an agent or representative of the Tenant.
2. The Tenant's application is amended to exclude Brigette O'Neill as a named Landlord.
3. The merits hearing shall not restrict access to the public, nor shall the parties' names be anonymized.
4. The Landlord's L7 application is dismissed.
5. The merits hearing for the Tenant's T2 application combined with the Landlord's L2 application is adjourned to a date to be scheduled by the LTB.
6. The parties shall provide their unavailable dates for the months of November 2024 through February 2025 to the LTB by October 31, 2024.

7. The LTB will send the parties a Notice of Hearing for the next hearing date.
8. No later than seven days before the merits hearing, the parties shall provide each other, and file with the Board a copy of all documents, pictures and other evidence they intend to rely on at the hearing.
9. If a party does not comply with the deadlines for disclosure in paragraph #7 above, the Member may refuse to accept the evidence or consider the issues not disclosed.
10. If parties want to make disclosure through the Tribunals Ontario Portal, they must sign and file the LTB's form called "Consent to Disclosure through Tribunals Ontario Portal" found on the LTB's website.
11. I am seized.

October 25, 2024
Date Issued

Nancy Morris
Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

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