

Order under Sections 35 & 69  
Residential Tenancies Act, 2006

File Number: EAL-00666  
& EAT-08083

**In the matter of:** Montreal St  
Kingston ON K7K 3H3

**Between:** Michael Cole Landlords  
Jeff Cole

**and**

Tenant

Michael Cole and Jeff Cole (the 'Landlords') applied for an order to terminate the tenancy and evict (the 'Tenant') because the Landlords require possession of the rental unit for the purpose of residential occupation. The Landlords also claimed compensation for each day the Tenant remained in the unit after the termination date.

(the 'Tenant') applied for an order determining that Michael and Jeff Cole (the 'Landlords') harassed, obstructed, coerced, threatened or interfered with her and substantially interfered with the reasonable enjoyment of the rental unit by the Tenant or by a member of her household.

These applications were heard in Kingston on March 21 and April 18, 2007.

The Landlords represented by Tina Tom and the Tenant represented by John Ross Done attended the hearing.

Although the application only lists Michael Cole and not his brother Jeff Cole as the Landlord this Order has been amended to show both Landlords.

**Background:**

The Tenant and her young daughter reside in the top two floors of an older complex with a small one bedroom apartment below theirs. The complex has a single forced air gas heating system that services both units.

**Landlords' Application:**

This Board as a finder of fact must assess the Landlords' motives for serving the notice to terminate the tenancy to the Tenant. The test of good faith is the Landlords' genuine intention to occupy and not the reasonableness of the Landlords' proposal.

The Landlords have given the notice, to terminate the tenancy, after the Tenant filed her application for tenant's rights against them. I need to determine if the notice was given in good faith, according to the standard for this Board, which is on the balance of probabilities. I considered the following to arrive at my findings.

The Landlord Michael Cole and his mother both testified that prior to his parents selling their home to him both parties agreed that upon their return from traveling, the parents would occupy one of the rentals units. Presently the Landlords only own the two unit complex at Montreal Street. The main floor unit is a one bedroom and the upper unit consists of one bedroom plus a finished loft. testified she and her husband required the upper unit.

testified that her husband has health issues and will be required to stay in Kingston near his doctor until these health issues are resolved. They previously lived in a fifth wheel trailer which they used to travel in to the southern United States during the winter months. They returned to Kingston due to her husband's health problems and resided in the trailer in their son's driveway. After finding that too crowded they moved into their old home now belonging to their son and his wife. She stated she found being in such close proximity to her son and his wife was not good and requested that they take a unit in the rental complex as agreed in the fall of 2006.

wants the upper unit for the extra bedroom (the loft) in case her husband requires his own room while recovering from knee surgery that he may have soon. She described the loft in detail and why she wanted that room specifically. She likes the limestone walls, natural wood finish, and the amount of natural light the room receives.

If has an operation on his knee, is a unit with a steep flight of stairs and an additional flight to access the loft practical? The believe that the stairs will not be a problem because the injury prevents from walking any distance on a level surface but even the stairs in their previous two story home did not pose a problem.

Counsel for the Tenant questioned the issue of the stairs with . She felt certain that other than his immediate recovery time that the stairs were not an issue. Mr. Done then questioned her why, after living in an upper middle class neighbourhood, she would want to live in a less affluent and amenable part of the city? responded that she felt comfortable with the decision.

Michael Cole testified that the complex has been for sale for over nine months and he and his brother are not prepared to sell the property at a loss. When the complex sells the proceeds will be used to purchase a home for their parents. In the meantime they could live there. He confirmed 's testimony that the decision to have the parents reside in the unit was arrived at in the fall of 2006. Although the timing of the notice may appear suspicious, the decision had been made months previously.

I find, on the balance of probabilities, that the Landlords' intention to occupy the unit is genuine and that the notice was given in good faith.

### **Tenant's Application:**

Although the application includes allegations that the Landlords restricted the Tenant from using her above ground pool and the Tenant is seeking a rent abatement of \$ , no submissions

were made at the hearing regarding this matter. This portion of the Tenant's application is dismissed.

The Tenant alleges that smoke from the unit below is entering her unit and this substantially interferes with her reasonable enjoyment. The negative effects from the second hand smoke include waking her child in the middle of the night, which results in the child being late for or absent from school on a regular basis and causing the Tenant and her daughter to endure the odour and possible harmful health effects of the smoke.

The Tenant presented a witness and submitted reports to support her claim of the harmful effects of second hand smoke. I accept the Health Canada findings of the ill effects of second hand smoke and I do not feel the subject requires debate. The question is not whether or not second hand smoke can be harmful but did the Landlords by not eliminating the smoke, substantially interfere with the Tenant?

The testimony by witnesses of both parties and submitted documents were extensive. I shall limit references to that evidence to the portion I feel contribute to the findings in this matter. The Tenant testified that the incidences of her child being either late or absent from school were 75% less prior to November when the problem began. However exhibit #8 submitted at the hearing April 18, 2007 clearly shows that testimony to be incorrect. The number of times the child was late or absent was greatest for the period September 25 to October 26, 2006 prior to when the problem of smoke began. If the Tenant found her child suffered from the effects of the smoke, why did she allow her daughter to sleep with her, in a room with vents which would allow entry of the smoke, when the Tenant testified her daughter's room does not have any vents at all? Further the Tenant stated that a police officer was reprimanded by his superior for not responding to a call placed by her. The Officer testified he did respond to the call, did not uncover sufficient evidence to lay a charge and informed his Sergeant of such at the end of his shift, which is standard procedure. This was not disputed by the Tenant. The Tenant also testified that the smoke was so heavy she could see it coming from the vents. A Property Standards Officer who had attended the Tenant's unit six times testified that she did not smell smoke in the Tenant's unit during any of her visits and in her many years experience has never visibly seen cigarette smoke coming out of a forced air vent. This again was not disputed by the Tenant.

On Easter Sunday the Tenant left a phone message for the Landlord that she could smell dirty ashtrays from the unit below. The tenant below testified that she normally smokes two cigarettes a day in her unit, usually when she returns home from work at 3am. On the balance of probabilities, it is difficult to think that such limited smoking could emit an odour from cigarette butts in an ashtray and that the odour would travel to the unit above.

I find the credibility of the Tenant questionable based upon the examples above.

I do not doubt the harmful effects of second hand smoke. The Landlords have an obligation under the Act to take action to eliminate the smoke. But I do not find, on the balance of probabilities, that in this case the Tenant's reasonable enjoyment was substantially interfered with.

**Determinations:**

**Landlords' Application:**

1. The Landlords in good faith require possession of the rental unit, for the purpose of residential occupation.
2. The Landlords collected a rent deposit of \$ from the Tenant and this deposit is still being held by the Landlords.
3. Interest on the rent deposit is owing to the Tenant for the period from May 1, 2005 to April 30, 2007.
4. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the Act, and find that it would not be unfair to postpone the eviction until June 30, 2007 pursuant to subsection 83(1)(b) of the Act. This will allow the Tenant's daughter to finish this school year and give the Tenant ample time to find alternate living accommodation.

**Tenant's Application;**

1. It is the responsibility of the applicant to prove her case. I find the Tenant has failed to meet that onus.

**It is ordered that:**

**Landlords' Application:**

1. The tenancy between the Landlords and the Tenant is terminated. The Tenant must move out of the rental unit on or before June 30, 2007.
2. As of the date of this order, the amount the Landlords are holding for the rent deposit and the interest owing on the deposit exceeds the amount the Tenant owes for compensation by \$.
3. The Landlords are authorized to offset from the amount he owes the Tenant the following amounts: \$ per day for compensation for the use of the unit from May 15, 2007 to the date the Tenant moves out of the unit; and \$150.00 for the cost of filing the application.
4. The Landlords may collect from the Tenant any amounts that become owing as a result of this order.
5. If the Tenant does not pay the Landlords the full amount owing on or before June 30, 2007, she will start to owe interest. This will be simple interest calculated from July 1, 2007 at 6.00% annually on the balance outstanding.

6. If the unit is not vacated on or before June 30, 2007, then starting July 1, 2007, the Landlords may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
7. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlords on or after July 1, 2007.

**Tenant's Application:**

1. The Tenant's application is dismissed.

**May 16, 2007**

**Date Issued**

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**Brian McKee**

Member, Landlord and Tenant Board

Eastern Region  
4th floor, 255 Albert Street  
Ottawa ON K1P 6A9

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 26, 2007 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.