

# Case seeks clarity on transfer of occupancy

BY DARYL-LYNN CARLSON  
For Law Times

A tenant who doesn't live at his rented home full time, but has roommates who do, doesn't relinquish legal right to the property, an Ontario divisional court has ruled.

But the Ontario Court of Appeal seems interested in taking a crack at the issue, recently agreeing to hear arguments on the question of transfer of occupancy in the case, said Greg Sidlofsky, a Toronto lawyer who represented the tenant.

In a decision delivered last

October, the divisional court examined the issue of transfer of occupancy and provided some clarification in *Nicholson v. Samuel Property Management Ltd.*

The court also included some comment on the issue of "illegal acts" when it cleared tenant, 53-year-old Gary Nicholson, of

contravening municipal building codes and bylaws when he spruced up his rented quarters to accommodate roommates.

"In this case, the court looked at what it means to occupy a premises," Sidlofsky says. And usually "eviction for illegal acts is for drugs or other criminal acts," he notes.

Sidlofsky says he was "a little surprised" the appeal court agreed to hear the case. "All I can guess is, they're interested in the legal test for occupancy."

The case headed to court after landlord, Samuel Property Management Ltd., won an eviction ruling against Nicholson in a complaint based on transfer of occupancy and illegal acts, heard by the Ontario Housing Rental Tribunal. Sidlofsky appealed.

In his argument to the court, Sidlofsky noted that Nicholson had lived at the two-storey Toronto apartment for 25 years. He also has a home in Orangeville, Ont., but stays in the city for an average of two nights per week when he is in on business.

The two roommates moved in to the apartment in 1997 and 1999 respectively.

In 2000, the landlord took action to evict Nicholson and roommates on the grounds that the renovations were illegal. As well, the landlord argued that occupancy had technically been transferred to Nicholson's roommates because of his weekly absence.

The tribunal had agreed with



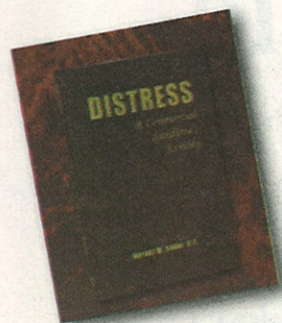
Greg Sidlofsky was surprised the Ontario Court of Appeal agreed to hear Nicholson.

apartment was 'not substantial enough to support a finding that he maintains a residency there.'

Justices Edward Then, Paul Cosgrove, and Donald Cameron accepted Sidlofsky's arguments. In their endorsement allowing the appeal, released last October, Cameron wrote: "A transfer of the occupancy under s. 81 of the TPA is not determined solely because the tenant is using the premises only part of the time. The reason for the tribunal's finding, namely that the tenant did not maintain a substantial enough connection to the unit, is wrong in law."

Cameron wrote further, on the point of the rent collected by Nicholson, "There was no evi-

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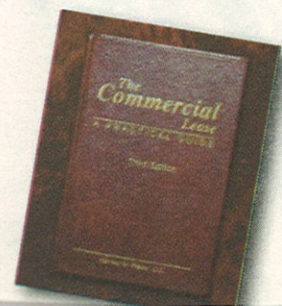


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Samuel Property on both counts, and the three were ordered evicted.

But on appeal, Sidlofsky challenged the tribunal's decision on several counts.

He questioned whether the tribunal applied the correct legal test to determine whether or not the tenant had transferred occupancy of the apartment to his roommates.

The appeal included an argument that the rent paid by the roommates to Nicholson was not illegal. And it questioned whether any of the complaints filed by the landlord — even if substantiated — warranted eviction at all.

Although the roommates paid Nicholson a fee, it covered only basic costs, exceeding the actual rent by just \$12.85 per month, the court heard. "The tenant does not profit from the above arrangement," wrote Sidlofsky.

He continued, "The Divisional Court allowed the appeal regarding the tribunal's finding that there had been a transfer of occupancy. The test employed by the tribunal, that the tenant did not 'maintain a substantial enough connection to the apartment,' was determined by the Divisional Court to be wrong in law. The divisional court found as a matter of law that occupancy cannot be determined solely on whether the tenant resides at the apartment only part of the time."

Specifically, Sidlofsky wrote, "There was no evidence that the tenant sublet or assigned his lease to his roommates. Rather, the tribunal found that the tenant transferred occupancy to his roommates based on its determination that the tenant's connection to the

dence that the amount paid by the occupants was paid to the tenant on account of rent. The total amount of money paid by the occupants to the tenant monthly was \$500, while the monthly rent paid by the tenant to the landlord was \$487.40. The amount paid by the occupants to the tenant was intended to include an amount on account of rent and a further amount on account of repairs and maintenance by the tenant, which the landlord did not provide under its lease to the tenant. In these circumstances, there was no breach of s. 121 of the TPA and a finding of such was contrary to law."

On the issue of illegal acts, the divisional court simply found the landlord didn't present any evidence that bylaws or building codes had been breached, and therefore rejected the tribunal's finding.

"There is no evidence of a breach of the TPA so serious as to justify eviction," wrote Cameron.

"If there was a difference in rent it was an inconsequential amount. There is no evidence of the degree or severity of the bylaw breach. As a matter of law eviction was not warranted."

Costs to the appellant were fixed at \$3,500.

There's no date scheduled yet for the appeal, but Sidlofsky expects it could be heard before the summer.

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Nicholson v. Samuel Property Management. **Order No. 001/290/056, pp. 4.**