# Order under Section 69
# Residential Tenancies Act, 2006

**Citation:** Garcia v Fournier, 2024 ONLTB 13667
**Date:** 2024-03-01
**File Number:** LTB-L-053990-23



**In the matter of:** B, 269 ST PHILIPPE ST
ALFRED ON K0B1A0

**Between:** Jairo Garcia — Landlord

**And**

Stephane Marcel Fournier — Tenant

Jairo Garcia (the 'Landlord') applied for an order to terminate the tenancy and evict Stephane Marcel Fournier (the 'Tenant') because:

- the Tenant, another occupant of the rental unit or a person the Tenant permitted in the residential complex has seriously impaired the safety of any person and the act or omission occurred in the residential complex;
- the Tenant, another occupant of the rental unit or someone the Tenant permitted in the building has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord in a building that has three or fewer residential units and the Landlord resides in the building.

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

Jairo Garcia (the 'Landlord') also applied for an order requiring Stephane Marcel Fournier (the 'Tenant') to pay the Landlord's reasonable out-of-pocket expenses that are the result of the Tenant's conduct or that of another occupant of the rental unit or someone the Tenant permitted in the residential complex. This conduct substantially interfered with the Landlord's reasonable enjoyment of the residential complex or another lawful right, privilege or interest.

This application was heard by videoconference on February 13, 2024.

The Landlord Legal Representative Lisa Duchene, the Landlord, the Tenant Legal Representative Alexis Fafard attended the hearing.

The Board was assisted by a French language interpreter Manual Costa in the hearing.

**Preliminary determinations:**

Motion to Adjourn

1. The Tenant requested that the hearing be adjourned because there is a concurrent criminal proceeding addressing a Peace Bond Application (the 'Bond") requested by the Landlord.

2. The Tenant submitted that it would be unfair to require the Tenant to testify in this proceeding if the answers could be used to incriminate him in the criminal proceedings. If the Tenant could not testify, then he may not be able to defend against the allegations in the application.

3. The Tenant submitted that the allegations contained in the Bond were practically the same as the allegations contained in the N7 notice of termination served on the Tenant.

4. The Landlord opposed the motion. They submitted that the issues alleged in the N7 notice of termination extended beyond the allegations contained in the Bond. They also submitted that an adjournment would severely prejudice the Landlord; and if granted would seek costs.

5. The Landlord also submitted that the Board has in the past proceeded where there have been concurrent proceedings.

6. In the alternative, the Landlord agreed to waive the allegations at paragraphs 1-7 in the N7 notice of termination and to proceed only on the remaining issues outlined in paragraphs 8-12 if the hearing proceeded.

7. The request to adjourn was denied.

8. Section 5 (2) of the *Canada Evidence Act* provides protections from testimony arising in a criminal proceeding from being used in a civil proceeding:

> **Answer not admissible against witness**
>
> **(2)** Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, **the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place,** other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence. (emphasis added)

9. Section 14(1) of the *Statutory Power Procedures Act* (the 'SPPA') also provides protections from testimony arising in the civil proceeding:

> **14.** (1) A witness at an oral or electronic hearing shall be deemed to have objected to answer any question asked him or her upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and ***no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place***, other than a prosecution for perjury in giving such evidence. (emphasis added)

9. Therefore, the Tenant could decide to provide evidence and testify to defend against the allegations in the N7 notice of termination if he chose too and not fear that his evidence and testimony might be used to criminate him in other proceedings.

10. The Landlord was unable to provide jurisprudence to show that the Board had proceeded with a hearing where there was an ongoing criminal proceeding. This was not determinative, since the Board has in some instances proceeded where a stay issued by the Divisional Court could be lifted in accordance with the SPPA to permit the Board to proceed to hear a matter. I also note that the parties did not suggest that the criminal court had issued a stay.

11. The Landlord still bears the burden to prove the allegations in the N7 notice of termination, and as such it is the Landlord that must also decide what evidence to present so that it does not impact, negatively the criminal proceedings.

Motion to Dismiss

12. The application would proceed to hear those allegations contained at paragraphs 8-12 in the N7 notice of termination.

13. The Tenant submitted that the allegations were the same allegations and dates as those contained in an N5 notice of termination that had been previously served on the Tenant. They submitted that an N5 notice of termination cannot be changed to an N7 notice of termination where the legislature had contemplated a graduation of notices of termination from a voidable notice to non-voidable notices. The Tenant also submitted that the remaining allegations in the N7 notice of termination were not significant enough to warrant an N7 notice of termination. That if the first N5 notice of termination had been breached after the voiding period with the same conduct that a second notice of termination with new dates and allegations should have been served.

14. The Landlord opposed this motion to dismiss the application on the remaining allegations.

15. The Landlord submitted that it is the Landlord right to choose the appropriate notice of termination and that there is no procedural conflict in doing so.

16. The motion to dismiss was granted, and therefore the Landlord application is dismissed. As a result, there shall not be an order for costs.

17. There are decisions where the Board has determined that where a landlord served a voidable notice at the same time and based on the same factual allegations as a non-voidable notice, the notices are void and the Board cannot make an order under section 69 terminating the tenancy and evicting the tenant based on those notices.

18. There are also decisions where the Board has determined that the practice of serving voidable and non-voidable notices at the same time and based on the same factual allegations is not a barrier to the Board making an order under section 69. There are review-level decisions of the Board that accept both approaches. There are no Divisional Court decisions that address this issue that I am aware of.

19. The intention of the Act is that where the tenant has addressed the conduct or activity identified on a termination notice served pursuant to sections 62 or 64, the tenancy is preserved and the tenant and cannot be evicted based on those allegations.

20. Section 64 of the Act says that a notice of termination given under that section is void if the tenant, within 7 days, stops the conduct or activity or corrects the omission identified on the notice. Where the issues identified by the landlord set out in the notice are not repeated during the 7 days following the N5 being served results in the tenant 'voiding' the notice.

21. The right to preserve the tenancy is, as a practical matter, available to a tenant only once every 6 months.

22. If more than 7 days but less than 6 months after a landlord served a valid notice of termination under section 62 or 64 further activity takes place, conduct occurs or a situation arises that constitutes grounds for termination under sections 62 or 64 of the Act, the landlord can serve another notice under the applicable section and the tenant has no right to preserve the tenancy by stopping or correcting the conduct or activity identified on that second notice. It is implicit in the Act that if the tenant stops or corrects the activity or conduct identified on the first notice the tenancy cannot be terminated and the tenant evicted based on that specific activity or conduct. The activity or conduct identified in a second notice cannot be the same as the activity or conduct identified on the first notice.

23. In my view, where a landlord believes that the activity or conduct of a tenant can justify termination under either a section of the Act that provides the tenant with the right to preserve the tenancy or one that does not, the landlord must make an election. Put another way, a landlord cannot serve a tenant notice that they may be evicted if they do not address the activity or conduct identified on a termination notice and, at the same time, or even subsequently, tell the Tenant on another termination notice that they cannot preserve the tenancy by addressing that same activity or conduct. Under the Act, it is one or the other.

24. In my view, fairness, and a proper balancing of the rights and responsibilities of the landlord and the tenant, particularly where the Act is remedial in nature in that it has a tenant protection focus, would dictate that the Board consider only the N5. To permit the landlord to rely on an N6 or N7 notice of termination to obtain an order terminating the tenancy and evicting the tenant in circumstances where the Landlord expressly elected to provide the tenant with the right to preserve the tenancy by serving a first (voidable) N5 would, in my view, be unfair to the tenant.

25. The test that the Board must apply to determine if a notice of termination was confusing is not subjective—whether the tenant was actually confused by the notices—but objective—whether a reasonable tenant would be confused by the notices. This means that whether or not the tenant asserted that he or she was confused or establishes that he or she was actually confused is not determinative. The Board must consider whether a reasonable tenant who received the multiple notice(s) would be confused.

26. In this particular application, I have reviewed the allegations in the N5 notice of termination and those allegations in the N7 notice of termination. They are, for all intents and purposes, identical. Therefore, a reasonable tenant would be confused by the service of multiple notices for the same conduct. The ambiguity that results is plain and obvious—the tenant cannot possibly know whether or not the tenancy can be or has been preserved by addressing the activity or conduct being relied upon by the landlord to terminate the tenancy.

27. In summary, where a landlord elects to serve a tenant with a notice of termination under a section of the Act that provides the tenant with a statutory right to preserve the tenancy by remedying the activity or conduct upon which the notice is based, the landlord cannot then cause confusion and functionally undermine the tenant's statutory right to preserve the tenancy by asserting a concurrent or subsequent right to terminate the tenancy under a section of the Act that does not provide the tenant with the ability to preserve the tenancy; even where that concurrent or subsequent notice is served at the same time or within the 6 month period available to the Tenant to preserve the tenancy.

Conclusion

28. The application is being dismissed for technical reasons. The Landlord may, as a result, bring another application based on the same activity and conduct on the part of the Tenant. This does not mean that the behaviour described in the notices is OK or that the Tenant may not be evicted if the conduct continues. The Tenant should behave himself more appropriately around the complex so as to not interfere with the reasonable enjoyment of others or the Landlord.

**It is ordered that:**

1. The Landlord application is dismissed.

**March 1, 2024**
**Date Issued**

Robert Patchett
Vice Chair, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor,
Toronto ON M7A 2G6

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