Landlord and Tenant Board
Ontario

Order under Sections 31 and 69
Residential Tenancies Act, 2006

File Numbers: TST-01913
TSL-20119

In the matter of: 34 Nineteenth St
Toronto ON M8V 3L3

Between: Tenant

and

Landlord

(the 'Tenant') applied for an order determining that (the 'Landlord') harassed, obstructed, coerced, threatened or interfered with him and entered the rental unit illegally. The Landlord then applied for an order to terminate the tenancy and evict the Tenant because the Tenant did not pay the rent that the Tenant owes.

This application was heard in Toronto on January 30, 2009.

The Landlord and the Tenant attended the hearing. The Tenant represented himself and testified on his own behalf with the help of an interpreter, The Landlord was represented by

Determinations:

The Tenant's Application

1. At the time the Tenant filed this application the only issue raised concerned the smell of cigarette smoke entering his rental unit through the ventilation system. After the Tenant filed the application, he served and filed an amended application to include events that occurred after his original application was filed. The Landlord did not object to the Tenant's request to amend the application so I granted the request and the application was amended accordingly.

The Smoking Issue

2. The Tenant moved into the rental unit in August of 2008. He testified that in September of 2008 he closed the windows as the temperature dropped, and then noticed the smell of cigarette smoke coming through the ventilation system. On September 12, 2008 he faxed a letter to the Landlord saying in part: "I have to inform you that someone is smoking inside of the building where I rent my apartment...please contact tenants who smoke in the building to stop to do that. If you are not able to provide me smoke free environment I will interrupt my tenancy as soon as I found new rent." The Tenant entered into evidence

a letter from friends which states that they were in his unit in September, 2008 and could smell cigarette smoke coming from the ventilation system. I explained to the Landlord and Tenant that such letters are considered hearsay as the writer is not available for cross-examination. As a result, such letters have little weight as evidence. However, at no time during the Landlord's testimony did he deny that there was a smell of smoke coming from the ventilation system in the rental unit. Rather it was his evidence the previous tenant of the rental unit never complained. The Tenant also entered into evidence a note from his doctor dated November 3, 2008 which states that the Tenant has allergic sinusitis from airborne chemical irritants such as cigarette smoke or "Febreeze".

3. It is not clear to me from the Tenant's evidence why he believed the Landlord had an obligation to provide to the Tenant a smoke free building. During the Tenant's evidence he stated that when he signed the lease agreement he discussed with the Landlord the "no pets allowed" clause and told the Landlord he did not smoke or have any pets. However, he did not say the Landlord promised the residential complex was a no smoking building. The only documents filed into evidence concerning the formation of the tenancy were an unsigned application to rent and an unsigned guarantor's form. Neither of those forms says anything about pets not being allowed or smoking. As a result, it is not clear to me that any written lease was ever signed. However, in the common areas of the building there is a posted sign informing tenants they are not to smoke in the common areas. Although he did not explicitly say so, the Tenant seems to have believed that by telling the Landlord he did not smoke, that meant that the residential complex was a smoke free environment.

4. According to the Landlord, on September 14, 2008 he gave to all the Tenants in the residential complex a note saying: "Please do not smoke cigarettes in the apartment or hallways..." The Tenant testified he never received any such note and on September 17, 2008 the Landlord called him and told him he had no right to ask other tenants to stop smoking inside their own apartments. The Landlord further told him that if he wanted to terminate the tenancy he would have to pay the advertising costs to find a replacement tenant, give proper notice to terminate and that he could only leave once a new tenant was found. The Tenant further testified that on September 26, 2008 he got another telephone call from the Landlord asking him if he was ready to pay for the advertisement and give notice. He also told the Tenant that cold weather was coming and the smoke smell would come more intensively through the ventilation system. The Tenant interpreted those remarks to mean that the Landlord knew all about the problem of the smell of smoke when he rented the unit to the Tenant and as a result, he filed this application.

5. This portion of the Tenant's application is based on section 22 of the *Residential Tenancies Act, 2006* (the 'Act') which states: "A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household." As can be seen from the wording of this section, it prohibits a landlord from substantially interfering with a tenant's reasonable enjoyment; it does not prohibit other tenants from doing so. There was no dispute on the evidence before me that the smell of cigarette smoke was coming from other tenants in the building

smoking inside their units and not from the Landlord. The case law in this area basically says that when one tenant complains about the behaviour of another tenant, the landlord has an obligation to act reasonably in response. If a landlord responds reasonably then the cases indicate the landlord will not be held financially liable for the behaviour of other tenants. Normally, a reasonable response to a tenant complaint would be to investigate to confirm the complainant's allegations and see what response there is from the complained about tenants. If the investigation results in the landlord concluding the complaint is well-founded, normally a landlord would then write a warning letter, or if the behaviour was particularly egregious it would issue a notice of termination to the problem tenant. If the problem continued warning letters would increase in severity and eventually the landlord would be expected to bring the offending tenants to the Board on an eviction application.

6. If this had been a non-smoking building, that is the kind of response I would have expected from this Landlord. But there was no evidence before me that this was a non-smoking building. In the situation of a building where smoking is not prohibited, complaints from a non-smoker about smoking in the building present a difficulty for landlords because telling a tenant who smokes that he or she cannot smoke in their own home might very well be a breach of the smoking tenant's right to reasonable enjoyment of their rental unit. Rather a reasonable response in a building where smoking is permitted might be to attempt to ameliorate the problem for the non-smoker by investigating how the ventilation system might be improved, by installing an air filter system, or by providing the complaining tenant with an air purifier.

7. None of that happened here. Instead, according to the Landlord he served notices on all of the tenants of the building that they could not smoke. Although a copy of this notice was filed into evidence before me, I am of the view that it is highly unlikely that the Landlord actually served the notice on the building as he claims. I say this because if he had, the Tenant would have received a copy of it on September 14, 2008 and there would have been no reason for him to have subsequently filed this application with the Board. In addition, the Landlord did not dispute in any way in his testimony the evidence of the Tenant concerning his phone conversations with the Landlord of September 17 and 26, 2008. It seems to me highly unlikely that the Landlord would serve a no smoking notice on all of the residents of the building and then three days later explain to the Tenant that he did not have the right to tell other tenants to stop smoking in their units. In addition, it seems to me highly unlikely that serious smokers would not react to receiving notice from their landlord barring them from smoking in their own homes when they always could before, but the Landlord stated that none of the smokers in the building had spoken to him about the new ban. As a result, with respect to the Landlord's response to the Tenant's complaints about smoking, I do not find the Landlord's evidence credible and I accept the Tenant's evidence that the Landlord's only response to his complaint was to attempt to negotiate an agreement to terminate.

8. In some limited circumstances offering an agreement to terminate might be a reasonable response to the Tenant's complaint. For example, if a landlord and tenant talked about smoking being an issue before the tenancy commenced so that both understood it was an issue for the tenant but not something that could be guaranteed by the landlord, then doing nothing more than offering an agreement to terminate might be a reasonable

response because the tenant would have known in advance that the landlord could not necessarily provide the environment the tenant was looking for. However, the evidence before me in this case indicates that there was no real understanding between the Landlord and Tenant concerning smoking in the building at all. As a result, I find that the Landlord substantially interfered with the Tenant's reasonable enjoyment by failing to respond to his complaints about the smell of cigarette smoke coming from the ventilation system in a reasonable manner.

The Privacy and Harassment Issue

9. The Tenant's amended application alleged that the Landlord or his employees or agents had illegally entered his rental unit on several occasions. Some of these entries involved notices being given and some did not. The first incident complained of was on October 23, 2008. According to the Tenant, the Landlord served him with a notice of entry for October 23, 2008 but failed to serve the notice 24 hours in advance as required by section 27 of the Act. The Tenant testified that he received the notice on October 23, 2008 in his mailbox. On cross-examination he testified that it is his routine to check his mailbox when he leaves the building in the morning and when he returns home from work in the evening. The Landlord testified that he personally delivered this first notice of entry on the Tenant by putting it in his mailbox on October 22, 2008 at 9 a.m. which is the date and time indicated on the notice itself. There is no dispute between the parties that on October 23, 2008 the Landlord entered the rental unit to check the heating and ventilation systems.

10. Clearly the evidence of the two parties concerning service of this notice is in direct conflict and cannot be reconciled. If the Landlord served the notice as he says, and if the Tenant is telling the truth about when he checked his mail, then the Tenant would have received the notice on October 22, 2008. On any application before the Board, the burden is on the applicant to prove his case on the balance of probabilities. This means that the onus is on the Tenant to lead sufficient evidence to establish that it is more likely than not that the Landlord served the notice of entry less than 24 hours prior to the time set out in the notice for the proposed entry. Unfortunately, the evidence before me with respect to the service of the notice is essentially even – the Landlord says he did it, the Tenant says he did not. There was nothing further in the evidence before me concerning service of notices of entry that made one party more credible then the other on this issue. As a result, I find that the Tenant has failed to meet the burden of proof and I am not satisfied that the entry on October 23, 2008 was in contravention of the Act.

11. The Tenant entered into evidence four additional notices to enter which gave notice to enter for November 18, 2008 at 4 p.m., November 20, 2008 (no time provided), November 25, 2008 at 5 p.m., and December 7, 2008 at 3 p.m. All of the notices are in the same form, which is substantially different then the previous notice of entry for October 23, 2008 discussed above. The notices are unsigned, provide no information concerning the reason for the proposed entry and unlike the previous notice, provide no information concerning service.

12. With respect to the notice for entry on November 18, 2008 the Tenant testified he received it on November 17, 2008 but is unsure if anyone entered the rental unit on

November 18, 2009 as set out in the notice. However, he believes that someone entered the rental unit on November 19, 2009 because when he returned home he found evidence someone had entered. The evidence was a self-created detection system the Tenant had put in place. He had a small block of wood which he said he would put near the front door inside his rental unit. When he exited, he would only open the door a few inches so the wood would remain close to the door. He would enter the rental unit the same way so if the wood was pushed far away from the door, the Tenant took that as evidence that his unit had been entered. According to the Landlord he was out of the country from November 7 to November 23, 2008 and the notices and any entry would have been done by his employee or agent. He further testified that the four similar notices were all about going in to work on the smoke alarm in the building which had malfunctioned and needed recalibrating. Although four notices were served, the Landlord's agents only entered twice to do the work. With respect to the November 18, 2008 date the technician did not show up as scheduled and it had to be rebooked. The only other evidence indicating when entry occurred were two invoices filed by the Landlord which are dated November 24 and December 7, 2008.

13. On November 20, 2008 the Tenant sent another letter by fax to the Landlord complaining about the notices of entry he had received so far. Basically the Tenant took the position that the notices were illegal and did not permit entry and he would not consent to entry for November 20, 2008. The Landlord did not respond.

14. The Tenant is quite correct that the four similar notices of entry to work on the smoke alarm system do not meet the requirements of the Act, although the content of the previous one when the heat was checked on October 23, 2008 does. Subsection 27(3) of the Act says: "The written notice [of entry] ... shall specify the reason for entry, the day of entry and a time of entry between the hours of 8 a.m. and 8 p.m." All four of the notices with respect to the work on the fire alarm fail to set out a reason for entry and one does not stipulate a time of entry. As a result, they do not meet the technical requirements of the Act. Subsection 27(1) says a landlord may enter a rental unit in accordance with proper written notice. Section 25 says a landlord may only enter a rental unit pursuant to sections 26 or 27. Section 26 does not apply to the circumstances that existed here. As a result, when the Landlord's agents entered the Tenant's rental unit pursuant to the four invalid notices, regardless of the exact date and time those entries occurred, the Landlord was in breach of section 25 of the Act.

15. According to the Tenant, his home detection system indicated to him someone entered his rental unit on November 19, November 20, November 25 and December 10, 2008. As stated above the Landlord conceded his employees and agents entered twice during this period but failed to say when. I am of the view that the Tenant's home detection system is not necessarily as reliable as the Tenant believes as the wood could have been dislodged by any number of reasons given there is a gap under the door; and because it is always possible that someone other than one of the Landlord's agents could have entered the Tenant's rental unit. In addition, the evidence indicates the Landlord has a routine practice of serving notices of entry so it is does not really make logical sense that he would enter without doing so. As a result of all of the above, I believe the most reliable evidence concerning when entry occurred are the invoices dated November 24, and December 7, 2008. As a result, I am satisfied that the Landlord entered the Tenant's

rental unit in contravention of the Act at least twice between November 18, 2008 and December 10, 2008.

16. The Tenant also took the position that the service of the notices of entry was harassment under the Act. Harassment can be defined in general terms as a course of conduct that a reasonable person ought to know would be unwelcome. Clearly, after the Tenant's letter of November 20, 2008 the Landlord should have known the Tenant considered the invalid notices to be harassment but as the Landlord was out of the country at the time, it is not clear to me on the evidence when or if he received the Tenant's letter as he did not respond to it in any way. More importantly, there is no dispute that the Landlord needed to enter the rental unit to fix the alarm system as the Tenant knew it was malfunctioning. I am of the view that a landlord must be entitled to serve notices of entry for valid work without fearing that the Board will label service of those notices harassment. There was no evidence before me to indicate that the Landlord deliberately served improper notices as the one for October 23, 2008 was in a proper form. Rather the evidence would tend to suggest that the Landlord went out of town and his employees did not understand the formal requirements of proper notice. I do not believe that is harassment as I seriously doubt the responsible employees knew the invalid notices would be unwelcome or were improper. As a result, I am not prepared to find that the notices constituted harassment pursuant to section 23 of the Act.

<u>The Issue Concerning Address for Service</u>

17. Although the issue was not included in either the original or amended versions of the Tenant's application, the Tenant complained at the hearing of the application that he had not been provided with an address for service as required by section 12 of the Act. According to the Tenant when he requested an address for service so he could serve the Landlord his application, he was told the address for service was the residential complex and there is a drop box for mail in the building. However, he was not provided this information in writing and section 12 requires it be provided in writing. That being said, there is no dispute that sometime in November, 2008 the Tenant received notice of termination for non-payment of rent. That notice clearly gave the name and address of the Landlord's legal representative which is notice of an address for service. As a result, once that notice of termination had been received the Tenant did not have the legal right to withhold rent pursuant to subsection 12(4).

<u>Remedy</u>

18. It was not clear to me from the Tenant's submissions or from his application what remedies he was seeking. His application requested moving costs even though he has not moved yet and even though his application did not request termination of the tenancy. The Tenant also sought the value of pre-paid internet service if it cannot be transferred to a new address and the return of his deposit. Essentially the Tenant stated at the hearing before me that he would leave the appropriate remedy if any up to me. The Landlord's representative made no submissions concerning remedy.

19. I am of the view that in general the appropriate remedies for breaches of privacy and substantial interference with reasonable enjoyment are orders directing the landlord to

obey the Act in the future, abatements of rent for the tenant, and in truly egregious situations, administrative fines. With respect to the moving and internet costs, no evidence was led that the Tenant will occur those costs and as a result, I am not prepared to award them.

20. Although I am satisfied that the Landlord breached the Act more than once, I do not believe an administrative fine is called for in these circumstances particularly because the Tenant did not request one.

21. However, an order will issue requiring the Landlord to give proper notice of entry and to refrain from substantially interfering with the Tenant's reasonable enjoyment by failing to respond reasonably to complaints.

22. Abatement of the rent is a contractual remedy that is based on the idea that if you are paying rent for goods and services, you should be receiving everything you are paying for; if you are getting less then that you should be entitled to abatement roughly proportional to the difference between what you are paying for and what you are getting. Given that the issue with the cigarette smoke was sufficiently disturbing to the Tenant that he wanted to move out I am satisfied he is entitled to some abatement of the rent with respect to the smoke issue. In addition, given that the Tenant was sufficiently disturbed by the invalid notices to complain about it to the Landlord in writing I am also satisfied that it would be appropriate to award some abatement for the illegal entries. That being said, some consideration must be given to the Landlord with respect to the illegal entry issue given that notices were served but they were simply invalid. Given all of those factors and the quantum of rent charged, I am of the view that a reasonable abatement of the rent would be 10% of the rent charged for the period September 22, 2008 to February 28, 2009 with respect to the smoke issue because the Landlord has basically taken no steps to deal with it at all yet the Tenant has had full use of the rental unit, and $100.00 for the illegal entries, for a total of $387.33.

<u>Costs</u>

23. The Tenant requested costs on his application in the form of lost wages for attending the Board and for the cost of his interpreter. The Board has published Interpretation Guideline # 3 entitled "Costs" in order to inform landlords and tenants how the Board normally approaches the issue of costs claimed before the Board. It is not binding on me but I agree with the principles set out in and see no reason on this application to depart from those general principles. As stated in the Guideline, normally the only item of legal costs permitted is the filing fee for a successful applicant. The Tenant paid no filing fee for filing this application. The principle behind the Guideline is that if the Board uses costs awards freely then the fear of adverse cost awards will prevent people from coming to the Board with their disputes.

24. Essentially the Tenant wishes costs because he feels he had to come to the Board because of the Landlord's behaviour, and he lost wages from work as a result so the Landlord should compensate him for those losses. Under the Guideline, the only other costs which will be considered are the costs of representation where the opposing party has somehow acted unreasonable with respect to the proceedings before the Board. I am

of the view that the Landlord's behaviour in responding to the Tenant's application was not unreasonable and should not draw adverse cost consequences. The Tenant was asked to consent to a rescheduling of a hearing when the Landlord's representative was unavailable and refused to, so some of his lost wages are the result of his own decision with respect to that request. In addition, neither lost wages nor the cost of interpretation services are representational costs; rather they are the normal expenses that flow from deciding to bring an application to the Board and under the majority of circumstances parties are expected to bear their own costs. As I see no reason to depart from the Guideline in this case, the Tenant's request for costs is denied.

The Landlord's Application for Arrears of Rent

25. The Tenant has not paid the total rent he was required to pay for the period from October 22, 2008 to February 21, 2009. Because of the arrears, the Landlord served a Notice of Termination effective December 3, 2008.

26. The Tenant paid $1,500.00 into the Board after the application was filed.

27. As of the date of the hearing before me the arrears of rent owed to the Landlord for the period ending February 21, 2009 total $3,000.00.

28. The Landlord incurred costs of $150.00 for filing the application.

29. The parties before me agreed that an order should issue on consent terminating the tenancy effective February 28, 2009.

30. As a result an order will issue directing payment out of the Board to the Landlord of the $1,500.00 paid into trust by the Tenant.

31. The daily compensation due to the Landlord for use of the rental unit for the period February 22 to February 28, 2009 totals $172.60.

32. The Landlord collected a rent deposit of $750.00 from the Tenant and this deposit is still being held by the Landlord.

33. Interest on the rent deposit is owing to the Tenant for the period from August 22, 2008 to December 3, 2008. I calculate the interest owing is $3.00.

34. As a result, an order will issue requiring the Tenant to pay to the Landlord $682.27 for arrears of rent and daily compensation up to February 28, 2008 and the Landlord's cost of filing the application, less the abatement ordered against the Landlord and the deposit and interest owing on the deposit.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated. The Tenant must move out of the rental unit on or before February 28, 2009.

2. The Tenant shall pay to the Landlord $682.27, which represents the arrears of rent and daily compensation owing up to February 28, 2008 plus the Landlord's cost of filing the application, less the abatement ordered against the Landlord and the deposit and interest owing on the deposit.

3. The Board shall pay to the Landlord the amount of $1,500.00 together with any accrued interest.

4. If the Tenant does not pay the Landlord the full amount owing on or before March 2, 2009, the Tenant will start to owe interest. This will be simple interest calculated from March 3, 2009 at 4.00% annually on the balance outstanding.

5. If the unit is not vacated on or before February 28, 2009, then starting March 1, 2009, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.

6. 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 March 1, 2009.

7. If the Tenant does not vacate the rental unit on or before February 28, 2009 then the Tenant shall also pay to the Landlord $24.66 per day for compensation for the use of the unit starting March 1, 2009 to the date he moves out of the unit.

8. The Landlord shall only enter the rental unit in accordance with the provisions of the Act.

9. The Landlord shall not interfere with the Tenant's reasonable enjoyment by failing to respond reasonably to complaints.

February 19, 2009
Date Issued

Ruth Carey
Member, Landlord and Tenant Board

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

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 September 1, 2009 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.