Order under Section 69
Residential Tenancies Act, 2006

Citation: Hassan v Tunney, 2025 ONLTB 6695
Date: 2025-01-29
File Number: LTB-L-057444-24

In the matter of: 3, 340 Mill Street
Kitchener ON N2M3R7

Between: Fadlalla Omar Ahmed Hassan — Landlord

And

Jessica Tunney
Rick Hipson — Tenants

I hereby certify this is a true copy of an Order dated
Jan 29, 2025
Landlord and Tenant Board

Fadlalla Omar Ahmed Hassan (the 'Landlord') applied for an order to terminate the tenancy and evict Jessica Tunney and Rick Hipson (the 'Tenants') because:

- the Landlord in good faith requires possession of the rental unit for the purpose of residential occupation for at least one year.

The Landlord also claimed compensation for each day the Tenants remained in the unit after the termination date.

This application was heard by videoconference on December 3, 2024.

The Landlord's Legal Representative Shaun Harvey, the Landlord, the Tenants Legal Representative Rosalva Clubine and the Tenants attended the hearing.

Preliminary Issue:

1. At the outset of the hearing, the tenant submitted that the Landlord application should be dismissed on the basis that it did not comply with section 71(3) of the Act. They stated that the Tenant is aware that the Landlord has previously served N12 Notices to other tenants located in the residential complex and on them and that these notices were not listed in the declaration.
2. The Tenant submitted that for the purposes of compliance with subsection 71.1(3)(b)(i) that it is the termination date that is relevant and not the date signed and served.
3. The Tenant also relied on 2709 Lakeshore Holding Inc. v Offei et al, 2024 ONLTB 2711 (CanLII) ("Lakeshore").
4. The Landlord agreed that the original declaration did not include those other N12 Notices. They submitted that they were not properly served on the Tenants, and therefore they served a new N12 Notice and submitted this application.

5. Subsection 71(3) of the Act states:

   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.

6. I disagree with the Tenant submission that the termination date is the relevant date to determine which prior notices to include in the application. The Act clearly states that it is the “date the notice was given” as the determinative date to list all prior applications.

7. I have reviewed the decision in Lakeshore. I am not aware that this has been followed in other decisions issued by the Board. It is not binding on me, and I am not persuaded by it. I would note that in prior decisions Vice-Chair Shea determined that where the Landlord did not disclose prior notices that the Board is prohibited from evicting a tenant. See Said v Lyons, 2023 ONLTB 53473 (CanLII) and Star Towers Ltd v Wakunick-Fuery et al, 2023 ONLTB 64356 (CanLII). Both decisions state:

8. In my view, the correct way to interpret subsection 71.1(4) of the RTA 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).

9. The LTB’s Rules of Procedure require that a landlord specify: (a) the LTB file number, if any, associated with any previously delivered N12 or N13 notices; and, in the case of a notice delivered under section 50, (b) the intended activity for which the notice was delivered. [Rules of Procedure, Rule 4.10]

10. These provisions are intended to ensure that the tenant has full knowledge of all previously delivered N12 and N13 notices and the LTB has the evidence required to determine whether the landlord delivered the relevant termination notice in good faith. Subsection 73(2) of the RTA says:

    73 (2) In determining the good faith of the landlord in an application described in subsection (1), the Board may consider any evidence the Board considers relevant that

relates to the landlord's previous use of notices of termination under section 48, 49 or 50 in respect of the same or a different rental unit

11. I am not aware of a Divisional Court or Court of Appeal decision that is directly on the issues raised. I am aware of Miller Estate v. Arguelles, 2025 ONSC 112 issued on January 7, 2025, after this hearing had concluded. In that decision, the Divisional Court agreed with the Board. The Board had on its own motion amended the application. The Divisional court found the amendment appropriate and did not prejudice the tenant at paragraph 37:

    The amendment was appropriate, did not prejudice the tenant and was consistent with a fair and expeditious proceeding. I see no legal error.

12. I would distinguish the Divisional Court decision for two reasons: (1) in that case the undisclosed notice was given to the tenant, whereas in this application, the undisclosed notices were given to other tenants. (2) The Board's Rules at Rule 15.4 do permit an amendment to an application, whereas it is the declaration attached as an Annex to the application that is being amended. In my view a declaration cannot be amended by the Board.

13. In my view, this is also not a situation where there is substantial compliance with a form as may be permitted in accordance with section 212:

    (1) Substantial compliance with this Act respecting the contents of forms, notices or documents is sufficient.

    (2) For greater certainty, an error in the contents of a form, notice or document still constitutes substantial compliance with this Act, as long as the error does not significantly prejudice a party's ability to participate in a proceeding under this Act.

14. I note that in similar applications, where the declaration required in accordance with section 72.1 does not state that the intended occupant requires the rental unit in good faith for their own personal use for a period of at least 12 months, the Board and the Courts have permitted viva voca evidence. In other words, the intended occupant is permitted to testify to cure any defects in their affidavit or declaration.

15. In my view it is not reasonable to permit viva voca evidence to cure the defects of a declaration given in accordance with section 71(3). This is because it deprives the Tenant to know if they have grounds to challenge a Landlord application on basis of bad faith. They would not know the case the meet in order to prepare for a hearing. Given that the Act has a "tenant protection" focus to balance the power between a landlord and a tenant, it would not give effect to these ideals.

16. In my view, where the declaration is incomplete it is tantamount to providing the Board with false or misleading information which is an offence at section 233. In addition, the Board may control its process to prevent an abuse of process in accordance with section 23(1) of the Statutory Powers Procedure Act ("SPPA") and Rule A8 of the Boards Rules of Procedure. An incomplete declaration in this instance impugns the administration of justice if it is permitted, without consequences. That in my view would eliminate the legislative intent to having made them a mandatory requirement.

17. There are Adjudicators that have found that failure to disclose prior notices warrant dismissing the application. See Seignoret v Mcgavin, 2023 ONLTB 35958 (CanLII), Punja v Ruiz, 2024 ONLTB 50441 (CanLII).

18. In this particular case, it is the Landlord's Legal Representative that has made a false or misleading declaration to the Board. They were aware of the prior declaration and did not list it in their declaration.

19. There are Adjudicators that have found that failure to disclose prior notices by a Legal Representative warrant dismissing the application. I agree with this approach. See Ben-Margi v Yi, 2024 ONLTB 64298 (CanLII). In that decision, the Member stated at paragraph 20:

    A legal representative who is a licensee of the Law Society of Ontario, has a duty of honesty and candour to advance their clients' legal proceedings in a manner that is not misleading. This means that they should not make a false declaration to the Board and ought to know that making such a false declaration is an offence under the Act. By doing so, the Legal Representative risks bringing the administration of justice into ill repute, particularly when the parties charged with a duty of honesty and candour fail to abide by these fundamental ideals.

20. I would note that Vice-Chair Speers as he was then in Seignoret v Mcgavin, 2023 ONLTB 35958 (CanLII) stated at paragraph 10 that in certain circumstances, the appropriate result for non-compliance might be the dismissal of the application.

21. While I would accept that, **in certain circumstances, the appropriate result for non-compliance with subsection 71.1(3) might be the dismissal of the application**, in the current instance I am satisfied that the Tenants in fact had actual notice of the previous N12 notices. One was served upon them, the other on their neighbour. From a procedural fairness standpoint, the Tenants in this application are not prejudiced, as they had full knowledge of the Landlord's service of prior N12 notices They are not prejudiced in their ability to investigate any patterns in the Landlord's use of N12 or N13 notices of termination, nor are they prejudiced in their ability to bring any such findings before the Board should they wish to argue, under subsection 72(3) of the Act, that the pattern undermines the professed good faith of the notice of termination. (emphasis Added)

22. In my view, this is a situation where the appropriate result is dismissal of the application. The Tenant is forestalled from investigating the Landlord's good faith, because they were not aware of the notices served on other tenants. The Board also has a responsibility to ensure that there is not an abuse of legislative and Board processes; as such viva voca evidence is not appropriate to cure mandatory disclosure in a declaration, where the operative word in the legislative scheme is that they "shall" provide the information regarding all prior notices. In particular where it is the Legal Representative that has submitted an incomplete declaration that this warrants dismissal.

23. As a result, the Landlord application cannot proceed.

It is ordered that:

1. The Landlord's application is dismissed.

January 29, 2025
Date Issued

Robert Patchett
Vice Chair, Landlord and Tenant Board

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Toronto ON M7A 2G6

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