



Order under Section 21.2 of the Statutory Powers Procedure Act and the Residential Tenancies Act, 2006

Citation: Loader v Feener, 2023 ONLTB 64496

Date: 2023-10-03

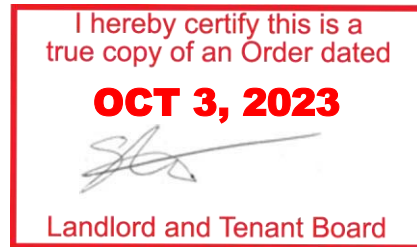
File Number: LTB-L-000154-23-SA-RV

In the matter of: B, 4496 STE. CATHERINE ST
ST. ISIDORE ON K0C2B0

Between: Shawn Loader

And

Rodney Feener



Landlord

Tenant

Review Order

Shawn Loader (the 'Landlord') applied for an order to terminate the tenancy and evict Rodney Feener (the 'Tenant') and for an order to have the Tenant pay compensation for damage they owe because the Tenant failed to meet a condition specified in the order issued by the Board on November 15, 2022, with respect to application LTB-L-000154-23.

This application was resolved by *ex parte* order LTB-L-000154-23 issued on March 20, 2023, which terminated the tenancy between the parties.

The Tenant filed a motion to set aside the order of March 20, 2023, and requested a stay of the order. On March 24, 2023, the Landlord Tenant Board (the 'Board') stayed the order until the set aside matter was decided.

On July 4, 2023, the Board denied the Tenant's motion to set aside and lifted the stay. On July 17, 2023, the Tenant requested a review of the Board's set aside order from July 4, 2023, and that the order of July 4, 2023, be stayed. The Board granted the stay and sent the matter for a review hearing.

This request to review was heard by videoconference on September 15, 2023. The Landlord, the Tenant and the Tenant's Legal Representative, Pierre-Étienne Daignault, attended the review hearing.

Determinations:

1. The Tenant's Legal Representative submitted that the Board's set aside order of July 4, 2023, LTB-L-000154-23-SA, contained several serious errors.
2. The Tenant's Legal Representative argued that the Board failed to provide the Tenant with the right to be heard, and therefore, raised an issue of natural justice. The Tenant's Legal

Representative submitted that at the set aside hearing of June 15, 2023, the Board failed to allow the Tenant's photos into evidence.

3. The Tenant's Legal Representative submitted that the Board's Interim Order which stayed the set aside order dated July 19, 2023, acknowledged that the Board had access to the disputed photos on the day of the hearing but did not accept them into evidence because the evidence did not contain an index or table of contents.
4. The Tenant's Legal Representative submitted that the photos were provided in compliance with the Board's *Rules of Procedure – effective September 1, 2023* (the 'Rules') and therefore, ought to have been considered.
5. The Tenant's Legal Representative acknowledged that the legal representative and the Tenant were both having technical difficulties at the set aside hearing. The Tenant's Legal Representative submitted that the Board's failure to be flexible to parties experiencing these issues and not providing them with accessibility and accommodation denies them justice.
6. The Tenant's Legal Representative argued that denying the Tenant the opportunity to provide an index or table of content during the hearing via email effectively denied the Tenant the chance to be fully heard.
7. The Tenant's Legal Representative also submitted that the Board made a serious error of law by failing to address the human rights component of the Tenant's set aside application because the Tenant failed to raise the issue during the Landlord's original application. The Tenant's Legal Representative argued that the Board cannot simply ignore its obligation to address the *Human Rights Code*, R.S.O. 1990, c. H.19 (the 'Human Rights Code') and is an error of law.
8. The Tenant's Legal Representative requested a new set aside hearing with a different Board member.
9. The Landlord submitted that the Board's stay should be lifted immediately. The Landlord reminded the Tenant's Legal Representative that the Board found that the Tenant's evidence was disorganized. The Landlord submitted that the Tenant's legal representative at the set aside has an obligation to comply with the Board's Rules and submit evidence in an organized and mannerly fashion.
10. Moreover, the Landlord submitted that even if the Board had considered the Tenant's evidence, its decision would be the same, as the Tenant's evidence had no evidence to the issue in dispute.
11. The Landlord confirmed that he did receive the Tenant's photos prior to the set aside hearing.
12. The Landlord also submitted that the Board did not exercise bias at the set aside hearing and was "just looking for the lawyer to his job".
13. I find that the Board's set aside order of July 4, 2023, contains a serious error due to a procedural issue which raises issues of natural justice. After carefully reviewing the Board's evidence, I see that the Tenant's legal representative emailed photos to the Board and the Landlord on April 4, and June 8, 2023.

14. Rule 19.1 states that all parties scheduled for a Board hearing must provide the other party and the Board with a copy of all evidence that the party intends to rely on at least 7 days before the hearing. In this case, the Tenant complied with the Rules, which the Landlord did not refute.
15. In terms of the Board's refusal to accept the evidence because it lacked a table of contents or index, it appears that the Order of July 4, 2023 relies on the Board's [Practice Direction on Evidence](#), despite not being named in the order. This document provides that the Board member determine whether to accept evidence and provides that:

Reasons an LTB Member may not to accept an item as evidence include, but are not limited to, the following:

1. It is not relevant;
2. It is unduly repetitious;
3. It is inadmissible due to privilege under the law of evidence;
4. Its prejudicial effect outweighs its probative value;
5. It was not provided to the LTB or the other parties by the deadline contained in the LTB's Rules or in accordance with this Practice Direction, an order or direction issued by the LTB.

16. I also note that further along in this same document, under the heading "Standards required for submission" the following is stated:

All documents, photographs and other items provided to the other parties and the LTB as evidence must:

- a. be readable
- b. have consecutively numbered pages; and
- c. include a list or table of contents identifying each item in order, and by page number, if more than one item is being submitted.

17. It appears that criteria "c" is the basis that the set aside Board member refused to consider the Tenant's evidence. When considering the totality of the circumstances, meaning the Tenant's and his legal representative's technical issues and the fact that the Tenant's evidence was served to the Board and the Landlord in compliance with the Rules, I agree that the Board failed to show the flexibility it ought to show parties.

18. I must also note with deference that the Practice Direction on Evidence is simply that, a practice direction. It must not be held "above" the *Act* or Rules when considering evidence. Instead, practice directions should be used as a helpful tool when interpreting laws and rules that are binding.

19. Though I respect the Board's findings with respect to the Tenant's lack of index or table of contents, I fail to see how taking a break to allow the Tenant's Legal Representative to do so within the confines of the hearing would have caused an issue for the parties or the Board.

20. I see the high potential prejudice this caused the Tenant, by refusing to consider his evidence and not providing him the full opportunity to be heard and provide fulsome submission to address his motion to set aside. I am persuaded that the Board's failure to

consider the Tenant's evidence amounts to a procedural issue which raises issues of natural justice.

21. In terms of the prejudice to the Landlord in allowing the Tenant to submit the disputed photos within the hearing, I note that this could have been addressed via a request for costs instead of excluding the entirety of the Tenant's evidence.
22. When considering the application of the Human Rights Code at the Board, a useful tool for guidance can be found within the Board's [Interpretation Guideline 17 – Human Rights](#). This document contains important information regarding when the Board can consider the Human Rights Code. I highlight the following:

“The Divisional Court in *Connelly v. Mary Lambert Swale Non-Profit Homes* suggested that where the landlord's application for eviction is based on the tenant's conduct, the Member must also consider whether the conduct has been directly caused by the tenant's disability.”

23. In terms of the Board's alleged failure to address the Human Rights Code, I find no error of law. After reviewing the original member's decision, I see that the member applied the correct legal test and addressed the application of the Code. I see no reason to revisit this issue.
24. I also note that the Tenant has not provided new evidence to support his original position. The Tenant's position was addressed in the original decision, and the hearing member found that Tenant did not provide persuasive evidence related to his disability and the alleged breaches of the *Act*.
25. For these reasons, I find that the Board did not make an error of Law. However, I also find that the Board made a serious error during the proceedings. A new hearing for the set aside motion shall be scheduled by the Board.

It is ordered that:

1. The request to review order LTB-L-000154-23-SA issued on July 6, 2023, is granted. Order LTB-L-000154-23-SA is cancelled.
2. The stay of order LTB-L-000154-23 shall remain in effect until the Board issues a final decision with respect to the set aside motion filed by the Tenant.
3. The Tenant's motion to a new set aside shall be heard, on a new date to set by the Board.
4. The Board shall issue new notices of hearings to the parties.

October 3, 2023
Date Issued



 Stephanie Kepman
 Member, Landlord and Tenant Board

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