Order under Section 69
Residential Tenancies Act, 2006

Citation: Star Towers Ltd v Wakunick-Fuery et al, 2023 ONLTB 64356
Date: 2023-09-29 **File Number:** LTB-L-006653-23 et al

In the matter of: A, B & D, 147 DIVISION ST WELLAND ON L3B4A1

Between: Star Towers Ltd — Landlord

And

Morgaine Wakunisk-Fleury, Stephanie Wakunick and Jasmine-Lynn Carriere -Lone — Tenants

This order relates to the applications identified on Schedule A. The applications involve Star Towers Ltd. (the 'Landlord'), and Morgaine Wakunisk-Fleury ('MW'), Stephanie Wakunick ('SW') and Jasmine-Lynn Carriere-Loney ('JC' and, together with MW and SW, the 'Tenants').

The applications were heard by videoconference on March 20, 2023 and June 26, 2023. The Landlord and the Tenants attended the hearings. The Landlord was represented by Peter Giblett. The Tenants were represented by Claire Hardy.

I heard evidence from Osama Abonassar, an architect retained by the Landlord, Haroon Rashid, the principal of the Landlord, and Tyler Meadows from the City of Welland.

This order: (a) resolves the L2 applications; and (b) addresses the procedure for how the L1, T1, T2 and T6 applications will be heard by me.

Determinations:

I. Background

1. These applications all relate to the same multi-story residential complex owned by the Landlord and located at 147 Division St in Welland ON. The Tenants occupy three units in the complex.

2. The L2 applications were brought under section 50 of the *Residential Tenancies Act, 2006* (the 'RTA') based on the assertion that the Landlord requires possession of the rental units because it intends to demolish them.

3. The Landlord also filed an L1 application asserting that SW has not paid rent.

4. The tenant applications are all based on assertions that the Landlord: (a) charged illegal rent; (b) entered the rental units illegally; (c) substantially interfered with the Tenants' reasonable enjoyment; (d) harassed the Tenants; (e) withheld vital services; and (f) failed to comply with maintenance-related obligations.

5. There was an L1 application brought by the Landlord against JC—LTB-L-000100-22—based on an N4 notice dated December 7, 2021. That application was heard on January 16, 2023 by another Member. At that hearing of that application JC raised issues under section 82 of the RTA that parallel the issues that are raised on JC's tenant applications[1]. The Landlord was not represented at the hearing on January 16, 2023, and indicated before me on March 20, 2023 that they would be asking to have whatever order is made on that application reviewed. I make no comment on the merits of any request by the Landlord to review whatever order is made on LTB-L-000100-22.

6. On June 19, 2023, the Landlord filed another L1 application against JC—LTB-L-04846023—based on the same N4 notice that was the basis for LTB-L-000100-22. That application will be heard by me together with the other Landlord and tenant applications. At the next attendance before me, the parties should be prepared to address whether the L1 and the tenant applications are subject to *res judicata* or issue estoppel based on whatever order is made based on the attendance on January 16, 2023.

7. I note that LTB-T-034660-23 was scheduled to be heard by another Member on July 6, 2022. That hearing was, however, cancelled and the application will be heard by me together with the other tenant applications.

II. Hearing of L2 Applications

8. On March 20, 2023, I convened a case conference to address these applications and to establish a path forward to have them heard on their merits. During that case conference, I directed that LTB-L-006653-23, LTB-L-006668-23 and LTB-L-006673-23 would be heard by me on June 26, 2023.

9. After the attendance on March 20, 2023, the Landlord issued three new L2 applications—LTB-L-026900-23, LTB-L-026907-23 and LTB-L-026909-23. Apparently, this was done to address issues with LTB-L-006653-23, LTB-L-006668-23 and LTB-L-006673-23, and, on June 26, 2023, the Landlord acknowledged that LTB-L-006653-23, LTB-L-006668-23 and LTB-L-006673-23 should be dismissed.

[1] It appears that the T1. T2 and T6 applications may have been before the Member.

10. On June 26, 2023, the Tenants asserted that the Landlord's '900 series' L2 applications were not scheduled to be heard by me that day. That was technically correct in that the '900 series' applications were not filed until after the attendance on June 26, 2023 had been scheduled. I determined, however, to proceed to hear the '900 series' applications because they were based on the same allegations as the (dismissed) L2 applications that had been scheduled to be heard that day and the Tenants were prepared to address the issues arising on those applications. This was, in my view, more expeditious than adjourning the '900 series' applications. **[See RTA, s. 183]**

III. No Need for New Tenant Applications

11. The Tenants have filed multiple applications asserting the continuation of issues raised on their original applications.

12. It was, in my view, not necessary for the Tenants to have filed new applications. Where a tenant seeks relief based on the continuation of actions or conduct as opposed to new actions or conduct, the best way to deal with that is to amend the original application rather than filing a new application.

13. The LTB's *Rules of Procedure* permit the LTB to amend an application after considering:

    (a) whether the amendment was requested as soon as the need for it was known;

    (b) any prejudice a party may experience as a result of the amendment;

    (c) whether the amendment is significant enough to warrant any delay that may be caused by the amendment;

    (d) whether the amendment is necessary and was requested in good faith; and

    (e) any other relevant factors. **[*Rules of Procedure*, Rule 15.3. See also RTA, s. 201(1)(f)]**

14. The *Rules of Procedure* also allow the LTB to exercise its discretion to grant a request to amend made at the hearing of an application if satisfied that the amendment: (a) is appropriate; (b) would not prejudice any party; and (c) is consistent with a fair and expeditious proceeding. **[*Rules of Procedure*, Rule 15.4]**

15. Considering the factors identified in Rule 15.03, it is difficult to imagine a scenario in which the LTB would not permit a tenant to amend an application to seek relief based on the assertion that the actions or conduct of the landlord raised in the application has continued after the application was filed. To require that a tenant file a new application in those

circumstances would, in my view, be contrary to section 183 of the RTA, which mandates that the LTB adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter **[RTA, s. 183]** and section 2 of the *Statutory Powers Procedures Act* (the 'SPPA'), which requires that the LTB's *Rules of Procedure* be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits. **[SPPA, s. 2]**

16. The Tenants raised the limitation period in subsection 29(2) of the RTA. The effect of this subsection is to prevent the LTB from granting a remedy in relation to issues that took place during the one-year period prior to an application being filed under section 29. **[*Toronto Community Housing Corp* v. *Vlahovich*, 2010 ONSC 1686 (Div Ct)]** They do not restrict the ability of the LTB to provide a remedy based on the continuation of actions or conduct raised in the application subsequent to the application being filed. The LTB often grants ongoing abatements where the actions and conduct of the landlord are continuing. **[See *Alexandre* v *Jones*, 2022 CanLII 82028 (ON LTB)]**

IV. Materials Filed by the Parties

17. Neither the Landlord nor the Tenants filed a factum or what is sometimes referred to as an '*aide memoire*'. While not required by the LTB's *Rules of Procedure*, a document outlining a party's argument can be of great assistance to the Member hearing an application.

18. Self-represented parties should not be expected to produce such a document, but legal representatives—lawyers and licensed paralegals—should seriously consider preparing a document akin to a factum or *aide memoire*, particularly where multiple applications are being heard together and/or the issues on an application are complex.

19. Neither the Landlord nor the Tenants filed a brief of documents. Instead, they each uploaded individual documents to TOP. While not required by the *Rules of Procedure*, a single PDF document that contains all of the documents a party will rely upon at the hearing of an application organized in some fashion can be of great assistance to the Member hearing an application.

20. Self-represented parties should not be expected to produce such a document, but legal representatives should seriously consider preparing a brief of documents, particularly where there are a large number of documents to which the Member hearing an application will be referred. At the very least, a legal representative should be able to refer the Member to any documents on which they intend to rely by the 'DOC' number assigned to that document by TOP.

V. Preliminary Tenant Motion

21. In a document filed on June 19, 2023, the Tenants requested that the LTB:

    (a) summarily dismiss LTB-L-026900-23, LTB-L-026907-23 and LTB-L-026906-23;

(b) declare the Landlord a vexatious litigant;

(c) award them costs; and

(d) order the Landlord to pay an unspecified amount as 'general compensation'.

22. I considered the document filed on June 19, 2023 to be a motion by the Tenants asking for the remedies set out in the document.

23. In my view, there is no basis for me to summarily dismiss LTB-L-026900-23, LTB-L026907-23 and LTB-L-026906-23.

24. Section 197 of the RTA provides the LTB with jurisdiction to summarily dismiss an application where: (a) the matter is frivolous or vexatious; or (b) the applicant filed documents that the applicant knew or ought to have known contained false or misleading information. **[RTA, s. 197]**

25. The Tenants also cite subsection 23(1) of the SPPA, which gives the LTB jurisdiction to make orders or give directions to prevent abuse of its processes. **[See also *Rules of Practice*, Rule A8.1]**

26. The assertion that the Landlord's applications are frivolous or vexatious and an abuse of process is based on the number of notices the Landlord has delivered and the number of applications the Landlord has filed. While there certainly have been numerous notices delivered and applications filed by the Landlord, the reason for this appears to be that the Landlord failed to comprehend the legal requirements of the RTA. That, in my view, does not result in the notices or applications being frivolous or vexatious, or an abuse of the LTB's process.

27. In general terms, the assertion that documents filed by the Landlord were false or misleading related to nature of the work to be undertaken by the Landlord. Given my determination below, it is not necessary for me to delve into whether these documents were false or misleading or, if they were, whether the Landlord knew or ought to have known they were false or misleading.

28. The Tenants asserted that the Landlord's applications were subject to *res judicata* or issue estoppel. I do not agree. There has been no determination of which I am aware that determines the issues that were before me on the Landlord's L2 applications. The Tenants cited the order issued in LTB-L-021122-22 on October 24, 2022, but that order dismissed an L2 application against SW based on an N13 notice because the Landlord requested permission to withdraw the application. The principle of res judicata applies only where there is a conclusive disposition of the merits. **[See, for example, *Canam Enterprises Inc.* v *Coles*, 2000 CanLII 8514 (ON CA)]**

29. The LTB has jurisdiction to find that a person is a vexatious litigant where the person has persistently instituted vexatious proceedings or conducted proceedings in a vexatious manner. The effect of declaring the Landlord a vexatious litigant can be the dismissal of an application or applications filed by that person and an order requiring that the person obtain

permission from the LTB to commence further applications before the LTB or to take further steps in a pending application. **[*Rules of Practice*, Rule A8.2]**

30. In determining whether to declare a person a vexatious litigant, the following factors are relevant:

    (a) whether proceedings by that person were brought to determine an issue or issues that had already been determined by the LTB or a court of competent jurisdiction;

    (b) whether the grounds and issues raised in proceedings brought by that person are rolled forward into subsequent proceedings, repeated and supplemented;

    (c) whether it is obvious that a proceeding commenced by that person is not capable of success or that no reasonable person could reasonably expect to obtain the relief requested; and

    (d) whether proceedings brought by that person are brought for any improper purpose, including harassment or oppression of other parties by proceedings brought for purposes other than the assertion of legitimate rights. **[See *Melnyk* v *Toronto Community Housing Corporation*, 2013 CanLII 75896 (ON SC), considering *Courts of Justice Act*, s. 140]**

31. While I appreciate the Tenants' frustration at the number of applications that have been filed by the Landlord, I am not prepared to find that the Landlord has persistently instituted vexatious proceedings or conducted proceedings in a vexatious manner. As noted above, the reason the Landlord has delivered multiple notices and commenced multiple applications that have either been dismissed or not pursued appears to be that the Landlord failed to comprehend the legal requirements of the RTA. That, in my view, does not make the Landlord a vexatious litigant.

32. I think that the request for costs is premature. While the LTB may order a party to pay the costs of another party, costs are generally only awarded in cases of unreasonable conduct that causes undue expense or delay**. [*Rules of Practice*, Rules 23.2 and 23.3]** I address the costs of the L2 applications below and will determine whether it is appropriate to award costs on the other applications when they are heard.

33. The Tenants referred to *Mejia* v. *Cargini* **[2007 CanLII 2801 (ON SCDC)]** and paragraph 31(1)(f) of the RTA in support of their request for general compensation. *Mejia* stands for the proposition that the LTB has the authority to award general compensation based on its jurisdiction to 'make any other order that it considers appropriate'. **[RTA, s 31(1)(f)[2]]** I do not believe that the LTB has 'free standing' jurisdiction to award a tenant general compensation or where a request is made under section 197 for an order dismissing an application.

[2] See also RTA, para 57(3) 1.1.

34. I wish to note that, as a general rule, preliminary motions of the type brought by the Tenants should be avoided and brought in only the clearest of cases. In my view, they typically serve no purpose but to delay the determination of applications on their merits.

VI. Subsection 71.1(3)

35. The Tenants raised a preliminary issue with respect to my jurisdiction based on the assertion that the Landlord's '900 series' L2 applications did not identify all of the previous N13 notices delivered by the Landlord. They relied on subsections 71.1(3) and (4), which say:

> ***71.1*** *(3) A landlord who, on or after the day subsection 11 (2) of Schedule 4 to the Protecting Tenants and Strengthening Community Housing Act, 2020 comes into force, files an application under section 69 based on a notice of termination given under section 48, 49 or 50 shall, in the application,*
>
> *(a) indicate whether or not the landlord has, within two years before filing the application, given any other notice under sections 48, 49 or 50 in respect of the same or a different rental unit; and*
>
> *(b) set out, with respect to each previous notice described in clause (a),*
>
> *(i) the date the notice was given,*
>
> *(ii) the address of the rental unit in respect of which the notice was given,*
>
> *(iii) the identity of the intended occupant in respect of whom the notice was given if the notice was given under section 48 or 49, and*
>
> *(iv) such other information as may be required by the Rules.*
>
> *(4) The Board shall refuse to accept the application for filing if the landlord has not complied with subsection (3).*

36. Given my finding that the L2 applications must be dismissed based on: (a) the failure of the Landlord to provide compensation to MW; and (b) the fact that the N13 notices upon which they are based are invalid, I do not need to consider the application of subsections 71.1(3) and (4), but I will.

37. The issue with the application of subsection 71.1(4) in practice is that there is no process for 'screening' applications filed electronically under section 69 of the RTA based on sections 48, 49 or 50 to determine if they are compliant with subsection 71.1(3). Indeed, there is no way the LTB could, as a practical matter, determine if a landlord had disclosed on an L2 application all of the notices under sections 48, 48 or 50 that were delivered in the preceding

two years because landlords are not required by the RTA to 'register' the delivery of an N12 or N13 notice.

38. In my view, the correct way to interpret subsection 71.1(4) is to prohibit the LTB from making an order under section 69 terminating the tenancy and evicting the tenant where it is established that the landlord has not complied with subsection 71.1(3). In this case, I dismissed the L2 applications based on other grounds and, as a result, did not need to consider whether the Landlord had complied with subsection 71.1(3).

VIII. Merits of the Landlord Applications

39. The residential complex is a multi-storey mixed-use building. The basement of the complex is vacant. There is one residential unit and three or four commercial units on the first floor of the complex. There are seven residential units on the second floor of the complex. The Tenants occupy residential units—Units A, B and D—on the second floor.

40. The L2 applications were brought under section 50, which says, in part:

> ***50*** *(1) A landlord may give notice of termination of a tenancy if the landlord requires possession of the rental unit in order to,*
>
> *(a) demolish it;*
>
> *(b) convert it to use for a purpose other than residential premises; or*
>
> *(c) do repairs or renovations to it that are so extensive that they require a building permit and vacant possession of the rental unit.*
>
> *(2) The date for termination specified in the notice shall be at least 120 days after the notice is given and shall be the day a period of the tenancy ends or, where the tenancy is for a fixed term, the end of the term.*
>
> *(3) A notice under clause (1) (c) shall inform the tenant that if he or she wishes to exercise the right of first refusal under section 53 to occupy the premises after the repairs or renovations, he or she must give the landlord notice of that fact in accordance with subsection 53 (2) before vacating the rental unit.*

41. Section 50 applies where the landlord requires possession of the rental unit: (a) to demolish it; (b) to covert it to use for a non-residential purpose; or (c) to do repairs or renovations that are so extensive that they require vacant possession of it. **[RTA, s. 50(1)]**

42. In *Gatti* v. *Forsythe* **[1988 CanLII 4591 (ON SC)]**, the Superior Court described what is now section 50 as follows:

> *Surely such a carefully crafted section was designed to protect innocent tenants from avaricious landlords who might otherwise circumvent the spirit of this legislation in pursuit*

of higher rents in a prosperous rental market. And so landlords, to terminate tenancies in certain situations, were required to justify the termination by: (1) bona fide demolition, (2) bona fide conversion to another use than "rental residential properties", or (3) bona fide repairs and renovations that were extensive enough to require a building permit and vacant possession.

43. The RTA differentiates between the rights of a tenant where that landlord requires vacant possession to do repairs or renovations. Where the landlord requires possession of the unit to do repairs or renovations the RTA gives the tenant a right of first refusal to occupy the unit once the repairs or renovations are completed. **[RTA, s. 53]** That right is not available where the landlord requires possession to demolish or convert the unit. A tenant who wishes to exercise the statutory right of first refusal must notify the landlord in writing before vacating the unit. **[RTA, s. 53(2)]**

44. As noted by the Divisional Court in *Salter* v. *Beljinac* **[2001 CanLII 40231 (ON SCDC)]**, a tenant has an interest in maintaining continuity of residence. Section 53, in my view, recognizes that a tenant has an interest in continuing to occupy the unit and balances the interest of a landlord that is required or wishes to do major repairs or renovations to a complex or unit and those of the tenant by providing the tenant with the first right to reoccupy the unit based on a rent determined as if the tenancy had not been terminated. **[RTA, ss. 53(1) and (3)]**

45. The LTB's N13 form requires that a landlord identify to the tenant one of three reasons the tenancy is being terminated that parallel subsection 50(1) (a), (b) and (c). Only where the landlord identifies that the termination is for 'Reason 2'—the landlord requires vacant possession to do repairs or renovations—does the form identify to the tenant that the landlord is required to give them a right of first refusal to reoccupy the unit as required by subsection 50(3).

46. To obtain an order under section 69 based on subsection 50, a landlord must establish:

    (a) valid notices of termination were provided to the tenant and comply with subsections 40(2), and 50(2) and (3) of the RTA;

    (b) the compensation required by section 52 of the RTA was provided to the tenant by the termination date on the N13;

    (c) the L2 application complies with subsection 71.1(3);

    (d) the landlord in good faith intends—genuinely intends—to carry out the work on which the N13 is based; and

    (e) the landlord has obtained all of the permits necessary to carry out the work on which the N13 is based or, if it is not possible to obtain permits until the unit is vacant, has taken all reasonable steps to obtain those permits. **[RTA ss. 50(2) and (3), 52, 55.1, 71.1(3) and 73(1)]**

47. There is no dispute that the Landlord intends to undertake extensive work to the residential complex. Mr. Rashid testified that the list of violations identified on an Inspection Order issued by Welland Fire and Emergency Services—DOC-1506988—and information from several electricians ultimately led the Landlord to determine that a major renovation of the residential complex was required. Nevertheless, I have determined that the L2 applications must all be dismissed.

A. LTB-L-026900-23

48. On March 20, 2023, the Tenants agreed that the compensation required by the RTA had been provided. However, on June 26, 2023, MW asserted that the cheque provided to her by the Landlord was not dated and could, as a result, not be cashed. Mr. Rashid testified that he was aware that the cheque provided to MW was undated and that an undated cheque could not be cashed.

49. Mr. Giblett agreed that LTB-L-026900-23 had to be dismissed as a result of the fact the required compensation had not been provided to MW by the termination date set out in the applicable N13 as required by subsection 55.1. **[RTA, s. 73.1]**

50. I note that even if the required compensation had been provided to MW, LTB-L-026900-23 I would have still dismissed the application for the same reason that I am dismissing the other two '900 series' L2 applications.

B. LTB-L-026907-23 and LTB-L-026909-23

51. LTB-L-026907-23 and LTB-L-026909-23 must also be dismissed. While the Landlord provided compensation to SW and JC, the N13 notices upon which LTB-L-026907-23 and LTB-L-026909-23 are based are invalid and cannot be the basis for orders under section 69.

52. For the LTB to make an order under section 69, the notice of termination upon which the application is based must be valid.

53. In my view, to be valid, an N13 notice based on work to be undertaken to a unit or complex must correctly identify whether the work to be undertaken constitutes: (a) the demolition of the unit; or (b) the repair or the renovations of the unit.

54. Subsection 43(2) of the RTA requires that a notice of termination (correctly) set out the reason and details respecting the termination. **[RTA, s. 43(2). See also *Metro Capital Management Inc. (Re)*, [2002] OJ No 3931 (Div Ct)]** A notice of termination must also be

clear and unambiguous. **[*Metropolitan Toronto* v *Atkinson*, 1977 CanLII 30 (SCC) and *Re Bianchi and Aguanno*, 1983 CanLII 1967 (ON SC)]**

55. An N13 that states that the landlord requires possession to demolish a unit in circumstances where the work to be undertaken by the landlord actually involves the repair or renovation of the unit does not accurately describe the reason the landlord requires possession as required by subsection 43(2). I also note that such a notice is confusing insofar as it does not indicate to the tenant that they have the statutory right of first refusal to re-occupy the unit as required by subsection 50(3).

56. The N13 notices on which the '900 series' L2 applications are based all identified the reason the Landlord required possession of the rental units as being to demolish them. I find, however, that the work the Landlord intends to undertake involves the renovation and not the demolition of the units.

57. In my view, the test applicable to determine whether the work to be undertaken by a landlord is a 'renovation' or a 'demolition' is not dependent on the work to be undertaken, but the result and, in particular, whether the unit will continue to exist in some form after the work is completed.

58. In my view, paragraph 50(1)(a) contemplates a situation where the rental unit will cease to exist such that the tenant cannot reoccupy it once the work is completed. The word 'demolish' means to "pull down, completely destroy or break" and "destroy, pull down, or do away with something" **[See *Ma* v *Sedor*, 2021 CanLII 139751 (ON LTB), para 13 and *TEL- 63893-15 (Re)*, 2016 CanLII 38366 (ON LTB), para 11]** While not directly application, I note that the *Building Code* deals with the issuance of construction and demolition permits. It defines 'demolish' as 'to do anything in the removal of a building or any material part thereof'. **[*Building Code Act, 1992*, s. 1(1)]**

59. Paragraph 50(1)(c), on the other hand, contemplates, in my view, a situation where the work being done is so extensive that vacant possession is necessary as a result, for example, the removal of structural components, power outages and interruptions to the water supply, but the unit will still exist in some modified form when the work is completed. The term 'renovation' is broad enough to include circumstances where there is a radical change to the floorplan of a unit or even a change in the size of the unit.

60. It is only where the rental unit is gone—no longer exists in any form—such that it is not possible for the tenant to exercise a right of first refusal that work to be undertaken to a rental unit or residential complex can be considered as involving the demolition of a unit. Any other interpretation of the distinction between 'renovation' and 'demolition' runs, in my view, contrary to the intent of section 53—it cannot be the intention of the Legislature that a landlord would be able evict a tenant without that tenant having a right of first refusal to reoccupy the unit by renovating a complex to change the configuration or size of the tenant's rental unit.

61. I accept that a landlord faced with having to undertake extensive renovations to a residential complex to bring it into compliance with local by-laws or to comply with its

obligations under subsection 20(1) of the RTA may elect to demolish the building and start over. **[See *SWL-11978-18 (Re)*, 2018 CanLII 42751 (ON LTB)]** It cannot, however, be the case that a landlord can use the 'opportunity' created by being required to undertake extensive renovations to a complex or unit to evict existing tenants. That, in my view,

would run contrary to the intention of the RTA. **[See *Gatti* v. *Forsythe*, 1988 CanLII 4591 (ON SC)]**

62. This is not a situation like *TSL-04700-19 (Re)* **[2019 CanLII 134413 (ON LTB)]** where certain of the units in the complex ceased to exist in any form because the number of units was being reduced or *Corbett* v. *Lanterra Developments The Britt Ltd* **[2014 ONSC 3297 (Div Ct)]** where the portion of the building that contained the rental unit was being converted to a non-residential use.

63. In this case, the Landlord is proposing to create additional units on the second floor of the complex.

64. Based on the documents filed by the Landlord—DOC-1025308 and DOC-1025364—the work to be undertaken by the Landlord will result in changes to size and the configuration of Units B and D. Unit B will be divided into two units—Units 9 and 10. Unit D will also be divided into two units—Units 7 and 8. The effect of this will be to change Unit B from a three-bedroom unit to a two-bedroom unit and to convert Unit D from a three-bedroom unit to a one-bedroom unit. Units B and D will, however, continue to exist.

65. In *Two Clarendon Apartments Limited* v. *Sinclair* **[2019 ONSC 3845 (CanLII)]**, the Divisional Court considered an appeal from an order of the LTB that made an order under section 69 in reliance on paragraph 50(1)(c) of the RTA—repair or renovation—where the N13 referred to paragraph 50(1)(a)—demolition.

66. The work to be done by the landlord in *Two Clarendon Apartments* involved significant changes to the interior of the unit, including removing one of the bedrooms, but did not involve a change to the outer boundary of the unit. The Divisional Court found that there was no error in the finding by the Member that the work constituted a renovation and not the demolition of the unit. The Court accepted the Member's interpretation of section 50(1):

> *13. In a situation where the rental unit continues to exist, albeit in an extremely altered form, it is possible for the tenant to exercise a right of first refusal, because the rental unit is still there: the tenant may move back and continue the tenancy. In a situation where the rental unit is gone, it is not possible for the tenant to exercise a right of first refusal: the rental unit is no longer there and so the tenant cannot move back. The fact that the Act distinguishes renovations and demolitions by the tenant's right of first refusal shows that the intention of these sections of the Act is to preserve tenancies where it is possible to do so.*

> *14. Accordingly, a project will be defined as a renovation under the Act in a case where it is possible for the tenant to move back into the unit and a project will be defined as a demolition where it is not possible for the tenant to move back into the unit.*

67. While the factual matrix is different from *Two Clarendon Apartments* insofar as the size of Units B and D will change, I do not think that is a material distinction—the units will continue to exist in an 'extremely altered form'.

68. My decision is consistent with *TSL-05299-10 (Re)* **[2010 CanLII 76078 (ON LTB)]**. In that case, the LTB dismissed an L2 application based on an N13 notice based on a finding that the work to be undertaken by the landlord amounted to a renovation and not demolition as was stated on the N13. I also note that in *TSL-97139-18 (Re)* **[2018 CanLII 141658 (ON LTB)]** the LTB dismissed an L2 application based on an N13 notice that described the work as involving a renovation based on a finding that the work involved the demolition of the unit.

69. I acknowledge that in *TSL-04699-19 (Re)* **[2019 CanLII 134423 (ON LTB)]**, the Member found that an N13 that incorrectly identified the purpose for which the landlord required possession of the rental unit was not invalid. I note, however, that the Member did not consider subsection 43(2) and the order pre-dated the Divisional Court's decision *in Metro Capital Management*.

70. I note that *Belcourt Manor Inc.* v *Collard* **[2010 ONSC 1160 (CanLII)]** has been referred to in other LTB orders dealing with the difference between renovating and demolishing a rental unit. In my view, *Belcourt Manor* is not particularly relevant to determining the issues that is before me in this case. Belcourt Manor involved a situation where the LTB had erred in approaching an L2 application as if it was based on the assertion that the rental unit was being demolished, but the N13 indicated that the unit was being repaired or renovated.

C. Section 202

71. In *Two Clarendon Apartments Limited*, the Divisions Court found there was no error in the LTB treating an L2 application brought based on paragraph 50(1)(a) as having been brought under paragraph 50(1)(c) based on the exercise of its jurisdiction under section 183 of the RTA. In the circumstances, I have chosen not to exercise that jurisdiction.

72. I am required to determine the 'real substance' of why the Landlord came before seeking the termination of the tenancies and the eviction of the Tenants based on paragraph 50(1)(a) instead of 50(1)(c). **[RTA, s. 202]**

73. The initial N13 notices that were delivered by the Landlord indicated that it required possession of the units because it intended to do renovations. However, later N13 notices, including the N13 notices upon which the '900 series' applications are based, indicated that the Landlord intended to demolish the units.

74. Mr. Rashid testified that the reason for the change to the N13 notices was the Landlord determined subsequent to delivering the initial N13 notices that additional units could be added to the second floor during the renovation. I note, however, that the N13 notices the Landlord delivered in January of 2022 indicated that possession was required to do renovations **and** that there would be additional units added to the second floor. It was not until March of 2022 that the Landlord delivered N13 notices that referred to the units being demolished. The schedules to the N13 notices from January and March of 2022 are slightly different, but Mr. Rashid was not able to identify any substantial differences between the description of the work to be undertaken by the Landlord in the schedules that would explain why one set indicated the Landlord would be undertaking renovations and the other set indicated that the units were being demolished.

75. I find that it is more likely than not that the reason the Landlord changed on the N13 notices the reason possession of the units was required was to avoid the Tenants having the right to reoccupy their units at a rent that is no more than what the Landlord could have lawfully charged if there had been no interruption in the tenancies. This would be consistent with the evidence of Abonasser, who testified that the work that was required to be done to the complex presented the Landlord with the opportunity to generate more revenue from the complex.

76. Give my finding as to the 'real substance' of why the Landlord came before me seeking an order under section 69 based on paragraph 50(1)(a) as opposed to 50(1)(c), it would, in my view, be inappropriate for me to exercise my jurisdiction under section 183 and treat the applications as having been brought under paragraph 50(1)(c).

D. Appropriate Remedy

77. In *TSL-86609-17 (Re)* **[2017 CanLII 98312 (ON LTB)],** the LTB found that the work constituted the renovation as opposed to the demolition of the unit as was claimed on the N13. In that case, the LTB made an order granting the tenant a right of first refusal, but that was because the tenant had already vacated the unit as a result of the N13. The LTB noted:

> *Normally, when a landlord serves a defective notice of termination, as has happened here, the landlord's application is dismissed (where the only relief requested is termination). However, in this case the Tenant has already vacated the rental unit, and the rental unit and residential complex are still being renovated. Merely dismissing the application would be unfair, because the Tenant cannot move back into the rental unit until the renovations are complete.*

78. In this case, since the Tenants have not vacated, the appropriate remedy is, in my view, to dismiss the applications.

E. Application of Section 83

79. Subsection 83(3) of the RTA says, in part:

> ***83*** *(3) Without restricting the generality of subsection (1), the Board shall refuse to grant the application where satisfied that,*
>
> *(a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement;…*

80. The Tenants argue that I was required to dismiss the L2 applications because the issues that have been raised on their tenant applications constitute serious breaches. As a result of my determination that the L2 applications must be dismissed, I do not need to determine that issue and decline to do so.

IX. Tenant Applications

81. Having addressed the Landlord's applications, I must now address the hearing of the tenant applications.

82. I have decided to direct that the tenant applications be 'converted' to a combined writtenelectronic hearing.

83. Section 183 of the RTA requires that the LTB adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter. **[RTA, s. 183]**

84. The SPPA provides me with the jurisdiction to hold a combination—'hybrid'—writtenelectronic hearing**. [SPPA, s. 5.2.1]**

85. I have jurisdiction to hold a written hearing unless I am satisfied that there is good reason to not hold a written hearing. **[See SPPA, s. 6(4)(b)]** In this case, there is no good reason to not hold a hybrid written-electronic hearing.

86. As noted by the Superior Court in *Flying E. Ranche Ltd.* v *Attorney General of Canada* **[2021 ONSC 1512 (CanLII)]**, the 'hybrid' trial model has been used effectively in many trials before that Court. It improves trial efficiency and reduces the length of trials thereby facilitating access to justice. **[See also *Barker* v *Barker*, 2018 ONSC 3998 (CanLII)]** I also note that the approach that I am adopting is akin to how applications under the *Rules of Civil Procedure* are heard—direct evidence by way of affidavit and cross-examination on that affidavit evidence.

87. The Tenants' direct evidence will be in writing and consist of an affidavit or declaration from each of the Tenants setting out the factual basis for the relief that is sought on their applications. **[SPPA, s. 10.1]** The Landlord will have the right to cross-examine each of the

Tenants before the LTB and will do so on the basis that each of the Tenant's direct evidence consists of the allegations in the affidavit or declaration delivered by that Tenant.

88. Each affidavit or declaration filed by a Tenant shall begin with a summary of the specific relief being sought by the Tenant on each application by category—T1, T2 and T6—and is to be divided into sections based on the type of application to which the factual allegations relate—T1, T2 and T6. To the extent that a Tenant's T2 and T6 applications are based on the same factual allegations, there is no need to repeat those allegations and they can be made only once in the affidavit or declaration and identified as applying to both the T2 and the T6 applications.

89. There will be no documents or other evidence attached to the affidavits or declarations. The affidavits or declarations will instead refer to a PDF brief of documents that will include all of the documents upon which the Tenant intends to rely to support the factual assertions made in the affidavit or declaration.

90. Each of the Tenants will prepare a PDF brief of documents that contains all of the documents referenced in their affidavit or declaration. The brief of documents must be a single PDF document—no further documents are to be uploaded to TOP as stand-alone documents. The pages of the PDF are to be numbered and the brief of documents is to include a table of contents that is hyperlinked to the documents in the brief. Each of the documents in the brief must also be 'bookmarked'.

91. The Landlord will prepare three briefs of documents—one for each of the Tenants—that contain all of the documents upon which the Landlord wishes to rely in opposing the specific Tenant application. The Landlord's briefs will be organized in the same manner as the Tenants' brief of documents.

92. The Tenants are to deliver to the Landlord and upload to TOP their affidavits or declarations and their brief of documents to the Landlord by no later than October 31, 2023. The Landlord is to deliver to the Tenants and upload to TOP its brief of documents by no later than November 15, 2023.

93. The Landlords and the Tenants are also a document outlining the law upon which they rely within seven days of the hearing of the L1, T1, T2 and T6 applications. There should be one legal argument filed by the Tenants and one filed by the Landlords. Any 'reply' by the Tenants can be provided orally. There is no need to attach reported cases to the legal argument so long as the case is reported and the citation is to CanLII.

94. The Tenants are to deliver their legal argument no less than 30 days prior to the hearing of the applications. The Landlord is to deliver its legal argument no less than 15 days prior to the hearing of the applications.

95. The Tenants and the Landlord will, no less than 30 days prior to the hearing, provide to the other and upload to TOP a list of any witnesses they intend to call at the hearing of the Tenant applications. The list is to identify the name of the witness and how long he or she is expected to testify. For any witnesses that are expected to testify for more than 30

minutes, a 'will say' statement will be provided identifying, in general terms, the evidence that is expected will be elicited from the witness.

96. That approach outlined above will, in my view, result in the most expeditious and costeffective determination of the Tenant applications.

X. L1 Applications

97. As a practical matter, L1 applications are dealt with as hybrid applications. The L1/L9 Information Update a landlord is required to deliver to the tenant and file prior to the hearing of the L1 **[*Rules of Procedure*, Rule 10]** stands as evidence of the fact that the tenant has failed to pay rent and the amount owed. It is only where the tenant disputes the amount shown as owed on the L1/L9 Update that verbal evidence concerning the payment of rent is required. In my experience, it is often the case that, given the opportunity, legal representatives are able to resolve any issues with the amount of rent owed or at least narrow the issues to be determined by the Member hearing the application.

98. My expectation is that: (a) the Landlord will deliver and file L1/L9 Updates in advance of the hearing of the L1 applications; and (b) the legal representatives will communicate and either: (a) resolve any issues with the rent the Landlord asserts is owed; or (b) at least narrow the issues to be determined by me concerning the rent owed.

XI. Removal of Jessica Mary Travers as a Party

99. The Tenants have named Jessica Mary Travers as a respondent based on the assertion that Ms Travers represented herself to be the Landlord's property manager and was directly involved in harassing the Tenants.

100. Ms Travers attended before me on March 20, 2023 and requested to be removed as a party. She asserted that at all times she acted only as the Landlord's legal representative. The Tenants objected to this request and insisted that they were entitled to a remedy against Ms Travers.

101. I indicated on March 20, 2023 that I was not prepared to remove Ms Travers over the objection of the Tenants without hearing the evidence on the tenant applications concerning he role, if any played by Ms Travers.

102. The Tenants should, however, consider whether they are prepared to 'release' Ms Travers.

103. Remedies under the RTA are generally available against a 'landlord'. A landlord may, of course, be vicariously responsible for the actions of their property managers.

104. The RTA defines a 'landlord' to include:

> (a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit;

(b) the heirs, assigns, personal representatives and successors in title of a person referred to in clause (a); and

(c) a person, other than a tenant occupying a rental unit in a residential complex, who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or the RTA, including the right to collect rent. [**RTA, s. 2(1)]**

105. A property manager who 'permits occupancy of a rental unit' or who is 'entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or [the RTA]' may be a landlord. However, a person who simply acts as a property manager is not, in my view, a 'landlord' within the meaning of the RTA.

106. By no later than October 31, 2023, the Tenants shall write to the LTB copying the Landlord and Ms Travers to advise whether they are prepared to release Ms Travers.

107. The Tenants should be aware that if they are unable to establish that Ms Travers is a 'landlord' or that a remedy is otherwise available against Ms Travers personally, there may be cost consequences that flow from having named Ms Travers as a party.

XII. Costs

108. As noted above, the Tenants requested costs. I am not going to direct that the Landlord pay the Tenants' costs on the L2 applications.

109. Costs are generally only awarded in cases of unreasonable conduct that causes undue expense or delay. **[*Rules of Practice*, Rules 23.2 and 23.3]** In this case, the fact the Landlord delivered multiple notices and filed multiple applications might have increased the time it took to hear the applications, but it was the conduct of the Tenants that was, in my view, unreasonable and caused undue delay. The Tenants' legal representative repeatedly refused to take direction during the hearing on June 26, 2023 and, on several occasions, argued with me over the directions given by me.

XIII. Board Costs

110. During the course of the hearing on June 26, 2023, I directed that the Tenants' legal representative pay what is generally known as 'board costs'. I will, however, reserve my final decision with respect to 'board costs' until I have heard the tenant applications.

XIV. Conclusion

111. The L2 applications based on the N13 notices are all dismissed. The remaining applications will be scheduled to be heard by me.

112. The Landlord is free to deliver new N13 notices. Should the Landlord deliver new N13 notices, any L2 applications filed by the Landlord will be scheduled in the ordinary course. They will not be heard with the L1, T1, T2 and T6 applications.

It is ordered that:

1. LTB-L-006653-23, LTB-L0006673-23, LTB-L-006668-23, LTB-L-026900-23, LTB-L-026909-23 are dismissed. The L2 application included in LTB-L-026907-23 is dismissed.
2. The Tenants SW and JC shall, within 30 days, 2023, repay the compensation paid to them by the Landlord.
3. The L1, T1, T2 and T6 applications will be heard together by me on a date to be scheduled.
4. The Tenants are to deliver to the Landlord and upload to TOP: (a) affidavits or declarations in support of their applications; and (b) briefs of the documents by no later than October 31, 2023.
5. The Landlord is to deliver to the Tenants and upload to TOP briefs of documents by no later than November 15, 2023

September 29, 2023
Date Issued

_____
E. Patrick Shea
Vice Chair, 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.

SCHEDULE A

Application	Filed	Unit	Tenant	Type
LTB-L-006653-23	8 Feb 2023	A	Morgaine Wakunisk-Fleury (‘MW’)	L2
LTB-L-026900-23	13 Apr 2023	A		L2
LTB-T-046709-22	18 Aug 2022	A		T2
LTB-T-034660-23	30 Apr 2023	A		T2
LTB-T-023410-23	19 Mar 2023	A		T1 and T6

LTB-T-045979-23	9 Jun 2023	A		T1, T2 and T6
LTB-L-006673-23	6 Feb 2023	B	Stephanie Wakunick (‘SW’)	L1 and L2
LTB-L-026907-23	13 Apr 2023	B		L1 and L2
LTB-T-015742-23	20 Feb 2023	B		T1
LTB-T-011475-23	4 Feb 2023	B		T2
LTB-T-011488-23	5 Feb 2023	B		T6
LTB-T-046011-23	10 Jun 2023	B		T1, T2 and T6
LTB-L-006668-23	8 Feb 2023	D	Jasmine-Lynn Carriere-Loney (‘JC’)	L2
LTB-L-026909-23	13 Apr 2023	D		L2
LTB-L-048460-23	19 Jun 2023	D		L1
LTB-T-046365-23	11 Jun 2023	D		T1, T2 and T6