

*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 interpretation questions respecting eviction applications under the *Residential Tenancies Act, 2006* (the "RTA"), based on use of the rental unit by: the landlord; a family member of the landlord; or a person who provides or will provide care services to the landlord or a family member of the landlord where the person receiving the care services resides or will reside in the building. It also deals with eviction by the landlord for personal use of a unit by: a purchaser; a family member of the purchaser; or a person who provides or will provide care services to the purchaser or a family member of the purchaser if the person receiving the care services resides or will reside in the building.

A family member may be the landlord's (or purchaser's) spouse, or a child or parent of one of them. The term "spouse" includes opposite-sex couples and same-sex couples who are married or who live together in conjugal relationships outside of marriage.

For general information about eviction applications, see Guideline 10, entitled "Procedural Issues regarding Eviction Applications".

### **PERSONAL USE BY THE LANDLORD OR LANDLORD'S FAMILY**

Section 48 of the RTA permits the landlord to give notice of termination to a tenant if the landlord, in good faith, requires the unit for residential occupation by: the landlord; the landlord's spouse; a child or a parent of either the landlord or the landlord's spouse; or a person who provides or will provide care services to the landlord or a family member of the landlord where the person receiving the care services resides or will reside in the building. The termination date in the landlord's notice of termination must be at least 60 days after the notice is given and must be the last day of a fixed term tenancy, or if there is no fixed term, on the last day of a rental period. For example, if the current month is January and the lease expires on June 30 of the same year, the termination date should be June 30. Another example may arise on a month to month lease where notice is provided to the tenant on January 20. In this scenario, the earliest the termination date on the notice can be is March 31 which is 60 days after the notice is given and on the last day of the monthly rental period.

The landlord may apply to the Board as soon as this notice has been given, but any order issued may not be effective before the termination date in the notice. During the notice period, the tenant may give the landlord ten days written notice to terminate the tenancy at an earlier date.

### **Requirement of Good Faith**

The issue that arises in some cases is whether the landlord or a family member has a real intention to reside in the rental unit. Subsection 72(1) addresses this concern by requiring the landlord to file with the Board an affidavit sworn by the person who personally requires the rental unit certifying that the person in good faith requires the rental unit for his or her own personal use.

### **PERSONAL USE BY A PURCHASER OR THEIR FAMILY**

Section 49 of the RTA permits the landlord to give notice of termination to a tenant if:

- (a) the landlord has entered into an agreement of purchase and sale to sell a residential complex containing no more than 3 units or a condominium unit, and
- (b) the purchaser, in good faith, requires possession of the complex or the unit for residential occupation by the purchaser, his or her spouse, or a child or parent of one of them.

### **Agreement of Purchase and Sale**

Before a landlord may give a notice under section 49, there must be an agreement of purchase and sale to sell the residential complex. The Board may refuse an application if it is not reasonably certain that a completed sale will result from the agreement. If a term or condition of the agreement makes it uncertain that the deal will be completed, it may be appropriate to delay the application until the sale becomes more certain.

The Board may also dismiss the application if the purchase is a sham created for the purpose of evicting the tenant. For example, a transfer to a family member should be examined. A sale for much less than market value may raise questions. Section 202 provides authority to look at the real nature of any transactions.

A landlord applying based on a notice under section 49 is well advised to file with the application a copy of the agreement, together with an explanation of the circumstances of the intended sale.

## **Requirement of Good Faith**

The requirement is similar to that related to section 48 (see above). The requirement relates to the genuine intention of the purchaser and the person who declares they intend to occupy the unit (see subsections 49(1) and 72(1) of the RTA).

## **PERSONAL USE BY A PERSON WHO PROVIDES OR WILL PROVIDE CARE SERVICES**

Subsection 48(1)(d) and 49(1)(d) of the RTA permit a landlord to give notice of termination to a tenant if the landlord or purchaser, in good faith, requires the unit for residential occupation by a person who provides or will provide care services to the landlord or purchaser, or the landlord or purchaser's spouse, parent, child, or spouse's parent or child.

The person receiving the care must reside or be going to reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located.

Under section 2 of the RTA, "care services" is defined as meaning "subject to the regulations, health care services, rehabilitative or therapeutic services or services that provide assistance with the activities of daily living".

The termination date in the notice of termination must be at least 60 days after the notice was given and must be the last day of a fixed term tenancy, or if there is no fixed term, on the last day of a rental period. The landlord may apply to the Board as soon as this notice has been given, but any order issued may not be effective before the termination date in the notice. During the notice period, the tenant may give ten days written notice to terminate the tenancy earlier.

## **Requirement of Good Faith**

The requirement is similar to that related to section 48 (see above). The requirement relates to the genuine intention of the landlord and the person who declares they intend to occupy the unit (see subsections 48(1) and 72(1) of the RTA).

## **REQUIREMENT OF GOOD FAITH**

The case law under the similarly worded provision of the *Tenant Protection Act* (the "TPA") indicates that the landlord must have a real or genuine desire to occupy the rented premises. Tenants may believe that the landlord's intention is not genuine or honest<sup>1</sup>, and

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<sup>1</sup> Good faith was defined in Semeniuk v. White Oak Stables Ltd. (1991), 27 A.C.W.S. (3d) 505 (B.C. C.A.) as honestly, without fraud, collusion or participation in wrong doing.

seek to discredit it. The Ontario Divisional Court has said that the real issue is whether the landlord is genuine in their intention to occupy the rental unit.<sup>2</sup>

The Divisional Court has also held that the landlord does not have to prove their good faith beyond a reasonable doubt.<sup>3</sup> The correct test is whether the Member believes that good faith exists on a balance of probabilities. Thus the Member must decide whether it is more likely that there is good faith than not.

A tenant may wish to prove that the same landlord gave a notice of termination for personal use of another unit earlier, obtained possession and then rented it to another tenant. This is not determinative evidence that the landlord lacks good faith in the present case<sup>4</sup>, but it is a “similar fact” situation that may be considered, at least in weighing the landlord’s evidence. Under clause 202(b) the Board shall ascertain the real substance of activities and have regard to the pattern of activities relating to the residential complex or the rental unit.

The evidence of the landlord should be reviewed to determine if it convinces the Member that the landlord or family member will move into the unit within a reasonable time after the unit becomes vacant. Evidence of previous problems between the current tenant and the landlord may be relevant to the genuineness of the landlord’s intention to use the unit as stated in the notice. It may also be considered in reviewing requests for relief from eviction (see below).

Where a landlord provides notice to a tenant under sections 48 or 49 in bad faith and the tenant moves out of the unit as a result of the landlord notice or an application to or an order by the Board based on such a notice and no person specified under the appropriate subsection has occupied the unit within a reasonable time after the former tenant vacated the rental unit, subsection 57 of the RTA provides that the Board may make:

- An order that the landlord pay a specified sum to the tenant for all or any portion of any increased rent that the former tenant has incurred or will incur for a one-year period after vacating the rental unit, and a reasonable out-of-pocket moving, storage and other like expenses that the former tenant has incurred or will incur;
- An order for abatement of rent;

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<sup>2</sup> Beljinac v. Salter [2001] O.J. No. 2792 (Div. Ct.) Re: TSL-21378. Also see Feeney v. Noble (1994), 19 O.R. (3d) 762 (Div. Ct.) in which the Court decided that this requirement does not imply a “complete bona fides (i.e., untainted by any element of bad faith and total probity)”.

<sup>3</sup> Kulusic v. Kennedy, unreported Dec. 7, 1989 decision (file # 51/89) (Div. Ct.)

<sup>4</sup> Re Yarmuch and Jacobson (1985), 34 A.C.W.S. (2d) 145 (Ont. Dist. Ct.)

- An order that the landlord pay to the Board an administrative fine not exceeding the greater of \$10,000 and the monetary jurisdiction of the Small Claims Court; or,
- Any other order that the Board considers appropriate.

### **The Landlord Requires the Unit -- Test to be Applied**

The Ontario Divisional Court found that the reasonableness of the landlord's intention to occupy the unit was not important because the real test was the genuine want and desire for the unit.<sup>5</sup> In the leading case of Kennealy v. Dunne<sup>6</sup>, the English Court of Appeal stated that:

*A landlord need not establish that his requirement of possession was reasonable, only that he bona fide wanted and genuinely had the immediate intention to occupy the premises as a residence.*

Some court cases have held that the word "requires" means wants, and not needs. Accordingly, the landlord has no obligation to prove that the unit is the only option or the best one for the person intending to occupy the unit. However, in other cases, the Court concluded from the lack of real need for the unit, and usually from other circumstances such as disputes with the tenant, that the landlord lacked good faith in their desire to evict the tenant.

The burden of proof is on the landlord. It is relevant to the good faith of the landlord's intention to occupy the unit to determine the likelihood that the intended person will move into it.

### **Corporate Landlords and Shareholders of a Corporation**

Section 103 of the *Landlord and Tenant Act* (the "LTA") was similar in wording to section 51 of the TPA and section 48 of the RTA. Therefore, in interpreting section 48 of the RTA, it is appropriate to consider how courts have interpreted those provisions of the LTA and TPA.

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<sup>5</sup> Beljinac v. Salter [2001] O.J. No. 2792 (Div. Ct.) Re: TSL-21378.

<sup>6</sup> [1977] 2 All E.R. 16 (C.A.)

A number of decisions denied corporations the right to use section 103 of the LTA, finding that only a human landlord could personally occupy the premises.<sup>7</sup> In D.E.S.K. Properties Ltd. v. Skene<sup>8</sup>, a decision under the LTA, the County Court found:

*Although in some circumstances a corporation may be regarded as a facade, the fact that the premises here are owned by a corporation prevents an Order being made under s. [103]. I am satisfied that [Mr. H.] bona fide requires possession of the apartment, but it is the corporation whose shares he owns that is the landlord, not [Mr. H.] ... A corporation and its shareholders (even where, as here, one person owns all the shares) are two separate entities.*

The landlord appealed the decision to the Divisional Court, but the appeal was dismissed.<sup>9</sup>

In contrast, in other instances, courts have taken a more flexible approach to the interpretation of the legislation. Courts have found that the sole shareholder of a corporation may also be a “landlord,” as defined by the LTA, and may thus be entitled to use this ground for eviction for their personal occupation or that of their family member.

For example, in Megan Investments Ltd. v. Funston<sup>10</sup>, Philp J. held that where a corporation owns premises, the sole shareholder and officer may qualify as a landlord if the evidence establishes that he or she is “the person giving or permitting occupation” of the premises. In Duke’s Trailer Court Limited v. Block<sup>11</sup>, Platana J. followed and extended the reasoning of Megan Investments to allow a controlling shareholder of a family held corporation to claim that he acted separately from the landlord company and was another landlord with a right of occupation.

In Melhuish and Walsh v. 580472 Ontario Ltd. and Strelchuk,<sup>12</sup> the Court found that the TPA’s requirements were sufficiently met where the individual who sought to rely on the TPA was the beneficial owner of the rental unit, even though a numbered company was shown as the owner of the rental unit in the records of the land register. In support of the application, an officer of the corporate landlord swore a statutory declaration stating that

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<sup>7</sup> For example, see 629576 Ontario Ltd. v. Ogg, (1986) 42 R.P.R. 310 (Ontario District Court, Kileen, D.C.J.)

<sup>8</sup> (1982) 4 TLLR 101 (Co. Ct.)

<sup>9</sup> See (1983) 4 TLLR 103 (Div. Ct.).

<sup>10</sup> [1992] O.J. No. 1290, (1992), 25 R.P.R. (2d) 63 (Ont. Gen. Div.)

<sup>11</sup> [1997] O.J. No. 2415, (1997), 41 O.T.C. 129, 10 R.P.R. (3d) 194 (Ont. Gen. Div.)

<sup>12</sup> [2002] O.J. No. 4343 (Div. Ct.).

the corporation is solely a trustee and holds the title to the rental unit for and on behalf of the individual, the beneficial owner. The Court found that it was clear that the individual was the beneficial owner of the premises and a landlord.

The Board is required to ascertain the real substance of all transactions relating to a residential complex or a rental unit and the good faith of the participants in making findings on an application. Where the residential complex or rental unit is owned by a corporation, the Board must examine the real substance of the facts in each case to try to determine whether the sole shareholder of a corporate landlord can seek to rely on sections 48 and 49. In Melhuish, the Court noted section 188 of the TPA, now section 202 of the RTA. Section 202 of the RTA provides:

*In making findings on an application, the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants and in doing so,*

*(a) may disregard the outward form of a transaction or the separate corporate existence of participants; and*

*(b) may have regard to the pattern of activities relating to the residential complex or the rental unit.*

Consistent with the approach of the Court in Melhuish and section 202 of the RTA, the Board must examine the real substance of the particular facts of a case to identify a landlord who can rely on section 48 of the RTA.

## **RESTRICTION ON “CO-OWNERSHIPS”**

Co-ownership involves a number of individuals owning a building through a corporation or as tenants-in-common. Subsection 72(2) applies when such a building has been marketed as single units. This method of offering a building for sale on a unit basis avoids the rules of the *Condominium Act*. The co-owner has no rights to the unit they are apparently buying, except by agreement with the other co-owners. Their rights respecting the unit may only be the net revenue from that unit, but may also include the right to occupy the unit.

Subsection 72(2) provides protection for tenants of units that have been sold in this way to co-owners. Even if the co-ownership agreement purports to give the “unit owner” the right to occupy the unit, they cannot do so unless they meet the test set out in either clause 72(2)(a) or 72(2)(b).

Subsection 72(2) restricts the right of such a landlord to apply for possession for landlord’s or purchaser’s own use. Specifically subsection 72(2) provides:

(2) The Board shall not make an order terminating a tenancy and evicting the tenant in an application under section 69 based on a notice of termination under section 48 or 49 where the landlord's claim is based on a tenancy

agreement or occupancy agreement that purports to entitle the landlord to reside in the rental unit unless,

(a) the application is brought in respect of premises situate in a building containing not more than four residential units; or

(b) one or more of the following people has previously been a genuine occupant of the premises:

- (i) the landlord,
- (ii) the landlord's spouse,
- (iii) a child or parent of the landlord or the landlord's spouse, or
- (iv) a person who provided care services to the landlord, the landlord's spouse, or a child or parent of the landlord or the landlord's spouse.

This is not a general prohibition on landlords of complexes with more than four rental units. The underlined words most commonly refer to a co-ownership situation where specific co-owners claim rights to certain units.

## **RELIEF FROM EVICTION**

Even though the Board has found that the landlord or purchaser requires the unit in good faith, which would result in an eviction order, the Board must consider, having regard to all the circumstances, whether or not to refuse to grant the application or to postpone the eviction for a period of time. In some cases, refusing or delaying the eviction is discretionary; in others, refusing the eviction is mandatory. See Guideline 7, entitled "Relief from Eviction".