

*Interpretation Guidelines are intended to assist the parties in understanding the Board's usual interpretation of the law, to provide guidance to Members and promote consistency in decision-making. However, a Member is not required to follow a Guideline and may make a different decision depending on the facts of the case.*

Even though a landlord proves their case in an application to evict a tenant, the Board must review and consider the circumstances of each case to determine whether or not the eviction should be refused or delayed. In some cases, the Board must refuse the eviction. These powers are referred to as "relief from eviction".

## Legislation

Section 83 of the *Residential Tenancies Act, 2006* (the "RTA") states:

- (1) Upon an application for an order evicting a tenant, the Board may, despite any other provision of this Act or the tenancy agreement,
  - (a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or
  - (b) order that the enforcement of the order of eviction be postponed for a period of time.
- (2) If a hearing is held, the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection (1).
- (3) Without restricting the generality of subsection (1), the Board shall refuse to grant the application where satisfied that:
  - (a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement;
  - (b) the reason for the application being brought is that the tenant has complained to a government authority of the landlord's violation of a law dealing with health, safety, housing or maintenance standards;
  - (c) the reason for the application being brought is that the tenant has attempted to secure or enforce his or her legal rights;
  - (d) the reason for the application being brought is that the tenant is a member of a tenant's association or is attempting to organize such an association; or

- (e) the reason for the application being brought is that the rental unit is occupied by children and the occupation by the children does not constitute overcrowding.

## **General Principles**

The Board has a general discretion to refuse or delay an eviction under subsection 83(1), after considering all relevant circumstances. This authority arises upon any application for an order to evict a tenant. This general discretion does not automatically arise where an application is resolved without a hearing (e.g., in the case of an ex-parte order issued pursuant to subsection 78(6) of the RTA) or where a hearing is held for another purpose (e.g., in the case of a hearing of a set aside motion under subsection 74(11) of the RTA). Where a hearing is held on an application to evict a tenant, including a hearing that the tenant does not attend, and a hearing of an application that would normally be resolved by an ex parte order but has been sent to hearing (subsection 77 (1) or 78 (1) applications), the Board must review and consider the circumstances of both parties to determine whether or not the eviction should be delayed or refused prior to granting an application. The Board must consider the circumstances whether or not the tenant requests relief from eviction, and may pose questions to the landlord and/or tenant to better understand the circumstances.

Further, subsection 83(3) provides for mandatory relief from eviction in certain situations. If the Board finds that any of clauses (a) to (e) of subsection 83(3) applies, the Board must not grant the application to evict.

## **DISCRETIONARY REFUSAL OF AN EVICTION**

If a hearing is held, the Board must review and consider all the circumstances to determine whether or not to exercise its discretion to refuse an eviction. For example:

- in a case involving an allegation of tenant “fault” (such as eviction for arrears or illegal act), consider whether the reason is serious enough to justify eviction,
- in a case involving a landlord’s allegation of interference with reasonable enjoyment, consider whether refusing to evict the tenant would result applications against the landlord by other tenants for interference with their reasonable enjoyment, or
- consider whether refusing to evict the tenant would result in an unreasonable financial hardship to the landlord.

In “having regard to all the circumstances” the Member shall consider the relevant circumstances of the tenant and landlord and the impact on other occupants in the

residential complex in delaying or denying eviction. Therefore, if the tenant's request presents a possible reason for refusal, the landlord may then explain why the refusal to evict would be unfair to them or to other occupants in the residential complex.

Where the Board exercises its discretion to refuse to evict a tenant, the Board may attach conditions to such an order that one or both parties must follow.

### **Circumstances Justifying Discretionary Refusal**

The tenant's conduct has been an important consideration in many past decisions. For example:

- If the tenant got far behind in their rent payments, but has recently made extra payments to catch up, and owes relatively little now, the discretion may be exercised in their favour.
- In a case of persistent late payment of rent, the tenant had financial problems when he became unemployed, but for months since he found another job, payment has been right on time. The eviction may be refused despite the earlier months of late payments, due to the tenant's good conduct. In such circumstances, the Member may order that on-time rent payments are to be made, by the tenant to the landlord, for a specified number of months following the hearing.
- A tenant is not excused from paying rent even if the landlord has greater financial resources (e.g., a public agency or large corporate landlord). Other relevant factors may include whether the current reason for eviction has been repeated, the impact this tenant is having on the landlord or other tenants, whether the tenant has taken positive steps to reduce or eliminate the reason for the eviction, and other indications of good faith on the part of either the landlord or the tenant.

Landlord actions or conduct which led to the eviction should also be considered. For example, if the landlord unreasonably prevented a tenant from repairing damage done by a guest or child, this would be relevant. If the landlord has excused many other tenants from a minor breach, an arbitrary eviction of one tenant for the same breach may be refused, depending on all of the other circumstances.

### **DISCRETIONARY DELAY OF AN EVICTION**

The Board must review and consider the circumstances to determine whether or not to exercise its discretion to delay an eviction.

Although the time period is not set out in the RTA, Board orders commonly provide that a tenant has 11 days after an order for arrears of rent and termination of the tenancy is issued to pay all of the rent arrears and costs owing to the landlord. If the tenant does not make the necessary payment, the tenant can be evicted for failure to pay rent starting on the 12th

day after the order is issued. This period of time takes into account such matters as the time it takes for the tenant to receive the order in the mail and acquire the rent money to pay to the landlord. Therefore, a decision of the Board to postpone the enforcement of an eviction order under clause 83(1) (b) of the RTA often means the order would provide that the order could not be filed with the Court Enforcement Office until more than 12 days after the date the order is issued.

Generally, the Member would take into account the time that it will normally take the landlord to enforce the order through the Court Enforcement Office.

Even if “all of the circumstances” did not justify refusal of the eviction, the Member may look at the same issues of unfairness to each party, and decide whether or not to delay the eviction. Eviction may appear to be unfair if no other accommodation is available to the tenant (e.g., a social housing tenant). However, a case in which the landlord is in a better financial position than the tenant does not justify refusal of the eviction. Ordinarily, the tenant’s lack of resources will be considered as a reason to delay an eviction, not to refuse it. However, all circumstances must be considered.

The following are some examples that illustrate situations in which a delay may be considered:

- The tenant asserts that the market conditions in the locality are unusually “tight” and that it will take some time to find suitable accommodation.
- The tenant shows that they are affected by a severe medical condition which makes it difficult to find other accommodation, and there are no persons who can help him or her search for a vacant unit.
- The tenant’s family is very large and they require at least five bedroom accommodation, similar to their current unit. There are very few such units in the local market, and none are in the current advertisements.

## **MANDATORY REFUSAL OF EVICTION**

Mandatory refusal applies to situations which the RTA provides are serious enough to justify refusal - regardless of any other circumstances.

If a tenant raises circumstances which might fall into subsection 83(3), the Member must decide whether it applies.<sup>1</sup> Further, once it is found that subsection (3) applies, the Member must refuse the eviction.<sup>2</sup>

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<sup>1</sup> See Forgie v. Widdicombe Place [2002] O.J. No. 2956 (Div. Ct.)

<sup>2</sup> See Chin v. Hunt (1986), 17 O.A.C. 267 (Divisional Court)

## Serious Breach of Landlord Obligations

The Board must refuse an eviction if the landlord is in serious breach of the landlord's responsibilities under the RTA or the tenancy agreement.

Many claims are related to the landlord's maintenance obligations. A health or safety concern due to lack of repair may be serious enough to justify refusal. Conditions which deprive the tenant of the full use of the premises will usually be serious, particularly if it affects the kitchen, bathroom or sleeping areas. Members must decide whether other repair problems constitute a "serious breach" of obligations, considering the landlord's actions to resolve the problems as well. Other factors such as how long the breach was on-going or the level of risk to the tenants may also be relevant.<sup>3</sup>

In cases related to the obligation to repair, the tenant's conduct may also be relevant. For example, if the tenant has never before complained to the landlord about a long-standing repair problem, they may have shown they did not consider it to be serious. Further, if the landlord was not aware or could not reasonably have been expected to be aware of the problem, the Member may find that the landlord is not in serious breach. Further, the tenant should not have contributed to the problem, such as by obstructing the landlord's repair efforts.

In cases related to the obligation to repair, the age of the property and the landlord's intentions for the property may be factors for the Member to consider. For example, if the landlord is intending to demolish the property and the tenant was served a notice to terminate for that reason, the Member would consider these factors before deciding to refuse to evict<sup>4</sup>.

The tenant may raise a breach of another obligation of the landlord under the RTA. For example, the RTA imposes on landlords the obligation not to illegally enter a unit, nor to harass a tenant. The Member must decide the issue and, if satisfied that the facts presented show a serious breach, they must refuse the eviction. However, mandatory refusal of eviction is generally accepted to refer to serious breaches existing at the time of the hearing, not breaches from the past that have been remedied<sup>5</sup>.

If the tenant raises a breach of the tenancy agreement, they must present facts to show that it is a serious breach and that it relates to a significant provision of the agreement.

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<sup>3</sup> Sage v. Corporation of the County of Wellington (April 25, 2005), London Docket No. 1471 (Div. Ct.)

<sup>4</sup> Puterbough v. Canada Public Works and Government Services (unreported decision of Divisional Court, February 12, 2007)

<sup>5</sup> *Supra*, fn. 4

Even if the breach is not found to be serious and there would be no mandatory refusal, the lack of repair or other breach of obligation may still be considered. It would be one of the circumstances of unfairness to consider in deciding whether discretionary refusal is appropriate.

### **Retaliatory Actions by the Landlord**

The Member must refuse the eviction if the reason the landlord applied for eviction is described in clause (b) to (e) of subsection 83(3) (these clauses are quoted on page 1).

The tenant would explain what actions they took which they believe caused the landlord to seek the eviction. However, the tenant has a higher onus. They must prove that the reason for the application is one of the above motivations<sup>6</sup> It is difficult to prove another person's state of mind. The landlord will assert that the reason stated in the application was the reason for the application.

The tenant may try to show from the landlord's conduct that the motivation was retaliatory. For example, the tenant may be able to show that the landlord has evicted other tenants who asserted their rights. The tenant might also show that the landlord ignored the same issue that is the basis for this eviction, for other tenants. A pattern of conduct may be considered by the Board, but it may also be explained by the landlord.

Even if the tenant does not establish to the Member's satisfaction that the reason for the application was retaliation and, thus refusal is not mandatory, the facts that supported the tenant's claim could be one of the circumstances considered in deciding whether there should be discretionary refusal of the eviction.

### **Applications Under Section 77**

Under subsection 77(4) of the RTA, the Board may make an order terminating the tenancy and evicting the tenant without notice to the tenant and without a hearing (ex-parte), if the landlord has filed an application with the Board under subsection 77(1), based on either an agreement between the landlord and the tenant to terminate the tenancy or a notice of termination given by the tenant.

### **Decisions Made Ex Parte**

An application (L3) filed by a landlord pursuant to subsection 77 (1) of the Act is generally resolved by an ex parte order issued pursuant to subsection 77 (4).

The tenant may file a motion pursuant to subsection 77(6) to set aside the ex parte order. The Board then holds a hearing to consider the tenant's motion. As a hearing concerning such a motion does not arise upon an application for an order to evict a tenant, subsection

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<sup>6</sup> MacNeil et al. v. 976445 Ontario Ltd. (June 6, 2005), London Docket No. 04-1465 (Div. Ct.)

83(1) does not apply. Instead, the Board exercises similar discretionary relief under subsection 77(8), which provides:

If the respondent makes a motion under subsection (6), the Board shall, after a hearing,

- (a) make an order setting aside the order under subsection (4), if
  - i. the landlord and tenant did not enter into an agreement to terminate the tenancy, and
  - ii. the tenant did not give the landlord notice of termination of the tenancy;
- (b) make an order setting aside the order under subsection (4), if the Board is satisfied, having regard to all the circumstances, that it would not be unfair to do so; or
- (c) make an order lifting the stay of the order under subsection (4), effective immediately or on a future date specified in the order.

When having regard to all the circumstances, pursuant to clause 77 (8) (b) the Board should consider circumstances that occurred with regard to the signing of the agreement to terminate the tenancy and thereafter or circumstances that occurred after the giving of the notice of termination by the tenant to the landlord.

### **Decisions Made When a Hearing is Held**

In those cases where an application filed under subsection 77(1) is sent to hearing and therefore is not decided ex parte, subsection 83(2) provides that the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection (1).

With respect to the exercise of discretion under section 83, Members hearing a subsection 77(1) application will consider the circumstances that occurred with regard to the signing of the agreement to terminate and thereafter or circumstances that occurred after the giving of the notice of termination.

### **Applications Under Section 78**

Under subsections 78(6) & (7) of the RTA, the Board may issue an order evicting the tenant and ordering the tenant to pay arrears of rent without a hearing (ex-parte), if the landlord has filed an application with the Board under subsection 78(1).

### **Decisions Made Ex Parte**

An application (L4) filed by a landlord pursuant to subsection 78 (1) of the Act is generally resolved by an ex parte order issued pursuant to subsections 78(6) & (7).

The tenant may file a motion pursuant to subsection 78(9), to set aside an ex parte order issued under subsections 78(6) & (7). The Board then holds a hearing to consider the tenant's motion. As a hearing concerning such a motion does not arise upon an application for an order to evict a tenant, subsection 83 (1) does not apply. Instead, the Board exercises similar discretionary relief under clauses 78(11) (b) & (c).

Pursuant to clause 78(11)(b) the Board may make an order setting aside the ex parte order issued if the Board is satisfied, having regard to all the circumstances, that it would not be unfair to set aside the order.

This provision gives the Members discretion to grant relief to the tenant by setting aside the ex parte order, notwithstanding the fact that the tenant has breached a condition required in the conditional order or mediated agreement.

In their consideration of this provision, Members should take into account:

- Circumstances that occurred after the date of the mediated agreement or conditional order that caused the party to be unable to meet the terms of the agreement or order. (Circumstances that occurred prior to the issuance of the conditional order or the signing of the mediated agreement should have been considered at the time the conditional order was made or the mediated agreement was signed, with respect to the previous application.)
- The circumstances of both the landlord and tenant and the impact on other occupants in the residential complex in delaying or denying eviction.

It is also important to remember that setting aside the ex parte order results in the original mediated agreement or conditional order remaining in full force and effect. In some cases, it may be impossible for the tenant to fulfill the remaining conditions contained in the mediated agreement or conditional order (i.e. the deadline for payments has now passed), and/or the parties wish to consent to new conditions.

The matter may be resolved in one of the following ways:

- The parties can consent to be bound by a new mediated agreement containing new terms or conditions, and in addition agree that the ex parte order would be set aside by order of the Member which order would also acknowledge that the L4 application had been resolved through a mediated agreement.
- The parties can consent to be bound by a new hearing order to be issued by the Member containing new terms or conditions.
- In the absence of consent, the Member can issue a new order containing new terms or conditions that are fair in the circumstances (i.e. a revised payment schedule)

using the authority found in subsection 204(1)). In exercising this authority, the Member may, subject to the consideration of fairness, wish to consider ordering new conditions that are as close as possible to the original conditions imposed in the original order or mediated agreement.

If the tenant's motion to set aside the ex parte order is denied and clause 78(11)(b) has not been applied, the Board may make an order lifting the stay of the ex-parte order effective immediately or on a future date. Clause 78 (11)(c) directs the Member to lift the stay of the ex parte order, thus permitting the landlord to enforce the ex parte order. The discretion given to Members to lift the stay on a future date is similar to the relief from eviction provided by clause 83(1)(b) which gives the Member authority to postpone the enforcement of the eviction for a period of time.

In considering such relief, the Member should take into account the same criteria as set out for clause 78 (11)(b).

### **Decisions Made When a Hearing is Held**

In those cases where an application filed under subsection 78(1) is sent to hearing for clarification, therefore is not decided ex parte, subsection 83(2) provides that the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection (1).

With respect to the exercise of discretion under section 83, Members hearing a subsection 78(1) application will consider the circumstances that occurred with regard to the signing of the mediated agreement and thereafter or circumstances that occurred after the date of the hearing which resulted in the conditional order.