



**Order under Section 9(2)  
Residential Tenancies Act, 2006**

**Citation:** LOMAS v CUNGU, 2023 ONLTB 75620

**Date:** 2023-11-23

**File Number:** LTB-L-062277-23

**In the matter of:** 454 MOHAWK ROAD WEST  
HAMILTON ON L9C1X4

**Between:** ANA CUNGU Tenant

**And**

JOHN LOMAS Landlord

JOHN LOMAS (the 'Landlord') applied for an order to determine whether the *Residential Tenancies Act, 2006* (the 'Act') applies to the rental unit at 454 MOHAWK ROAD WEST HAMILTON.

This application was heard by videoconference on October 3, 2023.

The Landlord and his counsel, Ms. K. Hawkes, and the Tenant and her counsel, Mr. W. Chapman attended the hearing.

**Determinations:**

1. Based on the evidence before me, I am satisfied on a balance of probabilities that s.5(i) of the *Residential Tenancies Act, 2006 (the Act)*, does apply to the rental unit or residential complex, and as a result, the unit is excluded from the protection of the Act.
2. This application is made by the Landlord for a determination of whether the rental unit is excluded from the protection of the Act by virtue of s. 5(i).

**Exemptions from Act**

3. Section 5(i) of the Act states:

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;

4. There are four questions for determination:

(i) does the Act apply to the rental unit, which turns on three questions:

(a) are the Landlord and the Tenant required to share a bathroom or kitchen facility;

(b) did the Landlord live in the building/house in which the living accommodation is located at the time the tenancy commenced in September 2019; and

(c) did the Landlord subsequently vacate the house such that the Act took effect at a later date, with respect to the living accommodation of the Tenant.

5. I use the terms “landlord” and “tenant” simply as a convenient way to refer to the parties, and not as a way of describing their actual relationship or any nexus to the Act.

### **Background Facts**

6. The house in which the rental unit is located is owned by the Landlord.

7. The residential unit is part of the house.

8. The house is 1.5 stories. There is a rental unit in the basement which is not relevant to this application.

9. The main floor consists of a front porch, a living room, a first bedroom, a bathroom, a den or second bedroom, and a kitchen.

10. There is a flight of stairs from the kitchen up to a second floor. The second floor has a bedroom, a living room and a bathroom, and there is no dispute that it was at all times for the Landlord’s exclusive use.

11. The only way to access the second floor is by the staircase in the kitchen. Access to the kitchen was only by way of the front door, then through the living room, through a hall and into the kitchen.

12. The Landlord had lived in the house since 2017, two years before the Tenant moved in.

13. In July of 2019, the Tenant was a worker engaged by the Landlord to renovate his property. A new deck was put in at the front of the house with a fence.

14. The Landlord and Tenant were in discussion in July 2019 about the house and the Tenant moving in on the main floor.

15. The Tenant moved into the main floor of the house in September 2019. The rent was \$500.00/month. A lease was signed, but the Tenant claims she was never given a signed copy.

16. The lease describes the rental unit as “*a unit in a duplex, triplex, or fourplex*” (s. 1). No other persons were entitled to occupy the premises without the consent of the Landlord (s. 5), except for casual guests. The Landlord was to supply a stove, refrigerator, washer and

dryer, furnace, water heater, and dishwasher (s. 7(b)). The Landlord was required to give at least 24 hour's written notice before the time of entry to carry out repairs etc. (s. 11). The Tenant was required not to alter amend or change the décor of the premises without consent from the Landlord.

17. In June 2020, the Landlord sent an email to the Tenant to raise the rent to \$700.00. The Landlord gave the Tenant 90 days' notice. The justification for the increase was because the back deck and fence around the back yard would be completed by September 1, 2020 and added additional value to the house.
18. On June 28, 2023, the Landlord was denied access to the property by the Tenant's boyfriend. The police would not give him access without proof that the Act did not apply.
19. A notice of trespass was then issued and taped to the front door.
20. The Landlord then brought this application for a determination of whether the Act applies to the rental unit in the house.

### **Evidence of the Parties**

#### **The Landlord:**

21. The Landlord testified that the house was his primary residence and has been since 2017.
22. He testified that there was no kitchen in the upstairs part of the house, which was his exclusively. He did have a bathroom upstairs.
23. The Landlord testified that when he was at home at the house, he used the kitchen, on the main floor, prior to covid. After covid, he would come to change, as he was locked down in the US during covid.
24. The Landlord testified that the Tenant rented the first bedroom on the main floor. This was the only room she had exclusively to herself. As there was only one kitchen, it was the understanding of the parties in September 2019 that the kitchen was to be a shared area. The parties would also share the den, living room space and bathroom on the main floor.
25. At the time the lease was signed, there was no door separating the upstairs and the main floor kitchen, at the staircase point. The last time the Landlord was allowed into the house, on June 28, 2023, a door had been put in place, separating the upstairs of the house from the main floor kitchen. He was surprised to see it and had not given consent to it being installed.
26. As to the amount of time he spent at the house, the Landlord testified that in a month, he would be in hotels for 3 weeks, and then work from home for a week. He said he loved to go to his home. He had a bed there.
27. The texts between the Landlord and Tenant also shed light on the nature of the living arrangement in the house, in places where the lease is silent. For example:

- The Tenant wrote in July 2019: “*Well we’ll be living together so well (sic) have plenty of time!*”
- The Landlord wrote on July 12, 2019: “*my contract in Memphis just got extended until the end of the year, so I will likely only be home for 1 week a month until then.*”
- The Tenant wrote on September 13, 2019: “*And the house is great, slowly coming together! Got a 55 inch so you’ll enjoy watching tv a bit more*”
- The Landlord wrote on October 9, 2019: “*If you want to be able to lock your bedroom door when you’re out, there is a key in the top drawer of my desk upstairs*”
- The Tenant wrote on October 11, 2019, “*Is it ok to being (sic) my very well-trained cat to the house.*”
- The Tenant wrote November 6, 2019: “*But if you like him [ ie the cat] and all is well then hes (sic) our newest family member to the home*”
- The Tenant wrote on April 10, 2020: “*I was thinking of making the second room into an entertainment/office room for us*”
- The Tenant wrote on April 25, 2020: “*If you ever do plan on moving let me know how much the upstairs would be*”.
- The Tenant wrote in June 2020, in reply to the Landlord’s email that he was raising the rent to \$700/month: “*I got your email and 700 is reasonable, however, as you mentioned it is for the entire floor so can we arrange to have your belongings in the second room removed so I can actually have use of that room/whole floor.*” The Landlord quickly dispelled any such arrangement with his text: “*Ha! The email actually doesn’t say anything about the whole floor being yours.*” He then offered to take his couch out of the second room to give her more space, though the piano would stay in that room. She replied: “*Okay I see your (sic) firm on this issue, im (sic) not gonna try to persuade you any further and ill (sic) make due (sic) (smile emoji)*”
- The Landlord requested a key for both himself and his mom, as the Tenant had changed the lock to the front door (July 13, 2020).

28. Under cross examination from Mr. Chapman, the Landlord testified that his stuff could be seen in the fridge before COVID. His non-perishable food was in the cupboards, and the dishes were his which he used when he ate there. He used the kitchen from July 2019 to March 2020, when covid struck. He testified that he cooked steaks, bacon and eggs, which were his go-to, with avocado, and blueberry and strawberry shakes. He claimed he had Russ Govan over for steaks in 2019. He testified that he told the Tenant, in June 2019, that the kitchen would be shared. He gave an example where he had to remind her to turn off the burners on the stove, and this text was in evidence.

29. The Landlord testified that he would text the Tenant to let her know when he was coming home, because they were friends.

30. He reiterated under cross examination that Ana (the Tenant) rented a bedroom only, and the rest of the complex was shared. Upstairs was his area. The ground floor, minus her bedroom was shared. She paid \$500 a month and their relationship was amicable. There was a joint TV room. He testified that he was also entitled to use the bathroom on the main floor.

31. The Landlord also testified that he had the same arrangement with the previous Tenant. They also shared the kitchen.

32. I found the Landlord's evidence to be candid, straightforward and internally consistent.

### The Tenant:

33. The Tenant testified in her examination in chief that the arrangement was that she would rent the whole unit, with low rent, because the furniture of the previous tenant was there. She stated that there was no discussion about the kitchen prior to the lease. She testified that from July 19, 2019 to March 2020, the Landlord had never used the kitchen. The Landlord lived in the US. He was not aware of what was left in the house, and he would deal with that when he came back. She said he had canned food in the house from 2014. She said he did not use the house after March 2020 either.

34. The Tenant testified that in the summer of 2019, she was looking for a place in Hamilton and was a worker at the house. She then said, "John said he had a room that was available. He was in the process of evicting the previous tenant. The rent was low because his stuff was there as were the belongings of the previous tenant." She said the Landlord said she was doing him a favor by taking over that room. She clarified that "room" meant the room the previous tenant had leased.

35. She then testified, when she moved in, it was the room only; it then turned into the whole unit. She claims he offered her the whole unit, without a rent increase, in November 2019, two months after she moved in. She then checked the lease, which she claims referred to the unit, not just a room.

36. But under cross examination, the Tenant's story faltered.

37. For example, she gave inconsistent evidence about *what the lease entailed*. She initially claimed that she believed she would be getting the entire floor. She then testified that what was initially agreed was that she would just get the room. They did not talk about the whole unit until November 2019. This was a clear contradiction in her evidence.

38. She gave inconsistent evidence about *whether the Landlord had moved out*. She testified that the Landlord had moved out and used the upstairs only for storage. And yet, if this was the case, why would he always text her about coming home to the house, after a business trip. Also, why would she offer the cat and TV for the main floor if he was not using it.

39. When asked about the *time that they acquired the whole unit*, she could not remember, though she had previously testified that it was in November 2019. She then admitted it was in November 2019 that she acquired the whole unit.

40. She could not explain *the documentary evidence which proved she did not have the entire floor as of June 2020*. She was referred to her text message of June 2020, where she asked the Landlord if she could have the entire floor, and to repeat, her precise words were: "I got your email and 700 is reasonable, however, as you mentioned it is for the

entire floor so can we arrange to have your belongings in the second room removed so I can actually have use of that room/whole floor”.

41. Clearly, by June 2020, she did not have the entire floor, contrary to her story that she had the entire main floor from November 2019 on. She was asking for it in June 2020. But the Landlord clearly did not agree, and said so in a reply to her text. She then replied saying she would not push the issue.
42. She then contradicted herself in her testimony, that the house was both of theirs and then testifying that it was just hers. She testified that the understanding was that “*the house was to be both of theirs*”. She then corrected herself, and said, “*I mean, it was just mine.*” Another clear inconsistency.
43. *I prefer the Landlord’s evidence that prior to COVID, he was home 25% of the time, because his testimony was supported by a text message which corroborated this testimony.* She testified that the Landlord was in the US full time, and yet there were many text messages about him coming home to the house. Moreover, there was a period of time when he could not come home, as he was stranded in the US during COVID. Yet she testified that he was “*never home*”.
44. *I prefer the Landlord’s evidence that he used the kitchen to cook* because it had specificity, and consistency, as opposed to her evolving evidence that he never used the kitchen to cook. She testified that the Landlord never cooks in the kitchen and that all he had in the kitchen cupboards was expired canned goods, paper, tape, and Christmas things. In my view, her evidence in this respect is at odds with all the text messages about sharing the living space. She never asked to clear anything out of the kitchen. If the kitchen was in her exclusive possession, it is unclear to me why she would allow him leave these things in the kitchen.

#### 45. **Analysis**

46. In terms of the main issues for determination, case law has developed a clearer understanding of how s. 5(i) of the Act actually applies to the facts of this application.
47. Firstly as to whether the Landlord and the Tenant are required to share a bathroom or kitchen facility, the question arises as to what is the relevant time period for assessment.
48. Ms. Hawkes, referred me to *Cowie v. Bindlish*, 2010 ONSC 2628, a decision of the Divisional Court. It was held that the LTB must examine the situation between the parties at the commencement of the lease:

[16] It is my respectful view that neither view was a sufficient basis on which the board was entitled to decline jurisdiction. Both board members erred in law, albeit differently, in their respective interpretation of section 5 (i) of the Act and we must now interfere. The section explicitly creates an exemption from the general application of the Act only if the person in the category of the respondent “*lives in the building in which the living accommodation is located*”. That means that the respondent was required to live in the building at the time when she rented the room to the appellant in order for the exemption to apply. It was not

sufficient that she merely intended to move in at some subsequent time. Nor was it sufficient that she actually did move in at a subsequent time.

[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.

49. Further, in *McKnight v. Kirk*, 2022 ONSC 3617, also a decision of the Divisional Court, it was held that authorities subsequent to *Cowie*, have held that the Board must examine the circumstances throughout the tenancy to determine whether the Act began to apply at a later point in time:

[23] The Tenant submits that the Member failed to explain why she departed from *Cowie v. Bindlish* and LTB decisions that have subsequently found that the Board must examine the circumstances throughout the tenancy to determine whether the RTA began to apply at a later point in time.

[24] 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.

[25] In TET-87517-18-IN, 2018 CanLII 42846 (ON LTB), the LTB found that the landlord actually resided in a separate unit and "staged" his living situation to evade the application of the RTA.

[26] 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.

50. Secondly, as to the terms "lives in the building" and "required to share", in *McKnight v. Kirk*, the Divisional Court held that the question is not whether the family member is "required to share" with the tenants, but the reverse, whether the tenants are required to share with the family member:

[29] In addition, the Member properly interpreted the terms "lives in the building" and "required to share." The Tenant argues that J. was not "required to share" the bathroom

and kitchen with the tenants because she was able to use the bathroom and kitchen in the owner's first floor unit. However, based on the express words of s. 5(i), the question is not whether the family member is "required to share" with the tenants, but whether the tenants are required to share the facilities with the family member. There was evidence before the LTB that while J. used the first-floor bathroom to shower, she regularly used the second-floor bathroom, kitchen and laundry facilities. The tenants had no alternative facilities and were therefore required to share with J.

51. In my view, based on the authorities, I must first look at the situation at the time the parties entered the lease, as the relevant period for assessing the application of the s. 5(i) exemption.
52. Secondly, I must be alive to the fact that if the Landlord vacated the unit after entering the lease with the Tenant, or otherwise agreed to alter the terms of the arrangement, the Act may begin to apply at that later date.

***Were the Landlord and Tenant required to share a kitchen or bathroom at the time the lease was entered***

53. In my view, the evidence is all one way that as of the commencement of the lease, the Tenant was only leasing her bedroom, and that the kitchen was shared.
54. The Tenant herself admitted that the pre-lease discussions were for her to rent a room only. If she had exclusive possession of the bedroom only, it follows logically that the kitchen was shared.
55. Her evidence that she was entitled to the whole floor simply cannot stand when one considers that as of June 2020, the documentary evidence is clear that she did not have the whole floor, but wanted it for the \$700.00 she was required to pay. The Landlord clearly told her that she did not have the whole floor and she accepted that this was the case by her written reply.
56. There was only one kitchen in the house (ie excluding the basement unit which is not relevant). In other words, the parties were forced to share the kitchen as it was the only one.
57. The Landlord's evidence that he cooked steaks for Russ Govan in 2019 gave an air of reality to his claim to be sharing the kitchen.
58. The only kitchen the Tenant had access to was the one she shared with the Landlord, the same kitchen he needed to access his rooms on the upper floor.
59. The Landlord used the kitchen for cooking from September 2019 to March 2020. In one text, he called her out for not turning off a burner on the stove, which also shows that the kitchen was shared.



***Did the Landlord live in the house at the commencement of the lease***

60. The lease commenced September 1, 2023. The Landlord had been living in the house since 2017. There was no evidence that he moved out in September 2019.
61. Moreover, between the period of September 1, 2019 to March 2020, when COVID hit, there was a good deal of evidence by way of text messages about the Landlord giving notice that he would be coming home.
62. In her cross examination of the Tenant, Ms. Hawkes put to the claimant the question of how was it possible that the Landlord did not live at the house, with all the back and forth texts about him giving her notice that he was coming home. Her answer was that he arrived once in 6 months, and it's been three years since he came.
63. In my view, this allegation is not supported by the evidence.
64. At the commencement of the lease, the parties had a cordial relationship, and I find that the Landlord did live in the house, some 1 week out of 4, during the pre-COVID period. I prefer the Landlord's evidence on this point as it was clearly and consistently given.

***Did the Landlord, subsequent to the commencement of the lease, vacate the building***

65. This question is less straightforward.
66. There is no question that the relationship between the Landlord and the Tenant in this case was irregular. The Landlord consistently expanded the scope of the Tenant's rights to the house. In this respect, I am sympathetic to the Tenant. He stood by and allowed her to renovate the house, move his furniture to the second floor or garage, let the cat upstairs, take over the den - save for the piano, even change the locks to the front door. He even had no problem with her using his desk and monitor upstairs.
67. But the documentary evidence really only goes to October 2021, and the picture after that is less clear.
68. However, it seems that the rent stayed at \$700.00 throughout the lease.
69. The Landlord kept a key to the front door as did his mother, and the Tenant did not have an issue with this, which would be impossible to accept if she had exclusive possession of the entire main floor. Further, the mother would come by the unit to prepare the son's room, as the Landlord testified.
70. When the Landlord visited the house for the last time in June 2023, he was surprised to see the door between the kitchen and the upstairs, and was adamant that he did not authorise it.
71. The Tenant did request the Landlord to let her know if he ever wanted to move out from upstairs, but there is no evidence that he ever did.

72. The Tenant provided no evidence that the upstairs was ever for her use, and so it was obviously for the Landlord alone.

73. I find that the Landlord did not vacate the house such that the Act started to apply to the tenancy at some later date.

**Questions Answered**

74. I therefore make the following findings:

- (i) The Act does not apply to the living accommodation of Mr. Lomas and Ms. Cungu, because, within the meaning of s. 5(i) of the Act:
  - (a) Ms. Cungu and Mr. Lomas were required to share a kitchen and bathroom in the house at the time they entered the lease;
  - (b) Mr. Lomas lived in the house at the time Ms. Cungu moved in in September 2019; and
  - (c) Mr. Lomas did not vacate the house at a later date, and thereby the Act did not begin to apply at any subsequent point in time.

**It is ordered that:**

1. The *Residential Tenancies Act, 2006* does not apply to the relationship between the parties.

**November 23, 2023**  
**Date Issued**

\_\_\_\_\_  
James Campbell  
Member, Landlord and Tenant Board

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