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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
	)	
GURPREET SINGH AND AM ITA DHINARA	)	BATRA, MUKTA, for the Appellants
	)	
Appellants (Tenants)	)	
	)	
– and –	)	
	)	
SHAHAN SALIM	)	RODGERS, ZACHARY,
	)	for the Respondent
Respondent (Landlord)	)	

– and –	)	
	)	
	)	
LANDLORD AND TENANT BOARD	)	LINDA NAIDOO, TRIBUNALS ONTARIO, for the Landlord and Tenant Board
Tribunal	)	
		HEARD: Brampton: April 11, 2024

REASONS ON APPEAL

Mandhane J.

INTRODUCTION

[1] A member of the Landlord and Tenant Board ("LTB") refused to apply the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 ("the Code"), to determine whether a landlord's refusal to rent a townhome to a couple with three children was "arbitrary or unreasonable" under s. 95(5) of the *Residential Tenancies Act*, *2006,* S.O. 2006 c. 17 ("RTA").

[2] This was a serious error that requires correction on appeal. The Code is quasi-constitutional legislation that has paramountcy over the RTA: s. 3(4), RTA; s. 47(2), Code; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, at paras. 33-39. In *Tranchemontagne*, the Supreme Court of Canada found that Ontario's tribunals have the jurisdiction to interpret and apply the Code because is it "the law of the people."

[3] The Preamble to the Code recognizes that it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equality and non-discrimination. The Code gives everyone a right to equal treatment in respect to "occupancy of accommodation," without discrimination on the basis of seventeen grounds, including age, marital status, and family status. Family status attracts human rights

protection because of the family's unique and imperative role in caregiving.

[4] Here, I articulate the proper legal test for determining whether the refusal to assign a tenancy is "arbitrary or unreasonable" under s. 95(5) based on alleged family status discrimination under s. 2(1) of the Code. I would remit the matter back to the LTB for a re-hearing with the opinion of this Court: s. 201(4), RTA.

OVERVIEW

The Tenancy

[5] On January 1, 2021, Gurpreet Singh and Amita Dhinara ("the Tenants") signed a one-year lease ("the Lease") with Shahan Salim ("the Landlord") for a three-bedroom townhouse at 580 Murray Meadows Place in Milton, Ontario ("the Rental Unit"). The Tenants occupied the Rental Unit as a multigenerational family, with themselves, their three-year old child, and the paternal grandparents, for a total of five people.

[6] Under the Lease, the rent of $2,475 was due on the first of the month and was payable until December 31, 2021. The Lease stated that the Tenant could assign the Rental Unit to another person with consent of the Landlord, who could not arbitrarily or unreasonably withhold consent to a potential assignee.

[7] Towards the end of August 2021, the Tenants advised the Landlord that they would be moving out on October 21, 2021, and served final notice to end the tenancy. The Landlord agreed in principle to assign the Rental Unit. On September 3, 2021, the Tenants forwarded the Landlord information about two potential assignees. This matter revolves around the second potential assignee, Aamir Qadeer, who

proposed to move into the Rental Unit with his spouse and their three children, for a total of five persons ("the Assignees").

[8] In an email dated September 9, 2021, the Landlord refused to assign the Rental Unit to the Assignees because they had a "larger family and we don't feel the space is big enough for them" ("the Refusal"). He asked the Tenants to send him other potential assignees.

[9] On September 10, 2021, the Tenants emailed the Landlord noting that, the "LTB clearly states that the landlord cannot arbitrarily or unreasonably refuse a potential tenant as part of the lease assignment process. In fact, refusing assignment based on family size would be a discrimination under Ontario's human rights code." The Tenants stated that they would not be forwarding more potential assignees to the Landlord. The Tenants did not, however, seek a review of the Refusal before the LTB pursuant to s. 98(1) of the RTA. A successful review would have entitled the Tenants to request a remedy, including authorization of the Assignees, termination of the Lease or a rent abatement: s. 98(3).

[10] The Tenants vacated the Rental Unit on October 31, 2021. They did not pay rent for November or December 2021. The Landlord listed the Rental Unit in October 2021 and rented it out as of February 2022.

The proceedings before the Landlord and Tenant Board

[11] On March 24, 2022, the Landlord filed a "Form L10 Application to Collect Money a Former Tenant Owes," seeking payment of $5,271 for two months unpaid rent and costs ("the Application"). He asked the LTB to find that the Tenants vacated the Rental Unit without paying rent due under the Lease, contrary to s. 87(1) and 88(1) of the RTA.

[12] At a videoconference hearing on March 9, 2023, the Tenants, who were self-represented by Mr. Singh, admitted that they did not pay the rent but raised a defence.[1] The Tenants argued that the Landlord's Refusal violated s. 95(5) of the RTA because it unreasonably discriminated against the Assignees on the basis of "family status" contrary to the Code. The Tenants argued that the Landlord had rejected the Assignees "for no good reasons" and asked that the Landlord's Application be dismissed pursuant to s. 98. The relevant sections of the RTA are set out in Appendix A.

[13] In response, the Landlord told the LTB that he was acting on the advice of an agent who told him that the Assignees' "family was too big…[and] would not have fit," such that he was "not comfortable" assigning the tenancy to them. His counsel argued that the Landlord did not unreasonably refuse the Assignees because he had occupancy standards and the Assignees did not pass them.

[14] In a decision dated March 23, 2023, LTB Member Michael DiSalle decided in favour of the Landlord and found that the Tenants owed $5,151 in rental arrears and costs pursuant to the Lease ("DiSalle Order"). Member DiSalle rejected the Tenants' argument and found that the Landlord's Refusal was not arbitrary or unreasonable based on the Landlord's occupancy standards.

[15] Pursuant to s. 21.2 of the *Statutory Powers and Procedure Act,* R.S.O. 1990, c. S.22, and Rule 26 of the LTB's Rules of Procedure, the Tenants sought review of the DiSalle Order on the basis that it "contains a serious error." The Tenants identified two errors: the failure to consider whether the Landlord mitigated his losses, and the failure to consider whether the Landlord's Refusal was arbitrary and unreasonable because it was based on the Assignees' family size.

[16] On April 24, 2023, LTB Member Dana Wren dismissed the review without a hearing ("Wren Order"). Member Wren found that the Tenants had not raised the issue of mitigation at the hearing such that it was not properly before her on review. About the Refusal, Member Wren found that: "The hearing record does not support the Tenant's belief that the presiding Member failed to consider the circumstance with respect to the potential assignment of the rental unit." Member Wren found that the Tenants had not demonstrated that there was a "serious error" in the process or order of Member DiSalle and refused to order a review hearing.

The appeal to this court

[17] The Tenants appeal the Wren Order to this Court ("the Appeal"). As of January 25, 2023, the Associate Chief Justice of the Ontario Superior Court of Justice decided that all appeals from decisions of the LTB shall be heard and determined by a single judge of the Divisional Court because they meet the criteria in s. 21(2)(c) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and because having them heard by a single judge promotes access to justice.

[18] The Tenants say that I have jurisdiction to decide the Appeal because the LTB erred in law by failing to apply the Code when interpreting s. 95(5) of the RTA, and by failing to consider the Landlord's duty to mitigate his loss by leaving the Rental Unit vacant for two months. The Tenants ask me to set aside the LTB orders and to replace them with my own findings. They ask me to declare that the Landlord unreasonably refused to assign the Lease to the Assignees, that the Tenants were entitled to terminate the tenancy under s. 98(3), and that the Landlord should not be entitled to any rental arears under s. 98(4).

[19] The Landlord asks me to dismiss the Tenants' Appeal. The Landlord says that the LTB orders engage questions of mixed fact and law, and so lie outside my jurisdiction. He says that Member DiSalle considered the human rights issues and determined that the Landlord's Refusal was reasonable because of the stated occupancy limits, and that Member Wren accepted Member DiSalle's reasoning. On the issue of remedy, the Landlord says that, since the Tenants raised the Code as part of a defence, the LTB had the discretion to order that the Tenants still pay the monies due under the Lease regardless of whether discrimination was found against a third-party to the tenancy: s. 98(3), RTA.

[20] The LTB provided submissions on my jurisdiction to review an order of the LTB, but does not take a position on the outcome of the Appeal. If I find an error of law, the LTB asks that I remit the matter back to it for a re-hearing.

ISSUES

[21] The issues before me are as follows:

a. What is the scope of my jurisdiction on an appeal from the LTB?
b. Did the LTB commit a legal error by failing to consider the Landlord's duty to mitigate?
c. Did the LTB commit a legal error in its interpretation of s. 95(5) of the RTA?
d. If the LTB committed a legal error, what is the appropriate remedy?
e. Should I award costs for the appeal?

ANALYSIS

What is the scope of my jurisdiction on an appeal from the LTB?

[22] The RTA requires that disputes in residential tenancy be adjudicated before the LTB; the LTB can hear and determine all questions of law and fact with respect to matters within its jurisdiction: ss. 1, 174. I accept the LTB's submission that determinations about the assignment of tenancies lie at the heart of its specialized expertise.

[23] Appeals to the Divisional Court from LTB orders are limited to questions of law: s. 210(1). The Ontario legislature has signaled its intent to minimize judicial intervention in LTB decision-making by legislating that LTB appeals are "final and binding" and creating a narrow appeal right on questions of law only: see *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 23, 24, 36.

[24] It follows that I have no authority to intervene in factual determinations or on questions of mixed fact and law: *2276761 Ontario Inc. v. Overall,* 2018 ONSC 3264, at para. 31. The distinction between questions of law, fact, and mixed fact and law was explained in *Canada (Director of Investigation and Research) v. Southam Inc.,* 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[25] The Supreme Court of Canada has cautioned that, "where the legal principle is not readily extricable, then the matter is one of 'mixed fact and law'…" and I must not intervene: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[26] However, where a case raises an extricable question of law, the standard of review is correctness: *Vavilov,* at para. 37. I may affirm,

rescind, amend, or replace the decision or order, or it may remit the matter back to the LTB with the opinion of the Court: s. 210(4). In applying the correctness standard, I am free to replace the opinion of the LTB with my own: *Vavilov,* para. 54.

Did the LTB commit a legal error by failing to consider a Landlord's duty to mitigate?

[27] I can deal with this issue summarily. Member Wren refused this ground on the basis that the Tenants raised it for the first time on review, which was unfair to the Landlord. Having reviewed the hearing transcript, I agree that this issue was never raised by the Tenants at the hearing such that it was never before Member DiSalle.

[28] Member Wren's order on mitigation goes to the heart of procedural fairness; that is, the right of the Landlord to know the case to meet before the hearing. The Landlord rightly notes that, because mitigation was never raised at the hearing, he has been deprived of the opportunity to lead evidence about it.

[29] I would not interfere with Member Wren's decision denying review on this ground. Member Wren's exercise of her authority to control her own process while ensuring fairness was correct: *Law Society of Saskatchewan v. Abrametz,* 2022 SCC 29; *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 27.

Did the LTB commit a legal error in its interpretation of s. 95(5) of the RTA?

[30] Part VI of the RTA deals with assignment, whereby a new tenant replaces an existing tenant and takes over their lease. Practically speaking, assignment is one of the ways that an existing tenant can

terminate a lease early without having to pay the landlord the rent still owing under the contract.

[31] Section 95(5) of the RTA states that: "A landlord shall not arbitrarily or unreasonably refuse consent to an assignment of a rental unit to a potential assignee under clause 3(b)." The parties agree that s. 95(5) applies on the facts before me because the Tenants asked the Landlord to consent to the assignment of the Rental Unit to the Assignees, and the Landlord refused the Assignees: s.95(3)(b).

[32] The parties all conceded in oral argument that the Code is relevant to a determination of arbitrariness or unreasonableness under s. 95(5) of the RTA: *Re TET-36140-13*, 2013 CanLII 51235 (ON LTB), at para 5. See also: *Re TST-02623*, 2009 CanLII 74508 (ON LTB), at para. 20.

[33] On Appeal, the Tenants says that the LTB erred in law because it did not apply the Code when interpreting whether the Refusal "arbitrary or unreasonable" under s.95(5) of the RTA. The Tenants note that the DiSalle Order and Wren Order are silent on the issue, and that the hearing transcript strongly indicates that Member DiSalle refused to apply the Code.

[34] The Landlord disagrees. The Landlord says that the Member DiSalle made findings of mixed fact and law such that there is no right of appeal to this Court. He says that the Member DiSalle applied the Code to the facts before him and found that the Landlord's refusal was neither arbitrary nor unreasonable because it was based on occupancy limits. Member Wren found that the DiSalle Order did not contain a serious error. The Landlord says I should rely on Member DiSalle's assurances at the hearing that he would consult legal counsel to find that he applied the Code to the issues before him when he wrote his decision.

[35] In paragraphs 13 and 15 of the DiSalle Order, to find that the Landlord's refusal was reasonable, the member referred to the Landlord's "screening process", and the fact that the Assignees did not "pass" it because it "was too many people for the Landlord's liking." There is no mention of the Code, discrimination, or "family status".

[36] Member Wren's reasons shed little light on whether Member DiSalle considered the Code. They are largely conclusory, stating:

> The hearing recording does not support the Tenants' belief that the presiding Member failed to consider the circumstance with respect to the potential assignment of the rental unit. The parties provided lengthy submissions on this topic and the Member clearly advised the parties that he was reserving on his decision and would consult with LTB legal advisors for additional comment and the order would reflect the final decision.
>
> The hearing recording and application record show that there was sufficient evidence for the presiding Member to find, on a balance of probabilities, that the Landlord did not breach s.95 of the Act when he refused to consent to the Tenants proposed assignees.

[37] The hearing transcript is opaque but manages to clarify a few issues: see Appendix B. First, it is shows that the Tenants explicitly argued that the Landlord's refusal was arbitrary or unreasonable under s. 95(5) of the RTA because the Landlord discriminated against the Assignees on the basis of "family status" contrary to s. 2(1) of the Code.

[38] Second, it is clear that the Landlord's counsel was alive to the Code issue because he addressed it towards the end of his own submissions. The Landlord's counsel resisted any application of the Code because the Assignees were not themselves before the LTB claiming discrimination. He argued that the Refusal was not arbitrary or unreasonable because the Assignees proposed having "more people than there were bedrooms."

[39] Third, it is clear that Member DiSalle thought that family size might be relevant to an assessment under s. 95(5), but that he did not know how. He said that the Landlord's justification for refusing the Assignees was "sketchy" and repeatedly told the parties that he would consult legal counsel before making his order. That all being said, I also find that Member DiSalle ruled at the hearing itself that discrimination was irrelevant to his assessment of reasonableness under s. 95(5). In an exchange with the Landlord's counsel at the end of the hearing, Member DiSalle was unequivocal, stating, "Well, no, I'm not worried about *Human Rights Code* 'cause I find that as a big red herring as far as I'm concerned," and that, "The *Human Rights Code* has nothing to do with the Landlord Tenant Board." The Landlord's counsel agreed with Member DiSalle's statement, and the Tenants were not given an opportunity to challenge it. This exchange strongly suggests that Member DiSalle had already decided that the Code was irrelevant to his interpretation of s. 95(5) of the RTA well before he consulted legal counsel.

[40] Therefore, while I accept that Member DiSalle may have consulted legal counsel about the circumstances of the case, I have serious doubts as to whether Member DiSalle asked legal counsel about how the Code applied to his interpretation of s. 95(5) of the RTA. This is because the DiSalle Order makes no mention of how the Code factored into his reasonableness analysis whatsoever. Member DiSalle references the Landlord's "screening process" and occupancy limits without considering whether the screening process or occupancy limits themselves were discriminatory. In her review of the DiSalle Order, Member Wren also did not reference the Code or clarify the LTB's findings about discrimination at all.

[41] On the record as a whole, the inescapable conclusion is that Member DiSalle refused to apply the Code when making his

determination under s. 95(5). This was a serious error of law. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513, paras. 33, 40, the Supreme Court of Canada held that Ontario tribunals must have the jurisdiction to interpret and apply the Code because that is the best way to make sure that the most people benefit from human rights coverage:

> The most important characteristic of the Code for the purposes of this appeal is that it is fundamental, quasi-constitutional law. Accordingly, it is to be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies. And not only must the content of the Code be understood in the context of its purpose, but like the *Canadian Charter of Rights and Freedoms*, it must be recognized as being the law of the people. Accordingly, it must not only be given expansive meaning, but also offered accessible application.[citations omitted]

[42] The LTB is a busy tribunal that administers justice on the frontlines of Ontario's affordable housing crisis. It is well-positioned to make sure that equality rights in accommodation are a lived reality for people across Ontario. Within this context, I find it disappointing that the issue of discrimination in housing was not properly identified and addressed by the LTB at both the hearing and review stage.

[43] Having found that the LTB made an error of law by refusing to apply the Code when interpreting s. 95(5), I now turn to articulating the correct legal test, before remitting the matter back to the LTB for a re-hearing.

How does the Code factor into the proper interpretation of s. 95(5) of the RTA?

[44] Section 2(1) states that every person in Ontario has "a right to equal treatment with respect to the occupancy of accommodation,

without discrimination based on…family status." Section 2(1) applies to all types of occupancy of accommodation, including but not limited to renting, being evicted, building rules and regulations, repairs, harassment, and use of services and facilities.

[45] In *Moore v. British Columbia (Education),* 2012 SCC 61, [2012] 3 S.C.R. 360 at para. 33, the Supreme Court of Canada articulated the test for discrimination under human rights legislation, stating:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[46] This approach was recently applied to the Code by the Court of Appeal for Ontario in *Ontario (Health) v. Association of Midwives,* 2022 ONCA 458, 161 O.R. (3d) 561, at para. 101. It was also applied to the ground of "family status" under s. 5(1) of the Code in *Misetich v. Value Village Stores Inc.,* 2016 HRTO 1229, at paras. 35-48. While there has been some uncertainty in the case law on this point, in my view, Adjudicator Jennifer Scott took the correct approach in applying the *Moore* test to the ground of family status in *Misetich*. It is important to apply a uniform test for discrimination to all protected grounds, including family status.

[47] It is obvious that the Tenants in this case would not be able to meet the *Moore* test because they themselves did not experience discrimination. This would certainly pose an insurmountable obstacle if the Tenants were seeking a remedy under the Code for discrimination.

However, I am not troubled by the Tenants' lack of standing to bring a discrimination claim in the situation before me. Here, the Tenants do not ask for a remedy for discrimination, but rather that I apply the Code when making a finding about reasonableness under s. 95(5) of the RTA. Because the focus is on the landlord's decision and the tenants' rights, it does not matter whether or not the potential assignee themselves launched a claim for discrimination. I am supported in this interpretation by the Court in *Tranchemontagne,* at para. 39, which states that: "allowing many administrative actors to apply human rights legislation fosters a general culture of respect for human rights in the administrative system." The Code is a relevant factor under s. 95(5) because the provision is clearly designed to deter landlords from arbitrarily or unreasonably refusing potential assignees. If a landlord discriminates against a potential assignee, the refusal is *necessarily* "arbitrary and unreasonable" under s. 95(5) and entitles the tenant to seek a remedy, whether not the assignee has made a claim for discrimination: *Re TET-36140-13*, at para. 5; *Fu v. Gao,* 2022 CanLII 137234 (ON LTB), at paras. 12, 14.

[48] In situations where the LTB is asked to consider discrimination against a potential assignee in its assessment under s. 95(5), the *Moore* test must be adapted as follows:

(1) Has the tenant established that the landlord engaged in *prima facie* discrimination against the potential assignee?

a. Was the potential assignee a member of a group protected by the Code?

b. Was the potential assignee subjected to adverse impact?

c. Was the Code-protected status a factor in the adverse impact on the potential assignee?

(2) If a *prima facie* case has been established, can the landlord justify the conduct or practice within the framework of exemptions available under the Code?

a. If the conduct or practice can be justified, is the refusal "arbitrary or unreasonable" on other grounds?

b. If the conduct or practice cannot be justified, is the tenant entitled to a remedy under s. 98(3) of the RTA?

[49] I now go on to consider how the adapted *Moore* test would apply to a claim of "family status" discrimination under s. 2(1) of the Code. Of course, the ultimate finding about whether an individual has been discriminated against is a question of mixed fact and law.

Was the potential assignee an individual protected under the ground of "family status"?

[50] Having articulated the correct test for assessing discrimination in the context of s. 95(5) of the RTA, I now turn to the scope of protection afforded under the ground of "family status" in the context of "occupancy of accommodation": s. 2(1), Code.

[51] The Code defines "family status" as "the status of being in a parent and child relationship": s. 10. The ground of "family status" has been found to cover a broad range of parent-child "type" relationships that revolve around caregiving: *York Condominium Corp. No. 216 v. Dudnik (No. 2)* (1990), 1990 CanLII 12506 (ON HRT), 12 C.H.R.R. D/325 at para. 165 (Ont. Bd. Inq.), aff'd (1991), 1991 CanLII 13171 (ON SCDC), 14 C.H.R.R. D/406 (Ont. Div. Ct.).

[52] The Human Rights Tribunal of Ontario has applied an intersectional approach to "family status" by identifying the compounding stereotypes facing, for example, single, Indigenous mothers: *Flamand v. DGN* Investments, 2005 HRTO 10, at paras. 138-140. It is important to identify how discrimination on the ground of "family status" in housing may intersect with other grounds enumerated in s. 2(1) such race, ancestry, place of origin, colour ethnic origin, creed, sex, sexual orientation, gender identity, gender expression, age, and disability. This is because family status discrimination will often be based on conscious or unconscious stereotypes and biases based on a person's committed caregiving role, their family size and makeup, *along with* their age, marital status, race, ancestry, religion, sexual orientation, gender identity, and so on.

[53] The Preamble to the Code refers to the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 ("UDHR"), as the foundation for all human rights protections. Article 16(3) of the UDHR recognizes: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The family is also recognized and protected in human rights treaties to which Canada is a party. The Preamble to the *Convention on the Rights of the Child*, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3, affirms that states parties are: "Convinced that the family, as the fundamental group of society and natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can assume its responsibilities within the community."

[54] Articles 23(1) of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Can T.S. 1976 No. 47, echoes the language in the UDHR, while Article 17 prohibits "arbitrary or unlawful interference"

with one's "family" and "home." In General Comment No. 19: The Human Rights Committee, which monitors compliance with the ICCPR, noted that the concept of "family" will differ amongst states such that it is not possible to give the concept a "standard definition": General Comment: The right to social security (Art. 9 of the Covenant), U.N. Doc. E/C.12/GC/19 (February 4, 2008), at para. 2. The question is "whether the group of persons is regarded as a family under the legislation and practice of the State": para. 2. The Committee highlighted that it is possible that "diverse concepts of family" will exist within a single state, for example, capturing both "nuclear" and "extended" families. Implicit is the idea that family is both a legal and social status, and that the concept of family will necessarily evolve and change over time.

[55] Article 10(1) of the *International Covenant on Economic, Social, and Cultural Rights, 1966*, 993 U.N.T.S. 3, Can T.S. 1976 No. 46 ("ICESCR"), states that "the widest possible protection and assistance should be accorded to the family…particularly…while it is responsible for the care and education of dependent children." Notably, Article 11(1) which recognizes the right to adequate housing extends this right not only to the individual but to "himself and his family." In my view, there is a clear link between protecting families from discrimination in housing, and progressive realization of the right to housing for all members of our community: see *National Housing Strategy Act*, S.C. 2019, c. 29, s. 313.

[56] The UN Committee on Economic, Social and Cultural Rights ("UN CESCR"), which monitors compliance with the ICESCR, has noted that family forms have changed and will change, for example, expanding to include married and unmarried parents, stepparents, adoptive parents, and foster-parents: UN CESCR's Concluding Observations at the Fourth Periodic Report of Germany, E/C.12/4/Add.3, 10 August 2000, para. 122. The UN CESCR states that, "One feature which all these long-term

relationships have in common is the reliable relationship between children and their parents": para. 122.

[57] The Ontario Human Rights Commission's ("OHRC") policies are authoritative when interpretating the Code: 45.5(2). The OHRC *Policy and Guidelines on Discrimination because of Family Status* speaks to the extreme diversity of Ontario families (Ontario Human Rights Commission, *Policy and Guidelines on Discrimination because of Family Status* (March, 2007), p. 8). According to the OHRC, the Code ground of "family status" coupled with the protection against discrimination based on "age" and "marital status," extends provincial human rights protection to a wide range of family forms including nuclear families, lone-parent families, blended families, adoptive families, and families headed by individuals with different sexual orientations or gender identities. The OHRC also notes that "family status" discrimination is often intersectional and affects women disproportionately because they still provide much of the caregiving in our society (p. 11).

[58] The Court in *Tranchemontagne,* at para. 33, noted that the Code must be interpreted in a "liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies". The Court applied similar reasoning in *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, [2002] 3 S.C.R. 403, at paras. 4, 39 when interpreting the ground of "family status." Therefore, I agree with the position taken by the OHRC in its Policy that "family status" must be interpreted to include committed caregiving relationships between adult children and their parents, such that an adult child who is providing elder care to a parent is protected against discrimination in housing (p. 10). Just like childcare, adults who provided care to their parents play an important social role in our society, especially as our population ages. A purposive reading of the Code also protects multi-generational families that include children, parents, and grandparents from discrimination in

housing. These families are structured to ease the burden of childcare and eldercare responsibilities amongst all members of the unit and fall into the category of a "parent and child" type relationships protected against discrimination under s. 2(1) of the Code.

[59] In short, whether an individual is protected under the ground of "family status" under s. 2(1) of the Code requires an inquiry into the person's legal and social relationships, bearing in mind that "family status" requires equal treatment for people who are involved in caregiving roles that are characterized by responsibility and commitment.

Was the potential assignee subjected to adverse impact on the basis of "family status"?

[60] The human rights tribunal cases about "family status" discrimination in housing generally revolve around landlords refusing to rent to families with minor children, especially lone parents: *Fakhoury v. Las Brisas Ltd.*, 1987 CanLII 8549 (ON HRT); *Cunanan v. Boolean Developments Ltd.*, 2003 HRTO 17; *St. Hill v. VRM Investments Ltd.*, 2004 HRTO 1; *Ceccanese v. Taylor*, 2020 HRTO 904.

[61] The Board of Inquiry in *Fakhoury* discussed the historical underpinnings for adding "family status" to the Code in 1982, noting that the OHRC had recommended its inclusion because of the "increasing problem" or "availability of living accommodation for families, particularly within large urban centres": paras. 18-21. The Hansard debates from the Ontario Legislature's 1981 session confirm that the inclusion of family status was meant to put an end to "adult only" buildings and ensure that families with children had equal access to housing: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 32rd Parl., 1st Sess. (December 1, 1981).

[62] In *Fakhoury,* the Board found that a landlord discriminated against a potential tenant when the landlord refused to rent her a two-bedroom apartment for herself and her three children, even though the landlord admitted that they would have allowed a family of two adults and two children to rent the unit. The Board of Inquiry wrote as follows:

> That is a distinction the legislation will not countenance. In the eyes of the Ontario *Human Rights Code* a family of four is a family of four and, subject to a reasonable requirement of parental presence and the tenancy being undertaken by a person with the legal capacity to contract, no further distinction can be made. The Legislature has deemed it appropriate, indeed urgent, to protect families and their children in their access to reasonable living accommodation. The Code does not permit landlords to impose their vision of the "normal" family to deny equal access to accommodation to single parents solely because of their family status.

[63] In its *Policy and Guidelines on Discrimination because of Family Status*, the OHRC noted that “There is a lengthy history of families with children being turned away from housing because of negative perceptions associated with family status” and “that this is a persistent, endemic problem in the rental housing market” (p. 44). The OHRC Policy outlines how the refusal to rent to families with children will generally be considered discriminatory on the basis of “family status” (p. 45).

[64] Referencing *Cunanan,* the OHRC Policy deals specifically with “occupancy limits” stating that “arbitrary rules regarding occupants per room or per bedroom may have an adverse impact on families with children” (p. 49). The OHRC notes that larger families “may have extreme difficulty locating adequate housing” (p. 15). The OHRC Policy notes that discrimination based on “family status” may be subtle in terms of referring to a “quiet building”, “adult lifestyle”, or units being “geared to young professionals” (p. 45).

Can the landlord justify the conduct or practice?

[65] If *prima facie* discrimination is established, the burden shifts to the landlord to justify the conduct or practice. Subsection 21(1) of the Code outlines specific exemptions to the guarantee of equality set out in s. 2(1). For example, where the landlord shares a bathroom or kitchen with the assignees ("shared accommodation"), or offers accommodation restricted to persons who are of the same sex ("single sex accommodation").

[66] A landlord could also argue that its refusal was based on occupancy limits or standards that are reasonable requirements and *bona fide* in the circumstances: Code, s. 11. The LTB should be careful, however, to consider whether such occupancy limits, standards, or other rules are truly reasonable or whether they reflect stereotypes based on typical, Western, middle-class families. Some families may not be able to afford a single room for each child, while co-sleeping is common and preferred in many cultures. The LTB must carefully consider whether the landlord's standards and rules result in adverse impact for no justifiable reason. Justifiable reasons will generally relate to health and safety concerns, building code standards, or the like. Occupancy limits and standards should not reinforce existing stereotypes about committed caregivers being undesirable tenants.

What is the proper remedy for discrimination under s. 98(3) of the RTA?

[67] If discrimination is found, the LTB has the discretion to determine the appropriate remedy under s. 98(3). While the remedies must relate to the relationship between the landlord and tenant, the LTB must remain mindful of the primacy of the Code over the RTA, the Code's quasi-constitutional status, and the importance of protecting families from

discrimination in housing. It would seem perverse to allow a landlord to claim a remedy before the RTA after engaging in discrimination, whether or not the person who was discriminated against is before the LTB. There is an important role for the LTB to play in holding landlords who discriminate accountable. This was the takeaway message from the Supreme Court of Canada's ruling in *Tranchemontagne* back in 2006.

What is the proper remedy on appeal?

[68] The appeal is allowed, and the matter shall be remitted back to the LTB with the opinion of the Court.

[69] I would also order that the LTB serve a copy of this decision on the Executive Chair of Tribunals Ontario, the Executive Chair of the Human Rights Tribunal of Ontario, and the Chief Commissioner of the Ontario Human Rights Commission. Proof of service shall be filed with the court within 7 days of the release of the decision to the parties.

Should I award costs?

[70] The Tenants were successful and are entitled to costs. The Tenants were well-prepared and filed materials that were very helpful to the court. The appeal raised a novel issue, and a hearing transcript had to be prepared. Counsel appeared in court for a half day to argue the appeal. The Landlord shall pay the Tenants $7,500 in costs on a partial indemnity basis.

APPENDIX A
RTA Excerpt

95(1) Subject to subsections (2), (3), and (6), and with the consent of the landlord, a tenant may assign a rental until to another person.

(3) If a tenant asks a landlord to consent to the assignment of the rental unit to a potential assignee, the landlord may,

…

(b) refuse consent to the assignment of the rental unit to the potential assignee; or

(c) refuse consent to the assignment of the rental unit.

(4) A tenant may give the landlord a notice of termination under section 96 within 30 days after the date a request is made if,

(a) the tenant asks the landlord to consent to an assignment of the rental unit and the landlord refuses consent

…

(c) the tenant asks the landlord to consent to an assignment of the rental unit to a potential assignee and the landlord refuses consent to the assignment under clause (3)(c)

…

(5) A landlord shall not arbitrarily or unreasonably refuse consent to an assignment of a rental unit to a potential assignee under clause 3(b).

…

98(1) A tenant or formal tenant of a rental unit may apply to the Board for an order determining that the landlord has arbitrarily or unreasonably withheld consent to the assignment or sublet of a rental unit a potential assignee or subtenant.

…

(3) If the Board determines that a landlord has unlawfully withheld consent to an assignment or subject in an application under subsection (1), the Board may do one or more of the following:

1. Order that the assignment or sublet is authorized.

…

3. Order that the tenancy be terminated.

4. Order an abatement of the tenant’s or former tenant’s rent.

APPENDIX B:
Hearing Transcript Except[2]

Tenant: I just wanted to point out, I’m looking at section within 95, says, quite right, landlord shall not arbitrarily or unreasonably refuse consent…. The second person that the denied was on family size which is actually, under section 2 of the Ontario Human Rights Code, is a violation. He said, “I think his family is too big for this house.” And this house, for your information, is a 15 or 1400-square-foot townhome from main level until the basement level. [coughing - unintelligible] he's really unreasonably denying tenancy…

…

Member DiSalle:…Now, Mr. Saleem, I got a question for you. Why did you turn down these two potential tenants?

…

Landlord: …the second tenant that was brought forward, again, I was acting on the advice of my agent, he felt that the family was too big. And again, I was not arbitrarily refusing…But these two tenants he presented to me did not—again, based on my agent’s expertise, would not have fit, you know, what—was something he was not comfortable with, and thereby I was not comfortable with.

Member DiSalle: Okay. One sec, Mr. Saleem. So, Mr. Rogers, then you’re contending that it was the—within the landlord’s right to not accept these two tenants based on what the landlord just said?

…

Landlord’s Counsel: I mean, the landlord gave reasons—gave reason to the tenant why he was—why he was rejecting them. The—yeah, I’m contending that it wasn’t unreasonable…

…

Landlord’s Counsel:…the main reason for the second one is that there were more people than there are bedrooms in the rent lease.

Member DiSalle: Are you talking like couples though, or are you just talking just- [crosstalk]

Landlord’s Counsel: Well, one couple and three individuals in a three bedroom.

Tenant: But they were two adults and their three children. And just so you know, while I was living at the property, we were five, four adults and one kid, and it was a three-bedroom townhome.

Member DiSalle: See Mr. Rogers, that’s potentially troubling. Do you understand? [crosstalk] That one-that one is a little more troubling…. However, claiming that the family is potentially too big for the unit, that’s a little sketchy there, Mr. Saleem. I have to admit, that one I’m gonna have to talk to legal about that. That one- [crosstalk]

Landlord: If I may--

Member DiSalle: -that one’s a little-when you said that one, that’s a little—that one sort of irked me a bit when I heard that so.

Landlord’s Counsel: Of course.

Landlord: So, if I may. So, the rationale behind it is that when Mr. Singh moved in, it was his parents living in the room. And so they would share a room plus their children or one child. As so it—a three bedroom would’ve been enough, but then somebody moves in with three children-

Member DiSalle: He just mentioned five people in the room when he was living there, Mr. Singh.

Landlord: So, with his parents, they would occupy one room, and then the child would be one room, and then Mr. Singh and his wife would be one room, so three bedroom versus, yeah- [crosstalk]

Member DiSalle: But why can't two kids stay in the same room with a bunk bed? Mr. Saleem? Because you said [crosstalk] you said three bedrooms. One --a couple and three kids, not enough bedrooms. But if, let's say they're two boys or two girls, let's say, and they stay in the same room, like on bunk beds, why could -- why isn't that possible?

Landlord: Again, I have a real estate agent –

Member DiSalle: …I have trouble with that second reason. I'm gonna tell you right now, I will be checking with legal before I do the order on this one, because if legal tells me that that's not a sufficient reason to deny somebody, then I gotta throw out your rent claim. If they tell me that it's good, then I'll allow the rent claim. Mr. Singh, you're hearing me right now, are you?

Tenant: I am, yep.

Member DiSalle: So that's what it's gonna come down to, I'll be talking to legal this afternoon because I wanna make sure. I'm just saying, Mr. Saleem, that was a troubling excuse that your real estate person gave. It's not like this is a family of 12 you're trying to put into a unit here. So yeah, that's a potential red flag, is what I'm trying to say.

…

Member DiSalle: If the legal guy says, well, it was unreasonable to turn down somebody based on the size of the family, I'll double check with that too. So I'm gonna talk to advisor this afternoon.

Landlord Counsel: And, if you find that the, you know, reason for the refusal was unreasonable, despite the fact that the refused tenant didn't make any allegations under the *Human Rights Code*.

Member DiSalle: Well, no, I'm not worried about *Human Rights Code* 'cause I find that as a big-big red herring as far as I'm concerned.

Landlord's Counsel: Okay.

Member DiSalle: I don't even care. The *Human Rights Code* has nothing to do with the Landlord and Tenant Board. I don't care what other boards do. I care about this board.

Landlord's Counsel: I agree.

…

Member DiSalle: So, Mr. Singh and Mr. Saleem and Mr. Rogers, I'll get my order out as soon as I can, but I said, I'm checking with legal first. I'm checking with legal first before I write anything.

Mandhane J.

CITATION: Salim v. Singh 2024 ONSC 2592
COURT FILE NO.: DC-23-39-00
DATE: 2024 05 03

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:

GURPRETT SINGH AND AMITA DHINARA
Appellants (Tenants)

- and -

SAHAN SALIM

Respondent (Landlord)

- and -

Landlord and Tenant board

Tribunal

REASONS ON APPEAL **Released:** May 3,2024

Mandhane J.

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[1] The parties agree that the LTB is mandated under ss. 87(2) and 82(1) to consider “tenant issues” raised in response the Landlord’s Application and to order remedies that would be available in a corresponding tenant application.
[2] For ease of reference, I have omitted from the excerpt use of the words “um,” “uh”, and repeated words to indicate a stutter such as “it-it”, and “plu-plus.”