Landlord and Tenant Board
Ontario

Order under Section 21.2 of the
Statutory Powers Procedure Act
and the **Residential Tenancies Act, 2006**

File Number: TSL-51258-14-RV
TSL-57023-14

Review Order

L.D.T.B.L. (the 'Landlord') applied for an order to terminate the tenancy and evict K.S. and P.D. (the 'Tenants') because the Landlord intends to demolish the rental unit. The Landlord also claimed compensation for each day the Tenants remained in the unit after the termination date.

The Landlord's initial application on this ground was resolved by order TSL-51258-14 issued on July 15, 2014.

On July 18, 2014, the Landlord requested a review of the order.

The request was heard in Toronto on August 22, 2014, November 13, 2014 and January 8, 2015. The Landlord was represented by T.H. D.S. represented the Tenants on August 22, 2014 and January 8, 2015. M.H., a tenant in the complex attended the November 13, 2014 hearing date solely to speak to an adjournment request.

On October 20, 2014, the Landlord filed a second application (TSL-57023-14) on the same ground which was heard with the review on January 8, 2015.

The following individuals were called as witnesses for the Landlord:

P.J.S., provided expert opinion evidence with respect to land use planning and development approvals;
J.S., Director of Operations, for the complex (June 2010 to July 2013); and
W.F., the Senior Project Manager for the construction project since May, 2014.

Evidence and Determinations:

Request for Review TSL-51258-14:

1. The Landlord's request for review argues that the Member erred in law in finding that the Notice to Terminate a Tenancy at the End of Term for Conversion, Demolition or Repairs (the 'N13 notice') given to the Tenants failed to comply with subsection 43(1)(a) of the *Residential Tenancies Act, 2006* (the 'Act'). Specifically, the street address of the complex given on the N13 notice was not the street address on the tenancy agreement. There is no dispute that the unit number was correctly identified. The Member found the N13 notice was defective and dismissed the Landlord's application.

2. In accordance with subsection 43(1) of the Act:

> *Where this Act permits a landlord or tenant to give a notice of termination, the notice shall be in a form approved by the Board and shall,*
>
> *(a)* ***identify the rental unit for which the notice is given;***
>
> *(b) state the date on which the tenancy is to terminate; and*
>
> *(c) be signed by the person giving the notice, or the person's agent.* [Emphasis added]

3. The situation involving this residential complex and the street address is rather unique. The complex is a high rise building with a former hotel on the lower floors and a number of occupied and vacant rental residential units on the upper floors.

4. The entrance to the hotel and residential units has always been through the common building front doors, lobby and elevators. Despite sharing an entrance the street address number for the hotel was "955" while the address for the residential units was "965". When the renovation and other construction work began the doors to the complex were close and a new one opened. It was the Landlord's position that both "955" and "965" are "so called addresses of convenience for the actual legal address of the complex [which] is 951".

5. The street address of "955" is reflected on the N13 notice given to the Tenants by hand on September 27, 2013.

6. The actual legal street address of the complex is "951" (Transfer/Deed, tax bill, etc.), the street address of "955" is found on various documents from the City of Toronto Fire Services and the Municipal Licensing and Standards Department.

7. It is the Landlord's position that the purpose of subsection 43(1)(a) of the Act is to give the Tenants notice that their unit is subject to a request to terminate the tenancy. The provision does not require that the address be shown exactly as in the tenancy agreement; rather it simply requires that the unit be identified. Furthermore, there was no possibility of confusion as to which unit was in issue given the Tenants have been aware of the redevelopment for nearly two years, the notice was delivered directly to the unit, and the Tenants were aware of the eviction application for almost ten months. Therefore the N13 notice given to the Tenants were in substantial compliance with the Act.

8. It is the Tenants' position that the original hearing Member's decision finding the N13 notice defective was reasonable and correct in law. The Tenants submitted that statutory notice provisions are mandatory in nature and require strict compliance (*Re Bianchi et al. and Aguanno et al.,* 1983 CanLII 1967 (ON SC)). In *Re Bianchi*, the termination date was not at the end of the term as mandatorily required by the Act, so the Divisional Court found the notice defective. *Re Bianchi* is distinguishable here on the basis that it is not a mandatory requirement of the Act that a notice of termination contain the correct mailing or legal address; merely that it identifies the rental unit.

9. The issue to be determined by the Board is whether the Member's interpretation of 43(1)(a) of the Act is unreasonable.

10. Subsection 43(1)(a) of the Act requires the notice to identify the rental unit. There is no dispute that the unit was correctly identified on the N13 notice. Pursuant to section 212 of the Act, "s*ubstantial compliance with this Act respecting the contents of forms, notices or documents is sufficient".* Section 212 does not give the Board the authority to waive the mandatory requirements with respect to the content of notices; but it does mean that mistakes with respect to non-mandatory parts of the Board's forms may not matter. It is unclear whether the original hearing Member turned his mind to this provision of the Act given that there is no mention of it in the order even though it says: "[a]ll the reasons for this order are contained herein, and no further reasons will be given". I believe that this failure to identify the mandatory requirements of the Act and separate them from the non-mandatory requirements for notices and apply s. 212 accordingly, constitutes is unreasonable and a serious error in law.

11. Given that the Tenants were aware of the redevelopment for nearly two years and that the N13 notice was hand delivered to the unit, there can be no possibility or confusion that the N13 notice was for their unit and they were fully aware of the case made against them. As a result, I find that the N13 notice was in substantial compliance with the Act. The request for review is granted.

Apprehension of Bias:

12. On November 13, 2014, the Board received a facsimile from Tenants' counsel indicating that he would be unable to attend the hearing later that day and was seeking an adjournment. The Landlord opposed the adjournment citing an alleged pattern of delay on the part of Tenants' counsel arguing the adjournment was an abuse of process. The Landlord directed me to the procedural history of this file including correspondence between the parties and prior adjournment requests. The adjournment was granted over the objections of the Landlord.

13. At the re-convening of the hearing on January 8, 2015, Tenants' counsel requested that I recuse myself from the hearing for reasonable apprehension of bias based on comments made by me with respect to this adjournment request at the November 13, 2014, hearing date.

14. The Tenants' counsel took issue with the Board's use of the word "convenient" when describing his absence on November 13, 2014. I stated:

> "With respect to any adjournment request, obviously I have to consider the prejudice on the parties. The concern I have in your request for denying the adjournment, that goes mostly to the fact, that clearly, albeit there may have been issues with respect to delay and I would agree with you that it seems shall we say convenient that it happened today but I'm guide by div court rulings with respect to

> adjournments where the parties have demonstrated a willingness to participate in the hearing you should give them the benefit of the doubt."

15. The Tenants' counsel submits that his credibility with respect to the representation of his clients has been damaged and the appearance of fairness has been irretrievably compromised.

16. The Landlord in response submits that there is no basis for a claim of bias given the innocuous remark reflecting the reality of granting yet another procedural indulgence to the Tenants. Furthermore, he argues the motive for the bias motion is nothing more than another attempt at delay.

17. In addition, Tenants' counsel took exception to comments I made during a verbal exchange between myself and Landlord's counsel regarding the time needed to hear the reviews at the next hearing. It is the Tenants' position that the following exchange would lead one to believe that I had already prejudged or had a predisposition towards the outcome of the hearing.

> "…these are applications based on demolition, it is not something that I think is in dispute, that it is going to be demolished, so really the only issue then is section 83 relief which is individual to each [of the] tenants."

18. It the Landlord's position that it is extremely clear that I was only expressing my impression or understanding of the position of the parties at the time, based on the submissions made before the Board. The Tenants have never asserted that the proposed project was not demolition. In a letter from Tenants' counsel dated June 27, 2014, to the Landlord he states: "Further to our recent correspondence and conversations, I enclose herewith Summary of Issues my clients intend to raise at the hearing before the Landlord and Tenant Board. To be clear, we will be relying on S. 83(3) of the *Residential Tenancies Act*". The letter goes on to list 60 issues and nowhere on this list is there any mention or any indication that the Tenants intend to assert the work does not constitute demolition.

19. The test for reasonable apprehension of bias is set out in the dissenting judgment of Mr. Justice de Grandpre in *Committee for Justice and Liberty et al.* v. *National Energy Board et al.,* [1978] 1 SCR 369 at 394:

> *…the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.*

20. The onus of demonstrating bias lies with the person who is alleging its existence. The basis for a reasonable apprehension of bias must be substantial. "Mere suspicion" is not enough, and a real likelihood or probability of bias must be demonstrated. (*R v S (RD) p. 531*.)

21. I do not believe that an informed and reasonable person, viewing the matter realistically and practically, and having thought the matter through would conclude that there is a reasonable apprehension of bias in this case. With respect to the first comment complained of, the Tenants were successful in obtaining the adjournment. With respect to the second, it was simply a statement of fact based on the record before the Board. More importantly, none of the behaviour complained of was in any way out of the ordinary or unreasonable. As a result, I declined to recuse myself.

The Applications for Termination for Demolition (TSL-51258-14-RV and TSL-57023-14):

22. The project undertaken by the Landlord involves a nine storey addition to the top of the existing tower effectively increasing the height from 32 to 41 storeys and adding to the base an eight storey podium building "with wings". One of those wings would include a purpose built building which would house 78 residential rental units. The scope of the work involves demolition of "demising walls and units on each of the existing floors", and the construction of the "super structure" that will support the additional floors.

23. The City Council approved the application to demolish the 161 existing residential units including the unit in which these Tenants reside. As part of the approval process the Landlord was required to provide and maintain 78 replacement rental housing units "comprising of 16 bachelor units, at least thirty-seven 1- bedroom or greater units and at least twenty-five 2 bedroom units, of which at least 28 units shall have mid-range rents". The City has issued four demolition permits from March, 2013 to March, 2014. In addition, City Council also required to the Landlord to double both the notice period set out in subsection 50(2) and the compensation payable to the Tenants.

24. The Landlord submitted into evidence, a letter from the City of Toronto's Acting Chief Planner and Executive Director dated April 20, 2012, in which he states in part "confirmation has been provided that the work proposed constitutes demolition rather than condominium conversion as per the City of Toronto Official Plan and Rental Housing Demolition and Conversion By-law".

25. The Landlord also submitted into evidence, architectural drawings of the complex which show the current configuration of the Tenants' unit will disappear with the removal of walls and changes to the floor configuration.

26. At the very end of the hearing the Tenants made submissions for the first time that the work constituted conversion and not demolition under the Act. No evidence was led in support of this proposition during the hearing.

27. Based on the evidence before me, I am satisfied that the work the Landlord intends to undertake would be in the nature of demolition and not conversion. The project will effectively cause the rental unit to disappear and change irrevocably. As a result, I find the work constitutes "demolition" under the Act.

28. The Landlord has paid the Tenants the amount of compensation required by the City, as stated above it is twice the amount required under section 52 of the Act.

29. Given all the above, I am satisfied that the Landlord in good faith requires possession of the Tenants' rental unit in order to demolish it.

Section 83:

30. The Tenants submitted that the Board must deny the eviction pursuant to subsection 83(3)(a) of the Act because the Landlord is in serious breach of the Landlord's responsibilities under this Act or of a material covenant in the tenancy agreement. The wording in s. 83(3)(a) is in the present tense meaning the serious breach must be ongoing at the time of the hearing before the Board.

31. The Tenants raised a number of issues in support of their claim that the Landlord is in serious breach of its obligations.

32. First, the Tenants raise maintenance issues including: elevators not in very good condition, a one-time occurrence involving a flood in the locker room due to a burst pipe, and occasional issues involving the HVAC. These problems do not rise to the level of "serious" as contemplated by s. 83(3)(a) of the Act.

33. Second, the Tenants raise the discontinuance or reduction of services and facilities. Essentially the facts are not in dispute. When the hotel in the complex closed on or about June 15, 2012, a number of the hotel services or facilities that were available to the residential tenants were discontinued or reduced. The following services or facilities were discontinued: front entrance/lobby, valet parking, concierge, restaurant, outdoor patio, lounge, pool, convenience store, wake-up service, room service, and foreign exchange service provided at the front desk. The size of the gym and the amount of equipment available there was reduced as were the laundry facilities. Although the loss of these facilities is ongoing it is no longer a breach of the Act. I say this because s. 130(5) of the Act sets out a one year limitation period for the loss reduction of facilities. As it is more than one year since these reductions or discontinuances occurred it cannot be said the Landlord is in serious breach of the Act with respect to them. As for it being a serious breach of the tenancy agreement, please see the discussion below.

34. Third, as the redevelopment work has already begun there is significant construction and demolition activity; the complex is a construction zone. The entrance to the building has been changed and as a result, the Tenants have lost independent access to the building. The Tenants require the construction security firm to permit them to access the complex and the laundry room. At times when security is not at their station they are required to wait until their return. It was the evidence before me that part of security's duties required

by the City involves a "fire walk" through the construction and garage areas where the life safety systems have been terminated. The Tenants have been provided with security's cell phone number to contact them in the event they are not at their station when the Tenants arrive.

35. The Tenants also takes exception to the construction security firm keeping a log of their comings and goings. The log book kept by security is a requirement of the Ministry of Labour.

36. Forth, there were number of issues raised by the Tenants that were not ongoing at the time of the hearing and therefore not relevant to s. 83(3)(a). These include the auctioning of the contents of the hotel, a letter sent to the tenants by the Landlord in April 11, 2014, and correspondence from a previous tenant sent in 2013 identifying himself as a quasi-representative for the Landlord in which he attempted to get other tenants to accept a financial package offered by the Landlord to vacate their units. These events shall not be considered. (See: *Puterbough v. Canada (Public Works and Government Services),* [2007] O.J. No. 748 (Ont. Div. Ct.)).

37. There is really no dispute that living in a construction zone is stressful and difficult. Pursuant to s. 8(3)(b) of Ontario Regulation 516/06 it is not open to the Board to find that the construction work constitutes a breach of the covenant for quiet enjoyment read into every tenancy agreement unless the Tenants establish the work could not be done in a more reasonable manner. That is not the case here.

38. More importantly perhaps, it seems to me that applying s. 83(3)(a) to the facts of this case would constitute an impermissible abuse of process. The Landlord wishes to develop its property which it has a right to do. The relevant City authorities have scrutinized the Landlord's proposal and approved it; in doing so it required the Landlord to give to the Tenants benefits in terms of notice and compensation that they would otherwise not be entitled to. To do as the Tenants ask would be to make that approvals process a nullity. I do not believe that is the intent of the legislation.

39. Section 1 of the Act says one of the purposes of it is to balance the rights and responsibilities of residential landlords and tenants. Given the existence of the development regime managed by the City and the Landlord's navigation of it, the fact that the approvals process took into account the Tenants' interest and gave them rights they would not otherwise have, it would not be a fair balance of the rights of the Landlord and the Tenants to permit her to use s. 83(3)(a) to essentially stop the Landlord from redeveloping the property.

40. The Tenants requested that the Board use its discretion under 83(1) of the Act to delay the eviction for a period of 6 months. The Tenants have been living in the unit since 1990. In addition, given that there is nothing comparable in price or services (previously provided) to their current unit, it would be a hardship on the Tenants. As a result, they will require additional time to locate another place to live.

41. The Landlord submitted that the Tenants' continued occupation of her rental unit requires special construction safety considerations including separation, lifesaving systems, asbestos removal considerations, and other factors that affect the construction. Working around the remaining sitting tenants has resulted in the Landlord having to incur additional costs in the amount of $250.000.00. In addition, the Tenants' continued occupation of the rental unit is also delaying construction of the 78 replacement rental units.

42. The Landlord was opposed to any relief from eviction citing that the City ordered that the Tenants receive twice the notice period required under the Act. The first N13 notice was served on the Tenants on September 27, 2013.

43. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), and find that it would not be unfair to postpone the eviction until April 30, 2015 pursuant to subsection 83(1)(b) of the Act.

It is ordered that:

1. Order TSL-51258-14 issued on July 15, 2014 is cancelled and replaced by the following: The tenancy between the Landlord and the Tenants is terminated, as of April 30, 2015. The Tenants must move out of the rental unit on or before April 30, 2015.

2. The Tenants shall also pay to the Landlord $52.63 per day for compensation for the use of the unit from March 24, 2015 to the date they move out of the unit.

3. If the unit is not vacated on or before April 30, 2015, then starting May 1, 2015, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.

4. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after May 1, 2015.

March 23, 2015
Date Issued

_____
Guy Savoie
Vice Chair, Landlord and Tenant Board

Toronto South-RO
79 St. Clair Avenue East, Suite 212, 2nd Floor
Toronto ON M4T1M6

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

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on November 1, 2015 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.