

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.

This Guideline deals with eviction applications under the *Residential Tenancies Act, 2006* (the "RTA") that are based on an illegal act or business. Subsection 61(1) of the RTA provides:

61.(1) A landlord may give a tenant notice of termination of the tenancy if the tenant or another occupant of the rental unit commits an illegal act or carries on an illegal trade, business or occupation or permits a person to do so in the rental unit or the residential complex.

Illegal Act or Business

The term "illegal" is not defined in the RTA but would include a serious violation of a federal, provincial or municipal law. If the illegality is trivial or technical, the act or business or occupation might not be considered serious enough to warrant eviction.

An illegal act will be serious if it has the potential to affect the character of the premises or to disturb the reasonable enjoyment of the landlord or other tenants.¹ The seriousness of this ground can be seen in the fact that there is no opportunity in section 61 for the tenant to avoid termination by rectifying the illegal act.

The fact that a tenant or another occupant may have devised a fraud in the unit, written a bad cheque or failed to file a tax return does not necessarily create a threat to the other tenants in the building or a problem for the landlord. By contrast, drug offences may bring the risk of harmful effects upon other occupants of the complex.

A contravention of the RTA would not, in itself, constitute an illegal act under section 61 of the RTA. If there is a remedy for the act elsewhere in the RTA, it would not be appropriate

¹ *Samuel Property Management Ltd. v. Nicholson* (2002), 61 O.R. (3d) 470 (C.A.), at paragraph 28, citing *Swansea Village Co-operative v. Balcerzak* (1988), 63 O.R. (2d) 741 at 745 (Div. Ct.).

to evict for an illegal act. For example, a failure to pay rent would not be considered an illegal act for the purpose of section 61. Subletting or assigning the rental unit without the landlord's consent would not necessarily constitute an illegal act that justifies eviction.²

However, in one case the Divisional Court held that where the tenant listed her rental unit with a real estate agent and repeatedly sublet the unit to short-term occupants for a rent that greatly exceeded the lawful rent and without the landlord's consent, this pattern of activity constituted the conduct of an illegal business.³ Such conduct is contrary to section 134 of the RTA and is an offence under section 234(l) of the RTA, but those sections do not provide a remedy for the landlord.

Permitting an Illegal Act or Business

A tenant may be evicted under section 61 if the tenant or other occupant "permits" a person to commit an illegal act in the rental unit or residential complex. It is not sufficient to prove that the tenant or other occupant allowed the person who committed the illegal act to be in the rental unit or residential complex.

A finding that the tenant or other occupant permitted an illegal act may be inferred from their knowledge of the illegal act. For instance, there may be sufficient evidence for the Member to conclude that the tenant or other occupant knew of the illegal act or was wilfully blind to the illegal act and therefore permitted it.⁴

Rental Unit or Residential Complex

Subsection 61(1) provides that the illegal act must have occurred in the rental unit or the residential complex. The definition of "residential complex" in section 2 of the RTA includes all common areas and services and facilities available for the use of its residents. This would include areas such as the laundry room, parking lot and recreational facilities.

² *Valleyview Apartments Ltd. and Estate of Max Rothbart* (1988), 65 O.R. (2d) 209 (Div. Ct.)

³ *Sutton Place Grande Limited v. Hammer and Griffiths* [2002] O.J. No. 1792 (Div. Ct.)

⁴ *Grant v. Metropolitan Toronto Housing Authority* [2002] O.J. No. 1162 (Div. Ct.)

The fact that a tenant or other occupant has been charged with robbing the convenience store across the street would not be a ground for the landlord to evict, whereas robbing other units in the complex would be sufficient.⁵

Notice Periods

Subsection 61(2) sets out notice periods for different types of illegal acts.

- (2) A notice of termination under this section shall set out the grounds for termination and shall provide a termination date not earlier than,
 - (a) the 10th day after the notice is given, in the case of a notice grounded on an illegal act, trade, business or occupation involving,
 - (i) the production of an illegal drug;
 - (ii) trafficking in an illegal drug;
 - (iii) the possession of an illegal drug for the purposes of trafficking; or
 - (b) the 20th day after the notice is given, in all other cases.

Subsection 61(2)(b) allows a landlord to terminate a tenancy on 20 days notice where a tenant or another occupant commits an illegal act or carries on an illegal trade, business or occupation in the rental unit or residential complex, or the tenant or another occupant permits someone else to commit an illegal act or carry on an illegal activity in the unit or the complex.

Subsection 61(2)(a) provides a shorter 10-day notice period when the illegal activity involves the production of an illegal drug, trafficking in an illegal drug or the possession of an illegal drug for the purpose of trafficking. Further, an application to terminate a tenancy based on such a notice is processed more quickly than most other types of applications, with a shorter time to hearing due to the potentially serious implications for the landlord and other tenants.

A landlord may file an application based on an illegal act immediately after the notice of termination is given, but not later than 30 days after the termination date in the notice.

⁵ *Peel Non-Profit v. Hogarth* (1990), 72 O.R. (2d) 702 (C.A.), affirming (1989), 68 O.R. (2d) 617 (Div. Ct.)

Notice Period for a Second Breach

If a landlord has given a notice of termination for damage under section 62, interference with reasonable enjoyment under section 64 or overcrowding under section 67, and the notice has become void as a result of the tenant's compliance, the landlord may give a 14-day notice instead of a 20-day notice if the tenant commits an illegal act within six months of when the first notice was given. But this does *not* apply if the second notice is for one of the three drug-related activities in subsection 61(2)(a) as the termination date in these cases is already a minimum of 10 days after the notice is given.

Drug Offences

The drug offences in subsection 61(2) include:

- (i) the production of an illegal drug;
- (ii) trafficking in an illegal drug;
- (iii) the possession of an illegal drug for the purposes of trafficking.

Subsection 61(3) provides the following definitions:

(3) In this section,

“illegal drug” means a controlled substance or precursor as those terms are defined in the *Controlled Drugs and Substances Act* (Canada);

“possession” has the same meaning as in the *Controlled Drugs and Substances Act* (Canada);

“production” means, with respect to an illegal drug, to produce the drug within the meaning of the *Controlled Drugs and Substances Act* (Canada);

“trafficking” means, with respect to an illegal drug, to traffic in the drug within the meaning of the *Controlled Drugs and Substances Act* (Canada).

Meaning of “illegal drug”

Subsection 61(3) of the RTA states that an illegal drug means a *controlled substance or precursor* as those terms are defined in the *Controlled Drugs and Substances Act* (CDSA).

The CDSA states that a “controlled substance” refers to those substances included in Schedule I, II, III, IV or V in the CDSA (such as Cannabis or Opium), and that “precursor” refers to a substance found in Schedule VI of that Act (such as Ephedrine).

Meaning of “possession”

Subsection 61(3) of the Act states that possession has the same meaning as in the CDSA. The CDSA states that possession means possession within the meaning of subsection 4(3) of the *Criminal Code*. Subsection 4(3) of the *Criminal Code* states:

- (3) For the purposes of this Act,
 - (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or another person, and
 - (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Note that simple possession of a drug is not enough to attract subsection 61(2) of the RTA which deals with possession “for the purposes of trafficking.” Thus, where mere possession of a drug is alleged, the landlord should give a 20-day notice under subsection 61(2)(b) instead of a 10-day notice under subsection 61(2)(a).

Meaning of “production”

Subsection 61(3) of the Act states that production means, with respect to an illegal drug, to produce the drug within the meaning of the CDSA. The CDSA states that “produce” means, in respect of a substance included in Schedule I to IV of that Act, to obtain the substance by any method or process including:

- ▶ manufacturing, synthesizing or using any means of altering the chemical or physical properties of the substance, or
- ▶ cultivating, propagating, or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained, and
- ▶ includes the offer to produce.

Meaning of “trafficking”

Subsection 61(3) of the Act states that trafficking in an illegal drug means to traffic within the meaning of the CDSA. The CDSA states that “traffic” means, in respect of a substance in Schedule I to IV, to

- ▶ sell, administer, give, transfer, transport, send or deliver the substance,
- ▶ to sell an authorization to obtain the substance, or
- ▶ to offer to do either of the above

unless they are done under the authority of the regulations to the CDSA.

Meaning of “possession for the purposes of trafficking”

The phrase “possession for the purposes of trafficking” in subsection 61(2)(iii) is not defined in the RTA or the CDSA. Subsection 5(2) of the CDSA simply states that “No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.”

In some cases, possession for the purposes of trafficking may be inferred from the surrounding circumstances. For instance, where the police find a large quantity of drugs, cash and weigh scales, the Member may be able to determine that the tenant or another occupant had possession of the drugs for the purpose of trafficking.

Burden of Proof

In most Board proceedings the burden of proof is based on a “balance of probabilities” rather than “beyond a reasonable doubt” as in criminal proceedings. However, in *Bogey Construction Ltd. v. Boileau*, the Divisional Court stated that allegations of criminal conduct in a rental housing context require a higher degree of proof than a balance of probabilities.⁶ The burden is not as high as proof beyond a reasonable doubt, but must be commensurate with the gravity of the allegations.

An eviction can be ordered even though the tenant or other occupant carrying on the illegal act, trade, business or occupation has not been *charged* with an offence relating to

⁶ *Bogey Construction Ltd. v. Boileau* [2002] O.J. No. 1575 (Div. Ct.)

the illegal act.⁷ Conversely, the fact that a tenant or other occupant has been charged with an offence is not necessarily proof that an illegal act was committed.⁸

Furthermore, section 75 of the RTA provides that the Board may evict a tenant for an illegal act whether or not the tenant or other person has been *convicted* of an offence relating to the illegal act. Therefore, there is no need for a Member to adjourn the Board proceeding until the matter has been heard by a court of competent jurisdiction.

Relief from Eviction

The Member must consider whether a termination of the tenancy may be unfair having regard to all the circumstances: see subsection 83(1)(a) of the RTA and the Guideline on “Relief from Eviction.” This means there will be a two step determination: first, whether the tenant has committed an illegal act that justifies eviction; and second, whether the eviction should, nevertheless, be refused or delayed having regard to the circumstances.

In determining whether to refuse or delay an eviction, the Member should weigh the seriousness of the illegal act against factors such as: the length of the tenancy, the financial circumstances of the tenant, whether there are children living in the unit, whether there have been other problems with the tenant, whether the tenant is likely to commit the illegal act again.⁹ There may be other factors to consider.

In addition, instead of terminating the tenancy the Member may impose conditions in the order pursuant to subsection 204(1) of the RTA. For example, if the tenant is keeping a dangerous animal in the rental unit, the tenant could be ordered to remove it. If the tenant is carrying on a business that is prohibited by a zoning by-law, the Member could impose a condition in the order that the tenant no longer conduct the business in the unit. If the tenant’s guest committed an illegal act, relief from eviction could be considered with a condition that the tenant not permit that person into the building again. The order could provide that if the tenant does not comply with a condition specified in the order, the landlord may apply *ex parte* under section 78 of the RTA for eviction.

⁷ *Samuel Property Management Ltd. v. Nicholson* (2002), 61 O.R. (3d) 470 (C.A.).

⁸ *Greaves v. Toronto Community Housing Corporation* (December 14, 2004), Toronto Docket No. 411/03 (Div. Ct.)

⁹ *Metropolitan Toronto Housing Authority v. Pennant* (1991), 81 D.L.R. (4th) 404 (Ont. Ct. Gen. Div.)