Order under Section 69
Residential Tenancies Act, 2006

Citation: 2709 Lakeshore Holding Inc. v Offei et al, 2024 ONLTB 2711
Date: 2024-01-09
File Number: LTB-L-006713-22, LTB-L-006728-22 and LTB-L-006747-22

In the matter of: 2, 3 AND 6, 2709 LAKE SHORE BLVD W ETOBICOKE ON M8V1G6

Between: 2709 Lakeshore Holding Inc. — Landlord

And

Evelyn Offei and Geffrey Appiah, Robert Harwood and Karen Harwood , and Lisa Hall — Tenants

2709 Lakeshore Holding Inc. (the 'Landlord') applied for an order to terminate the tenancy and evict Evelyn Offei, Geffrey Appiah, Robert Harwood, Karen Harwood and Lisa Hall (the 'Tenants') because the Landlord requires vacant possession of the rental units to do major repairs or renovations that require vacant possession.

This application was heard by videoconference on December 11, 2023. The Landlord and the Tenants attended the hearing. Francisco Gomez represented the Landlord. Robert Szollosy represented the Tenants,

Determinations:

1. This order relates to three applications, each of which involves a unit in the same residential complex: LTB-L-006713-22 (Unit 2: Evelyn Offei and Geffrey Appiah), LTB-L-006728-22 (Unit 3: Robert and Karen Harwood) and LTB-L-006747-22 (Unit 6: Lisa Hall).

2. The same evidence was before me on all three applications. For ease of reference, I will refer to the DOC numbers assigned in LTB-L-006713-22.

3. These applications involved N13 notices and the assertion that the Landlord wished to make repairs or renovations to the rental units that were so extensive that: (a) building permits are

required; and (b) the units must be vacant—Reason 2. **[Unit 2: DOC-040040, Unit 3: DOC040097 and Unit 6: DOC-040202]** The N13 notices were served on January 28, 2022 and had a termination date of May 31, 2022.

4. The L2 applications were filed on February 3, 2022. **[DOC-040053]** The Landlord filed 'replacement' L2 applications on March 25, 2023. **[DOC-092654]**

I. Request to Re-schedule/Adjourn

5. The December 11, 2023 attendance was the third time the parties had been before the LTB on these applications. On October 31, 2022, the applications were adjourned based on the assertion by the Tenants that they did not receive the notices of hearing in time to prepare for the hearing. On November 22, 2023, the applications were adjourned because they were not all scheduled to be heard together.

6. On November 22, 2023, the presiding Member directed that the parties provide their unavailable dates within five days **[DOC-2317319]**, but the LTB sent out notices of hearing for December 11, 2023 on November 22, 2023, before the parties had provided their available dates.

7. On November 27, 2023, Mr. Szollosy sent an e-mail to the LTB requesting that the applications be re-scheduled. That request was based on the unavailability of one of the Tenants and a witness. The LTB did not address this request before December 11, 2023.

8. On December 11, 2023, Mr. Szollosy requested an adjournment. Ms Szollosy told me that: (a) the Tenant who could not attend was Ms Hall; and (b) the witness who could not attend was going to provide evidence concerning the Landlord's good faith.

9. I decided to proceed on December 11, 2023. The Tenants indicated that they wanted to raise a preliminary issue that would resolve the applications if determined in their favour. I did not need to hear from Ms Hall or Ms Godin to determine that preliminary issue.

II. Preliminary Issues

10. The Tenants asserted that the applications had to be dismissed because they did not comply with subsection 71.1(3) of the RTA and should not have been accepted for filing by the LTB—that the applications were a nullity and could not be the basis for an order under section 69 terminating the tenancies and evicting the Tenants.

11. Subsections 71.1(3) and (4) of the RTA say:

> ***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.

(4) The Board shall refuse to accept the application for filing if the landlord has not complied with subsection (3).

12. 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]**

13. 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*

14. A landlord has until 30 days after the termination date on an N12 or N13 notice to file an application under section 69 that complies with subsection 71.1(3). **[RTA, s. 69(2)]** In this case, the Landlord had until July 1, 2022 to comply with subsection 71.1(3).

15. There is no dispute that the Landlord did not comply with subsection 71.1(3). The parties agreed: (a) N13 notices were served by the Landlord on the tenants of Units 1, 2, 3, 5 and 6 on December 20, 2021 and on January 28, 2022; **[Freeny 23 Nov 23 Declaration DOC2341637]** and (b) the L2 applications did not identify all of those N13 notices.

16. The L2 applications filed on February 3, 2022, identified no previous N12 or N13 notices delivered by the Landlord. However, the Landlord filed declarations signed by Nezar Freeny on February 3, 2022 in which Mr. Freeny identified the N13 notices for Units 2, 3, 5 and 6

that were delivered in December of 2022. **[Unit 2: DOC-040046, Unit 3: DOC-092666 and Unit 6: DOC-040211]** Mr. Freeny's February 3, 2022 declarations did not identify: (a) the previous N13 notice delivered for Unit 1; or (b) the N13 notices delivered for the other units in January of 2022—each declaration identified only the N13 notice that was delivered in January of 2022 for the specific unit to which the declaration related.

17. The replacement L2 applications filed on March 25, 2023 indicated that the Landlord had previously delivered an N13 notice only for the unit to which the application related. LTB-L006713-22 indicated, for example, only that the Landlord had delivered an N13 notice in January of 2022 for Unit 2. **[DOC-092654]**

18. The Landlord filed additional declarations signed by Mr. Freeny on November 23, 2023 in which Mr. Freeny indicated: (a) an N13 notice was delivered for Unit 1 in December of 2021; and (b) N13 notices for Units 1, 2, 3,5 and 6 were delivered in January of 2022. **[DOC-2341637]**. There is no serious dispute that the Landlord filed Mr. Freeny's November 23, 2023 declaration only after the issue of compliance by the Landlord with subsection 71.1(3) was raised by the Tenants in opposition to the L2 applications.

19. In addition, the information provided by the Landlord on its L2 applications concerning the previous N13 notices it delivered was inaccurate. On each of the replacement L2 applications, the Landlord identified the N13 notices delivered in December of 2021 as being for Reason 2—renovation. **[Unit 2: DOC-092654, Unit 3: DOC-092664 and Unit 6: DOC-092652]** However, the N13 notices delivered in December of 2021 were for Reason 1—demolition. **[See DOC-040046 and DOC-2382014, Tab 2]**

20. The issue before me on December 11, 2023 was the consequences of the LTB having accepted for filing applications that did not comply with subsection 71.1(3) and involved interpreting and giving meaning to subsection 71.1(4).

21. There are no Divisional Court or Court of Appeal decisions directly on point. The Tenants initially relied on the Divisional Court's decision in *Linhares* v. *Rahman* **[2023 ONSC 1435 (CanLII)]**, but later conceded that the Divisional Court did not deal with the consequences of the failure of a landlord to comply with subsection 71.1(3) in that case.

22. The Landlord relied on *TNL-36369-21* **[2022 CanLII 122598 (ON LTB)]**. While I accept that the LTB should strive to develop a consistent body of orders interpreting the RTA, I am not bound by orders made by other Members. I also note that in TNL-36369-21 the argument before Vice-Chair Speers, as he then was, appeared to be focused on whether it would be procedurally fair for the LTB to hear an L2 application that did not identify all of the previous notices rather than whether the application accepted by the LTB in contravention of subsection 71.1(4) was a nullity, which was the thrust of the argument before me on December 11, 2023. **[*TNL-36369-21*, 2022 CanLII 122598 (ON LTB), para 9 and 10]**

23. The issue that exists with the application of subsection 71.1(4) in practice is that there is no process for 'screening' applications filed electronically with the LTB under section 69 of the RTA based on sections 48, 49 or 50 to determine if they are compliant with subsection 71.1(3).

24. The LTB 'screens' L2 applications based on sections 48, 49 or 50 to determine whether the landlord has indicated that no N12 or N13 notices were delivered in the previous two years and, if the landlord has not 'checked' that box on the L2, whether the landlord has identified notices that it asserts were delivered.[1]

25. LTB staff does not, however, verify that all of the previous N12 and N13 notices delivered by the landlord are identified. Indeed, there is no way the LTB could, as a practical matter, determine if a landlord had disclosed all of the notices under sections 48, 48 or 50 that were delivered in the preceding two years because landlords are not required to 'register' the delivery of an N12 or N13 notice.

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26. The use of 'shall' in subsection 71.1(3) imposes a positive obligation on landlords to identify all N12 or N13 notices delivered for the unit that is the subject of the application or any other unit. The issue is not whether landlords are required to comply with subsection 71.1(3), but what consequences flow from a landlord not complying with subsection 71.1(3). **[*Sullivan on the Construction of Statutes* §5.05[11]]**

27. The RTA does not expressly declare an application accepted for filing in contravention of subsection 71.1(3) to be a nullity. **[See *Crown Liability and Proceedings Act, 2019*, s. 18(6)]** However, the fact that subsection 71.1(4) says that the LTB shall not accept for filing an L2 application that does not comply with subsection 71.1(3) means, in my view, that the application must be treated as a nullity and cannot be the basis for an order under section 69. In coming to this conclusion, I acknowledge the general reluctance to find nullities and have considered: (a) the general scheme of the RTA and the purpose of subsections 71.1(3) and (4)[2]; and (b) whether serious general inconvenience or injustice would result from treating applications that do not comply with subsection 71.1(3) as a nullities. **[See *York Region Standard Condominium Corporation No. 1206* v. *520 Steeles Developments Inc.*, 2020 ONCA 63 (CanLII), paras 25 and 33 and *M & D Farm Ltd.* v *Manitoba Agricultural Credit Corp.*, 1999 CanLII 648 (SCC), para 44]**

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[1] L2 applications are rejected for filing if the box indicating no N12 or N13 notices were delivered in the previous two years is not 'checked' and there are no N12 or N13 notices listed.

[2] The principles of statutory interpretation require that I read the words of the RTA in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature: See *Bell ExpressVu Limited Partnership* v. *Rex*, 2002 SCC 42 (CanLII).

28. One of the objects of the RTA is to protect residential tenants from unlawful evictions. **[RTA, s. 1]** Subsection 48. 49 and 50 of the RTA seek to balance the interests of landlords and tenants recognizing that tenants have a property interest in the rental unit. **[*Salter* v. *Beljinac*, 2001 CanLII 40231 (ON SCDC)]**

29. In my view, subsections 73(2), and 71.1(3) and (4) were added to the RTA to address the perception that sections 48, 49 and 50 were being used by landlords to unlawfully evict tenants. In prohibiting the LTB from accepting an L2 application that does not comply with subsection 71.1(3), the Legislature intended that no landlord would be able to secure an order under section 69 based on sections 48, 49 or 50 unless the landlord complied with subsection 71.1(3).[3] The RTA does not give the LTB discretion to accept for filing an application that does not comply with subsection 71.1(3) or a Member discretion to hear and determine an L2 application that does not comply with subsection 71.1(3).

30. When the right to apply to the LTB for an order terminating a tenancy and evict the tenant is subject to a requirement that certain formalities be complied with, it is not, in my view, unjust or inconvenient to require rigorous observance of those formalities as essential to the acquisition of the right, especially where there is no prejudice to the parties in the LTB requiring compliance.

31. The tenant is not prejudiced by the dismissal of an L2 application based on the failure of the landlord to comply with subsection 71.1(3). The consequence of an L2 that does not comply with subsection 71.1(3) being declared a nullity is, at worst, that the landlord must deliver a new notice of termination[4] and file a new L2 application. There is no prohibition on a landlord delivering another notice of termination or filing another L2 application based on that notice where an L2 application is dismissed for technical reasons.[5] **[See, for example, *CEL-75559-18-RV (Re)*, 2018 CanLII 88526 (ON LTB)]** In other words, the eviction of the tenant may be delayed but the landlord is not otherwise impacted where an L2 application is dismissed because the landlord did not comply with subsection 71.1(3).

32. The fact that a landlord may be delayed in evicting a tenant where it fails to comply with subsection 71.1(3) must, in my view, be considered in light of the fact that the landlord was or ought to have been aware of the requirement of subsection 71.1(3) and the potential consequences for not complying.

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[3] Subsection 71.1(2) provides for a similar result where a landlord does not comply with subsection 71.1(1), but the LTB is able to 'screen' applications for compliance with that subsection and where a landlord fails to comply with subsection 71.1(1), the L2 application does not come before the LTB for hearing.

[4] If the error is noted within 30 days of the termination date identified on the notice, there is no need to deliver a new notice and the L2 can be corrected: see RTA, s. 69(2).

[5] The failure of landlords to comply with the technical requirements of the RTA resulting in dismissal of the landlord's application under section 69 is, regrettably, not all together uncommon in L2 applications based on sections 48, 49 and 50.

33. The L2 form says:

If you have given any other N12 or N13 Notices in the past two years for this rental unit or any other rental unit ***you must complete the chart and provide all the requested information for each notice****…*[emphasis added]

34. The LTB's publication *Form L2: Application to End a Tenancy and Evict a Tenant or Collect Money*, which instructs landlord on how to complete the L2 form, says:

If you gave any other N12 or N13 notices in the past two years you must provide the requested information for each notice. You must provide this information whether the N12 or the N13 Notice was for this rental unit or another rental unit for which you are the landlord. For each notice you must provide:

- *the date you gave the notice,*
- *the address of the rental unit,*
- *if you gave a N12 Notice–the identity of the intended occupant*
- *if you gave a N13 Notice–the activity you intended to carry out (demolition/repair/conversion) if you filed an application based on the notice, the LTB file number.*

Shade the box located after the chart if you have not given any other N12 or N13 Notices in the past two years for this rental unit or any other rental unit.

Your application may be dismissed if you do provide this information. *It is also an offence to provide false or misleading information to the LTB.* [emphasis added]

35. My decision is consistent with how the LTB has treated the failure of a landlord to comply with section 53 of the *General Regulations*, which section requires that applications be accompanied by certain information. The LTB has found that an application that does not comply with section 53 must be dismissed because the LTB is without jurisdiction to hear such an application. **[See *Patel* v *Yussuf*, 2021 CanLII 146598 (ON LTB), *Zenkovich* v *Iannaci*, 2021 CanLII 141938 (ON LTB) and *TSL-62713-15 (Re)*, 2015 CanLII 32372 (ON LTB)]** I also note that the LTB has consistently dismissed applications that were filed in contravention of section 70, which prohibits a landlord from filing an application within the time a tenant is permitted by the RTA to 'void' a notice of termination. **[See *1351895 Ontario Ltd* v *Hamilton*, 2022 CanLII 52471 (ON LTB) and Tahir v Khan, 2021 CanLII 141480 (ON LTB)]**

36. My finding that an application accepted for filing by the LTB in contravention of subsection 17.1(3) is a nullity is consistent with how the courts have treated other provisions that impose a restriction on the ability of a party to commence a proceeding.

37. In *Younis* v. *State Farm Mutual Automobile Insurance Company* **[2012 ONCA 836 (CanLII)]** the Court of Appeal considered a section of the *Insurance Act* that restricts the ability of a person to commence an action or application unless there was first an attempt made to mediate. The plaintiff had commenced an action in contravention of that section. The Court of Appeal found that the action was 'statute-barred' and quashed it**. [See also *Hurst* v. *Aviva Insurance Company*, 2012 ONCA 837 (CanLII)]** In another case considering the same section of the *Insurance Act*, the Court of Appeal found that there was no jurisdiction to hear a claim where the action was commenced in contravention of the section. **[*Mader* v. *South Easthope Mutual Insurance Company*, 2014 ONCA 714 (CanLII)]**

38. In *Genentech, Inc.* v. *Pfizer Canada Inc.* **[2018 FC 233 (CanLII)]** the Federal Court found that it had no jurisdiction to hear a 'notice of application/motion' that should not have been accepted for filing. Similarly, in *M Gill* v*. Canada (Citizenship and Immigration)* **[2020 FC 33 (CanLII)]** the Federal Court found that an application that should not have been accepted for filing was a nullity.

39. I also note that in *York Region Standard Condominium Corporation No. 1206*, the Court of Appeal appeared to accept as correct a decision from British Columbia—*Owners, Strata Plan LMS 888* v. *Coquitlam (City)*, 2003 BCSC 941 (CanLII)—that found an action commenced without complying with a statutory requirement was a nullity. **[*York Region Standard Condominium Corporation No. 1206* v. *520 Steeles Developments Inc.*, 2020 ONCA 63 (CanLII), para 36]**

40. The Landlord asserted that when the initial L2 applications were filed on February 3, 2022, the L2 form on the TOP portal did not permit a landlord to identify previous N12 or N13 notices and that is why the Landlord filed Mr. Freeny's February 3, 2022 declarations. Assuming that is accurate, it does not explain why: (a) Mr. Freeny's February 3, 2022 declarations did not identify all of the previous N13 notices[6]; or (b) the replacement L2 applications filed on March 25, 2022 did not identify all of the previous N13 notices.

41. The Landlord, relying on section 212 of the RTA, asserted that the L2 applications were in 'substantial compliance'. I do not accept that argument.

42. Section 212 says:

[6] I am prepared to accept that a document filed with an L2 that: (a) identifies all of the previous N12 and N13 notices delivered by the Landlord in the previous two years; and (b) provides the specifics required by subsection 71.1(3) might satisfy the requirements of subsection 71.1(3).

212 *Substantial compliance with this Act respecting the contents of forms, notices or documents is sufficient.*

43. Section 212 is intended to ensure that technical issues—a typographical error for example—do not result in an application being dismissed so long as all of the required information in conveyed in the notice or form used by a person. **[See also Legislation Act, 2006, s. 84 and *O'Shanter Development* v. *Bernstein*, 2018 ONSC 557 (CanLII)]**

44. Subsection 71.1(3) and the Rules of Procedure require that on an L2 application based on sections 48, 49 or 50 the landlord: (a) identify each N12 or N13 notices it delivered in the previous two years; and (b) provide specific information with respect to each notice.

45. A landlord who identifies on an L2 application all of the N12 and N13 notices previously delivered, but does not identify the correct date of a previous notice or, in the case of N12 notices, does not set out the full name(s) of the intended occupant(s) might, in my view, be able to rely on section 212. The failure, however, of a landlord to identify previously delivered N12 or N13 notices as required by subsection 71.1(3) cannot, in my view, be 'saved' by section 212 because the defective L2 does not covey the required information. **[See *TSL-29748-12 (Re)*, 2012 CanLII 98084 (ON LTB, *D & A Properties Limited* v *Swan*, 2021 CanLII 148789 (ON LTB) and *CEL-02248 (Re)*, 2007 CanLII 75937 (ON LTB)]]**

46. I have also considered section 183 of the RTA and section 2 of the *Statutory Powers Procedures Act*. Those provisions apply, in my view, to the hearing of applications and do not assist in interpreting subsection 71.1(4).

47. The Landlord argued that the failure to identify all of the N13 notices was inadvertent and Tenants were not prejudiced by its failure to comply with subsection 71.1(3) because they had knowledge of the N13 notices that had been delivered for the other units in the complex and were able to investigate for themselves any pattern in the Landlord's use of N13 notices.

48. I do not accept that the knowledge on the part of a tenant that previous N12 or N13 notices had been delivered by the landlord relieves the landlord of its obligation under subsection 71.1(3) or results in the LTB being able to accept the applications for filing. Subsection 71.1(3) and (4) are clear as to the obligations of a landlord in connection with an L2

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application that is based on sections 48, 49 or 50 of the RTA and the consequences should the landlord fail to comply.

49. In my view, the fact that the tenant(s) may be aware of the N12 or N13 notices previously delivered by a landlord by the time an L2 comes before a Member for hearing does not 'save' the application that does not comply with subsection 71.1(3) or provide the LTB with jurisdiction to make an order under section 69 based on the application. To find otherwise would render subsection 71.1(4) meaningless and give no effect to the clear intention of the

Legislature as reflected in subsection 71.1(4) that L2 applications that do not comply with subsection 71.1(3) will not come before the LTB for hearing.

50. The Landlord argued that I should consider Mr. Freeny's February 3, 2022 and November 23, 2023 declarations as amendments to the L2 applications.

51. I am prepared to accept that Mr. Freeny's February 3, 2022 declarations were part of the applications that were filed by the Landlord on February 3, 2022 and March 25, 2023. Those declarations do not, however, satisfy the requirement of subsection 71.1(3) because they do not identify all of the previous N13 notices delivered by the Landlord.

52. Mr. Freeny's November 23, 2023 declarations were not framed as amendments to the L2 applications and the Landlord did not follow the procedure to amend the applications in Rule 15 of the LTB's *Rules of Procedure*. Moreover, while I accept that an application can be amended to address technical deficiencies, I do not accept that an application that is a nullity—the November 23, 2023 declarations were filed over one year after the Landlord was required to file L2 applications that were in compliance with subsection 71.1(3) based on the N13 notices that were delivered in January of 2022—can be 'saved' by an *ex post facto* amendment.

53. The Tenant raised the fact that Mr. Freeny controls other corporations that own residential complexes and that those corporations delivered N13 notices to their tenants. **[DOC2382014, page 77]** While the LTB is permitted to disregard the separate existence of participants **[RTA, s. 202(1)(a)**, subsection 71.1(3) does not require that a landlord disclose N12 or N13 notices delivered by related corporations.

III. Return of Compensation

54. Subsection 73.1(1) of the RTA says:

> ***73.1*** *(1) If the landlord compensated the tenant under section 48.1, 49.1, 52, 54 or 55, as the case may be, in connection with a notice of termination under section 48, 49 or 50 and the Board refuses to grant an application under section 69 for an order terminating the tenancy and evicting the tenant based on the notice, the Board may order that the tenant pay back the compensation to the landlord.*

55. While subsection 73.1(1) is discretionary, the general approach of the LTB appears to be to order that the tenant repay any monetary compensation where an application based on section 48, 49 or 50 is dismissed. **[See *Bouchard* v *Guindon*, 2022 CanLII 51428 (ON LTB) and *Harvey* v *Lovett*, 2021 CanLII 74193 (ON LTB)]**

56. I am directing that the Tenants return to the Landlord the monetary compensation they were paid. However, the parties agreed that if the Landlord delivers new N13 notices within 30 days, the requirement that the Landlord provide compensation to the Tenants in connection with those notices will be satisfied by waiver by the Landlord of the obligation to repay of the compensation as required by this order.

57. Given adjudicative resources that will be required to hear any future applications and the time already spent by me preparing to hear these applications, I will take carriage of any new L2 applications that are filed by the Landlord and will hear them together in 2024.

It is ordered that:

1. The applications are dismissed.

2. The Tenants shall repay to the Landlord the compensation paid to them by March 31, 2024. If, however, the Landlord delivers new N13 notices prior to February 29, 2024, the Landlord may waive the debt owed by the Tenants to provide the compensation required in respect of those N13 notices.

3. If the Landlord files new L2 applications for any of the units that are the subject of these applications, the Landlord shall advise me of those applications by delivering a letter identifying the LTB file numbers to my attention at LTB@ontario.ca.

January 9, 2024
Date Issued

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E. Patrick Shea
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.

Order Page