



## Order under Section 57 Residential Tenancies Act, 2006

**Citation:** Houweling v Bhabha, 2023 ONLTB 76602

**Date:** 2023-11-30

**File Number:** LTB-T-043107-23

**In the matter of:** 2, 28 Southend Cr  
Chatham Ontario N7M4X8

**Between:** Shawn Houweling Tenants  
Nicole Anderson

**And**

Rafiq Bhabha Landlords  
Richard Cosby  
Aneesa Bhabha

Shawn Houweling and Nicole Anderson (the 'Tenants') applied for an order determining that Rafiq Bhabha, Richard Cosby and Aneesa Bhabha (the 'Landlords') gave a notice of termination in bad faith.

This application was heard by videoconference on November 14, 2023.

The Landlord Rafiq Bhabha and the Tenants Shawn Houweling and Nicole Anderson attended the hearing.

### **Determinations:**

#### Preliminary Issue

1. At the hearing, the Landlord requested Richard Crosby and Aneesa Bhabha be added to the application as Landlords. The Landlord stated these people were listed as Landlords on previous applications between themselves and the Tenants. The Landlord confirmed he had spoken to Richard Crosby and Aneesa Bhabha about this issue and they were aware it would be raised at the hearing. The Landlord also confirmed he had the authority to attend the hearing on behalf of Richard Crosby and Aneesa Bhabha. The Tenants consented to the request and as such I amended the Tenants' application to include Richard Crosby and Aneesa Bhabha as Landlords.

#### T5 Application

2. As explained below, the Tenants proved the allegations contained in the application on a balance of probabilities.

3. This T5 application alleges the Landlords served an N12 Notice of termination on the Tenants in bad faith. The reason stated in the N12 Notice was that the rental unit was required for the Landlords' own use. Of the three Landlords, the Landlord who was to move into the rental unit for the purposes of residential occupation was Aneesa Bhabha.
4. Section 57(1)(a) of the *Residential Tenancies Act, 2006* sets out the Tenants' burden on this application. It reads as follows:

The Board may make an order described in subsection (3) if, on application by a former tenant of a rental unit, the Board determines that,

- (a) the landlord gave a notice of termination under section 48 in bad faith, the former tenant vacated the rental unit as a result of the notice or as a result of an application to or order made by the Board based on the notice, and no person referred to in clause 48 (1) (a), (b), (c) or (d) occupied the rental unit within a reasonable time after the former tenant vacated the rental unit;

5. Additionally, section 57(5) prescribes certain actions on the part of the Landlords that will trigger a rebuttable presumption of bad faith. This section says:

For the purposes of an application under clause (1) (a), it is presumed, unless the contrary is proven on a balance of probabilities, that a landlord gave a notice of termination under section 48 in bad faith, if at any time during the period described in subsection (6) the landlord,

- (a) advertises the rental unit for rent;
- (b) enters into a tenancy agreement in respect of the rental unit with someone other than the former tenant;
- (c) advertises the rental unit, or the building that contains the rental unit, for sale;
- (d) demolishes the rental unit or the building containing the rental unit; or
- (e) takes any step to convert the rental unit, or the building containing the rental unit, to use for a purpose other than residential premises.

6. The time period described in Section 57(6) of the Act begins on the day the Landlords served the N12 notice and ends one year after the Tenants vacated the rental unit.
7. The N12 notice was served on July 27, 2021. An L2 application under Board file SWL-53392-21 was filed by the three Landlords based on the N12 notice and an additional N5 notice. The application was before the Board on October 18, 2021 and the Board issued an order on consent on October 28, 2021. The parties agreed to a termination date of June 30, 2022. In addition, the consent order required the Landlords to pay the Tenants \$587.00 in compensation for one month's rent. The Landlords were also ordered to pay the Tenants \$2,000.00.
8. The Tenants' evidence was they vacated the rental unit on June 27, 2022 in accordance with order SWL-53392-21.

9. The rental unit is four plex property. There are two units in the front of the property and two units in the back. The rental unit is unit 2 located in the rear of the building. It is a two-bedroom, one bathroom, three level home with a backyard. The Tenants moved into the unit in 2005 and at the time they vacated the unit the monthly rent was \$587.00.
10. The Tenants evidence was their daughter lived beside them at the property in unit 3.
11. The Tenants testified the Landlord, Aneesa Bhabha, did not move into the rental unit. It was their evidence that the Landlords began renovations to the rental unit approximately three months after they vacated. They acknowledged Ms. Bhabha attended the unit on several occasions but did not live there. The Tenants testified they attended the property several times per week after they vacated and never saw anyone at their former rental unit.
12. The Tenants evidence was the property was listed for sale by the Landlords in April of 2023, less than one year after they moved out of the rental unit. The Landlords did not dispute the property was listed for sale in April 2023.
13. The Tenants' daughter, Leah Anderson, testified that she lived in unit 3 at the residential complex from March 2019 until October 1, 2023. Her evidence was after the Tenants moved out of the unit, no one moved into it. She stated the Landlords began renovating the unit in November 2022 and she was constantly woken up by the sound of hammers and drills.
14. Ms. Anderson testified that Aneesa Bhabha would sporadically attend the property and estimated the frequency to be once every couple of months. Her evidence was Ms. Bhabha would sit on the porch with her dog while her car was parked in the driveway.
15. Ms. Anderson's evidence was she played outside with her daughter and never saw Ms. Bhabha at the rental unit. Her evidence was Ms. Bhabha's dog was never seen in the backyard at the property.
16. Ms. Anderson testified she could see inside the rental unit and it remained empty. Ms. Anderson's evidence was these observations were made over the course of several months after the Tenants vacated the unit.
17. The Landlord did not cross examine Ms. Anderson on her evidence.
18. The Landlord's evidence was the consent order in Board file SWL-53392-21 did not make a determination on the merits of the N12 notice. The Landlord testified the consent agreement amounted to a "cash for keys" agreement.
19. The Landlord testified that the Tenants' daughter, Ms. Anderson, offered her unit for Ms. Bhabha if the Tenants could remain in the rental unit. The Landlord testified he did not want his daughter, Ms. Bhabha, living beside the Tenants based on issues they had had with the Tenant Mr. Houweling. He described Mr. Houweling as volatile. The Landlord's evidence was the N12 notice served on the Tenants was not about money.

20. The Landlord testified the Landlords own several rental units in the Chatham area. Ms. Bhabha looked after the properties during the summer months by performing the outside maintenance work. The Landlord testified Ms. Bhabha agreed to live at the rental unit for the upcoming school year and look after the maintenance at their various properties in the area. He testified Ms. Bhabha moved into the rental unit just before September of 2022 and spent two to three nights per week there. The rest of her time was spent at boyfriend's place in London, Ontario because she was a student at Western University.
21. The Landlord testified there was damage left behind by the Tenants and renovations were required. They started renovating the unit approximately 3-4 weeks after the Tenant vacated the unit. The Landlord's evidence was Ms. Bhabha lived on the main floor during while the upper level was being renovated.
22. The Landlord submitted photographs of a mattress on the floor in the living room. Ms. Bhabha's dog can be seen on the mattress. The Landlord also submitted a photograph showing Ms. Bhabha's dog on the floor in front of a dining room table. A photograph was also submitted showing Ms. Bhabha on the porch with her dog.
23. The Landlord testified Ms. Bhabha placed the utilities in her name and also activated internet service at the rental unit. No evidence of this was submitted by the Landlord.
24. The Landlord testified Ms. Bhabha signed a one-year lease with the other Landlords for the period July 1, 2022 until June 30, 2023. The monthly rent was approximately \$1,700.00. I confirmed with the Landlord this lease was between the Landlord Ms. Bhabha and himself and Richard Crosby, also the Landlords.
25. The Landlord testified the lease was to show revenue for taxation and financing purposes. The Landlord stated any sale of the property would have required the purchaser to accept Ms. Bhabha as a tenant to ensure she lived there for a period of one year. The lease was not submitted into evidence. No evidence was submitted showing the Landlords gave instructions to their realtor requiring prospective purchasers to accept Ms. Bhabha as a tenant.
26. During cross examination, the Landlord was asked why the monthly rent for Ms. Bhabha increased to over \$1,700.00 per month if the N12 notice was not about money since the Tenants had been paying \$587.00. The Landlord replied that the Landlords had approximately 15 rental units to choose from when deciding which unit Ms. Bhabha would live in. He further stated the Tenant, Mr. Houweling made the choice of unit easy for the Landlords because he was the most difficult and dangerous Tenant they had.
27. The Landlord's evidence was Ms. Bhabha continued to live in the rental unit when the Landlords listed the property for sale in April 2023.
28. The property did not sell during this listing. The Landlord testified the property was relisted and sold a week before the hearing date.
29. The Landlord testified the property was listed for sale because the market had softened and the Landlords wanted to transition to condominium rental properties because outside

maintenance is not required. The Landlord estimated the value of the property had decreased by about \$200,000.00 in the previous year.

30. I asked the Landlord if he was familiar with section 57(5) of the Act and he stated he was not. I read the section to him and the Landlord argued this section of the Act does not apply to the present case because Ms. Bhabha had a one-year lease and lived in the unit for one year's time.
31. The Landlord also argued consent order SWL-53392-21 constituted a waiver of the N12 notice on part of the Tenants because it was essentially a "cash for keys" agreement. He also argued the N12 notice was invalid and therefore should not permit the Tenants to later argue the eviction was in bad faith. It was the position of the Landlords that the Tenants T5 application was invalid based on the consent order.

### Analysis

32. Based on the evidence presented at the hearing, I am satisfied on a balance of probabilities the Tenants have met their burden on this application.
33. As stated earlier, the Tenants must prove three elements under section 57(1)(a) of the Act to be successful. I will deal with each of those three elements separately.
34. The first part of the test is whether the Landlords gave the Tenants an N12 notice of termination in bad faith. It is clear from the evidence taken at the hearing that the presumption of bad faith contained in section 57(5) was triggered when the Landlords listed the property for sale in April of 2023. This occurred less than one year after the Tenants vacated the rental unit. The Landlord was unaware of this section of the Act.
35. While the presumption of bad faith contained in section 57(5) is rebuttable by the Landlords, I do not find they have done so. The Landlord submitted no evidence showing a drop in real estate prices had affected the property. No appraisals or any other documentation were provided in evidence to support the Landlord's claim that the property had lost approximately \$200,000.00 in value.
36. No evidence was submitted showing the Landlords were in any unexpected dire financial circumstances at the time they listed the residential complex for sale. The property did not sell and in my view, if an unexpected change in finances had occurred, the Landlords were free to lower their asking price so the property would sell.
37. The Landlord also testified the Landlords as a group, wanted to transition into condominium rentals because maintenance needs were less. I do not find the Landlords choice to alter their investment strategy, after renovating the rental unit, amounts to an unforeseeable change in circumstances that required listing the property for sale. For these reasons, I do not find the Landlords have rebutted the presumption of bad faith contained in section 57(5) of the Act. As such, I find the N12 notice was served in bad faith.

38. The second part of the test requires the Tenants to prove they vacated the rental unit based on an N12 notice or an order of the Board based on an N12 notice. In this case, the Landlord filed an L2 application based in part on a defective N12 notice. Rather than proceed to the hearing, the parties agreed to terminate the tenancy on June 30, 2022. This does not erase the fact an N12 notice was served on the Tenants and Order SWL-53392-21 is based on this N12 notice. The Order itself also requires the Landlords to pay the Tenants the one month's compensation required under section 48.1 of the Act.
39. The Tenants vacated the rental unit pursuant to an order from the Board based on an N12 notice of termination. The termination date was June 30, 2022 and the Tenants vacated the unit on June, 27, 2022. A Board ordered consent agreement terminating a tenancy based on a defective N12 notice, does not remove the Landlords obligation to act in good faith. This applies even when the order of the Board requires the Landlords to pay the Tenants a sum of money.
40. No evidence was presented showing the Tenants had any other reason or motive to leave their home of 17 years. For all of these reasons, I am satisfied the Tenants vacated the rental unit because of Board Order SWL-53392-21.
41. The third and final part of the test under section 57(1)(a) of the Act requires the Tenants to prove the person named in the N12 notice did not occupy the rental unit within a reasonable period of time after the Tenants vacated the unit.
42. The Tenants evidence was after vacating the unit, they attended the property several times per week and never saw Ms. Bhabha living in the rental unit.
43. The Tenants' witness Ms. Anderson lives right next door the rental unit in the same building. Her evidence was she saw Ms. Bhabha attend the unit once every two months. She looked inside the unit and saw it was empty for months after the Tenants vacated. She played outside with her child daily and never saw Ms. Bhabha. She used the backyard frequently and never saw Ms. Bhabha with her dog in the back yard. The Landlord did not cross examine Ms. Anderson on any of her evidence.
44. The only Landlord who attended the hearing and testified was Mr. Rafiq Bhabha. Aneesa Bhabha did not attend and give evidence and subject herself to cross examination. Mr. Bhabha indicated the other Landlords were aware of the hearing and gave him instructions to act on their behalf. No explanation was given as to why Ms. Bhabha did not attend.
45. I conclude the Landlord's testimony on how often Ms. Bhabha stayed at the rental unit is hearsay evidence. I say this because no evidence was presented showing Mr. Bhabha also lived at the rental unit. Without residing there himself, he would not have firsthand knowledge of how often and for how long Ms. Bhabha spent at the unit. I find it most likely the Landlord's testimony on this point was actually based on information provided to him by someone else. As such, I gave this evidence little weight when considering it against the viva voce evidence given by the Tenants and their witness Ms. Anderson, all of whom were subject to cross examination.

46. I also found Ms. Bhabha's absence at the hearing concerning. Since evidence from Ms. Bhabha relating to her occupation of the rental unit could have reasonably been presented, I drew a negative inference from the Landlords failure to have Ms. Bhabha attend the hearing and testify.
47. I was not convinced the photographs submitted by the Landlord show Ms. Bhabha occupied the rental unit. I do not find this means she lives there. Quite frankly, the photographs of the interior of the rental unit show little to support a finding Ms. Bhabha was occupying the unit. There is a mattress on the floor and a table with some chairs depicted. I would expect to see far more items and belongings contained within the rental unit if Ms. Bhabha was indeed living in it.
48. Additionally, the Landlord testified Ms. Bhabha put utilities in her name and activated internet service. No evidence was submitted showing this. Additional evidence of the interior of the unit, utility bills and an invoice for internet in Ms. Bhabha's name would be reasonably available to the Landlord. I also drew a negative inference from the Landlords' failure to present this evidence.
49. I do not doubt Ms. Bhabha has been to the rental unit since the Tenants vacated it. The Landlords and the Tenants both submitted photographs of Ms. Bhabha on the porch of the unit. In my view, these photographs, when combined with the other evidence, do not support a finding Ms. Bhabha was occupying the rental unit. I find they support the Tenants' evidence which was Ms. Bhabha did attend the unit however infrequently.
50. When I consider the evidence presented, I find the Tenants' witness, Ms. Anderson was in the best position to assess whether Ms. Bhabha ever occupied the rental unit. She lived right next to the unit in the same building. She attended the hearing and testified. The Landlord chose not to challenge her evidence by cross examining her. I found Ms. Anderson credible and she gave her evidence in a straightforward manner. I found the Landlords' evidence unconvincing and lacking. For these reasons, I find it more likely than not Ms. Bhabha did not occupy the rental unit.
51. Based on all of the evidence presented, I am convinced on a balance of probabilities the Tenants have met their burden on this application. They vacated the rental unit because the Board ordered them to do so. This order was based on an N12 notice of termination. The Landlords proceeded to renovate the unit and list the property for sale less than one year after the Tenants vacated. The Landlords proved no sudden or material change in circumstances that required them to list the property for sale. Lastly, Ms. Bhabha did not occupy the rental unit within a reasonable time.

### Remedies

52. The Tenants sought an order pursuant to section 57(3)1 of the Act for the increased rent they paid for the one year after they vacated the rental unit. The Tenants testified their new rent was \$2,200.00. The Tenants evidence was they tried to find a less expensive home however the rental market was significantly more expensive than the \$587.00 they were paying to the Landlords. The Tenants signed a one-year lease for a three-bedroom, one bathroom home. They testified the new unit was smaller and the bedrooms could not fit all

their items. They no longer live there now. I am satisfied the Tenants' new home was reasonably similar to the rental unit and I accept the Tenants evidence that they could not find anything less expensive in the rental market they had to search in.

53. The difference in rent the Tenants paid was \$1,613.00 per month and I find the Tenants are entitled to 12 months of this difference. This amounts to \$19,356.00 and it will be ordered.
54. The Tenants also sought an order pursuant to section 57(3)1.1 of the Act for general damages. The amount requested by the Tenants in their application is \$20,000.00. Section 57(3)1.1 of the Act limits the amount of general compensation that can be ordered to the equivalent of 12 months of the last rent charged by the Landlords. Based on the monthly rent of \$587.00, this amounts to \$7,044.00.
55. The Tenants lived in the rental unit for 17 years and raised their family there. They ended up living right next door to their daughter at the property. The actions of the Landlord not only removed the Tenants from their home of 17 years, but it also splintered the family dynamic the rental unit provided them. For these reasons, I find the amount of \$7,044.00 to be fair and reasonable in the circumstances and it will be ordered.

**It is ordered that:**

1. The total amount the Landlords shall pay the Tenant is \$26,453.00. This amount represents:
  - \$19,356.00 for increased rent the Tenants have incurred for the one-year period from July 1, 2022 until June 30, 2023.
  - \$7,044.00 for general compensation.
  - \$53.00 for the cost of filing the application.
2. The Landlords shall pay the Tenants the full amount owing by December 11, 2023.
3. If the Landlords do not pay the Tenants the full amount owing by December 11, 2023, the Landlords will owe interest. This will be simple interest calculated from December 12, 2023 at 7.00% annually on the balance outstanding.
4. The Tenants have the right, at any time, to collect the full amount owing or any balance outstanding under this order.

**November 30, 2023**  
Date Issued

\_\_\_\_\_  
John Cashmore  
Member, 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.