



Order under Section 69 Residential Tenancies Act, 2006

Citation: Facca v Percy, 2025 ONLTB 545

Date: 2025-01-28

File Number: LTB-L-089884-23-RV

In the matter of: 2162 PARKDALE PL
WINDSOR ON N8W1X9

Between: Gino Facca

And

Ray Percy
Jackie Percy

I hereby certify this is a
true copy of an Order dated
JAN 28, 2025
Landlord and Tenant Board

Landlord

Tenant

REVIEW ORDER

Gino Facca (the 'Landlord') applied for an order to terminate the tenancy and evict Ray Percy and Jackie Percy (the 'Tenant') because the Tenant did not pay the rent that the Tenant owes.

On April 16, 2024 Interim Order LTB-L-089884-23-IN was issued requiring the Tenants to pay ongoing rent until the matter was heard. The hearing of this matter was held on September 4, 2024. Only the Landlord's representative Tim Currie attended the hearing.

This application was resolved by order LTB-L-089884-23 issued on September 17, 2024.

On September 24, 2024, the Tenant requested a review of the order and that the order be stayed until the request to review the order is resolved.

On September 25, 2024 interim order LTB-L-089884-23-RV-IN was issued, staying the order issued on September 17, 2024.

This review request was heard by videoconference on December 18, 2024. The Landlord's representative Tim Currie and both Tenants attended the hearing. The review was granted and the re-hearing was adjourned.

On December 30, 2024 review interim order LTB-L-089884-23-RV-IN2 was issued, granting the review and requiring the parties to produce evidence of rent payments, and requiring the Tenant to pay ongoing rent to minimize prejudice to the Landlord.

The de novo hearing was held by videoconference on December 18, 2024.

Only the Landlord and Ray Percy attended the hearing.

As of 10:24 a.m., the Tenant Jackie Percy was not present. Ray Percy submitted he could not speak on his wife's behalf and that he thought she may have gone to the hospital in the morning or to work, but he wasn't sure where she was. He provided no evidence that she was at the hospital. There was no record of a request to adjourn the hearing. Given the number of previous adjournments and resulting prejudice to the Landlord, the hearing proceeded in the absence of Jackie Percy.

Determinations:

1. The Landlord served the Tenant with a valid Notice to End Tenancy Early for Non-payment of Rent (N4 Notice). The Tenant did not void the notice by paying the amount of rent arrears owing by the termination date in the N4 Notice or before the date the application was filed.
2. As of the hearing date, the Tenant was still in possession of the rental unit.
3. The lawful rent is \$675.00. It is due on the 1st day of each month.
4. Based on the Monthly rent, the daily rent/compensation is \$22.19. This amount is calculated as follows: \$675.00 x 12, divided by 365 days.
5. The Tenant has not made any payments since the application was filed, despite 2 interim LTB orders to do so.
6. The rent arrears owing to January 31, 2025 are \$17,550.00.
7. At the review hearing on December 18, 2024 the Tenants challenged the amount of arrears owing.
8. The Tenants asserted all rent for 2023 had been paid. However, they did not produce evidence of those payments. The Tenant Jackie Percy acknowledged no rent has been paid for 2024. She states her bank account had been closed and she cannot find the documents. At the December 18, 2023 review hearing she asked for time obtain bank records and it was granted. The Tenants did not comply with the interim order to obtain those receipts, nor to pay the ongoing rent. As of this de novo hearing date no evidence of rent payments for 2023 and 2024 has been produced. The Tenants state the Landlord did not provide receipts as they have requested.
9. Ray Percy testified he gives Jackie Percy the monthly rent by e-transfer, and then Jackie Percy pays the Landlord. He does not have confirmation that she actually paid 2023 rent. He agrees he told Jackie Percy to withhold rent throughout 2024 due to maintenance issues and this L1 application. The Tenants at the December 18, 2024 hearing date testified that they pay the rent by going to the Bank and manually depositing \$675.00 into the Landlord's bank account.
10. The Landlord agrees one monthly payment was not credited to the Tenants from 2022. The Landlord produced a ledger supporting the claim that the Tenants now owe \$17,550.00 for arrears of rent from January 1, 2022 to January 31, 2025. A search of the Landlord's bank statements was also provided at the hearing showing all payments made by the Tenant since January 1, 2022.

11. While the Landlord bears the burden of establishing rent arrears in an application such as this, the Tenant typically bears the burden of establishing that a particular payment or payments were made once the Landlord has given some credible evidence that there are arrears owing: see *Muati v. Gibbs*, 2019 ONSC 3355 (Div. Ct.). Although providing receipts on request is required by the Landlord pursuant to section 109 of the Act, it does not alleviate the Tenants from their burden to establish their payments were made. Despite the lack of receipts by the Landlord in this case, as the Tenants did not provide any supporting evidence of any payments made, I was not satisfied that the Tenants had made the additional payments as they assert.
12. The Landlord collected a rent deposit of \$675.00 from the Tenant and this deposit is still being held by the Landlord. The rent deposit can only be applied to the last rental period of the tenancy if the tenancy is terminated.
13. Interest on the rent deposit, in the amount of \$83.17 is owing to the Tenant for the period from November 2, 2017 to December 18, 2024.

Mandatory Denial of Eviction 83(3)

14. The Tenant Ray Percy claims there are serious and ongoing maintenance issues. He showed his front window in the hearing through his camera, which was broken by vandalism in two places over a year ago. One small hole goes right through and is blocked by cardboard and tape. The Larger hole is only in the first pane of glass. He also testified the Landlord has not replaced the carbon monoxide detector and recharged the fire extinguisher. The Tenant provided no photographic or documentary evidence of these issues. I find that the video of the fire extinguisher was insufficient to establish it was not charged.
15. The Landlord agreed he knew about the damage and did nothing to repair it in that time, but states that he suspects the Tenant put the hole that goes through the window to run his power cord for his generator. The fire extinguisher was charged two months ago to satisfy a by-law infraction. He also states the Tenant refused to allow the property manager into the unit to replace the carbon monoxide detector because of his dogs. The Tenant did not deny he refused to allow her in, but wanted it scheduled when he was home.
16. Section 83(3)(a) of the Residential Tenancies Act, 2006 (the 'Act') states the Board shall refuse to grant an eviction application where it is satisfied the landlord is in serious breach of the landlord's responsibilities under the Act or of any material covenant in the tenancy agreement, it is mandatory to refuse the landlord's application for eviction. Breaches must be both serious and ongoing at the time of the hearing.
17. The leading case of the Divisional Court which outlines the test for a "serious breach" is *Puterbough v. Canada Public Works and Government Services* [2005] O.J. No 5727. In that case, the court interpreted a "serious breach" in the context of a landlord's statutory duty to repair and maintain the rental unit. At paragraph 22, the Court stated that a "serious breach", in the context of the Landlord's maintenance responsibilities:

"Means more than the rental premises being in a poor condition and in need of significant work...In short, a serious breach of the landlord's responsibilities is not established simply by the rental premise being in need of extensive repairs."

18. The purpose of subsection 83(3)(a) of the Act is to ensure landlords do not rely on an eviction of tenants as a means of circumventing their statutory obligations under the Act.
19. That said, when addressing a tenant's arguments pertaining to the landlord's alleged breaches in that case, the Court went on to state: "To accept the Tenant's argument that all breaches of the Landlord's responsibilities that raise health and safety concerns trigger subsection 83(3)(a) of the Act would render meaningless the word 'serious' in that subsection."
20. In *Puterbough*, the Court held that the wording of subsection 83(3)(a) of the Act is in the present tense meaning that the serious breach must be ongoing at the time of the hearing before the Board, not in the past or potentially in the future, and the onus is on the Tenants to prove this.
21. The word "serious" is not defined in subsection 83 (3) nor in any other part of the RTA. The definition of "serious" as defined in *Black's Law Dictionary* (5th ed), is "important, weighty, momentous, grave and great."
22. Considering the evidence provided regarding the carbon monoxide detector, I am not satisfied it reaches the level of seriousness contemplated in section 83(a). The Landlord's application will not be denied on that basis.
23. Regarding the broken window, I am similarly not satisfied that the issue reaches the level required to mandate refusal of eviction. Although a broken window is not a minor maintenance issue, only one window is broken through to the inside, and of that, the Tenant indicated it was a small hole which he patched to block the cold. No evidence was provided that the hole seriously threatened the Tenant's health or safety. The Tenant has not filed any maintenance complaint with the Board. I draw no conclusion as to the Landlord's liability should the Tenant choose to bring a T6 maintenance application against the Landlord.
24. As a result, the Landlord's application is not refused under s. 83(3)(a).

Discretionary Relief from Eviction 83(2)

25. In considering all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), including whether the Landlord attempted to negotiate a repayment agreement with the Tenant, the amount and longevity of the arrears, whether the Tenants complied with the interim orders to pay the rent, I find that it would be unfair to grant relief from eviction pursuant to subsection 83(1) of the Act.
26. The Tenant Ray Percy testified that they have lived in the rental unit for 8 years and have 2 dogs. They are both gainfully employed. The rent is very low and they insist they would be unable to afford rent elsewhere. A careful review of the Tenants' income and expenses demonstrate that there is, even without a change in discretionary spending, sufficient funds to pay the monthly rent in this case. I agree with Mr. Percy that the Tenants money management is very poor, however, there is, with minor changes to discretionary spending, sufficient funds to pay the rent elsewhere.

27. It was submitted by the Tenants that the rent was not paid through 2024 because of maintenance issues, and because the Landlord filed the L1 application. Ray Percy testified he believes his wife has approximately \$10,000.00 in the bank to pay some of the arrears.
28. The Tenants have made no effort to find alternate accommodation. Mr. Percy testified he has no time and is always at risk of being called away for work. He submits that they would need until the end of February to find alternate accommodation if evicted.
29. The Landlord submits they are significantly prejudiced by the delay thus far, as the application has been ongoing since November of 2023, and rent has not been paid in 2 years. The Landlord questions the Tenants' ability or willingness to pay the rent, pointing to the non-compliance with two interim orders. Mr. Facca states that he has taken loans to pay the arrears, which are substantial and can't afford further non-payment.
30. Based on the evidence of all parties at the hearing, the circumstances of the tenants, considering the rent has been unpaid since 2022, and that the Tenants have made no effort to comply with two interim orders, I find that any further delay would be unfair to the Landlord.

It is ordered that:


1. The tenancy between the Landlord and the Tenant is terminated unless the Tenant voids this order.
2. **The Tenant may void this order and continue the tenancy by paying to the Landlord or to the LTB in trust:**
 - \$17,736.00 if the payment is made on or before January 31, 2025. See Schedule 1 for the calculation of the amount owing.

OR

 - \$18,411.00 if the payment is made on or before February 8, 2025. See Schedule 1 for the calculation of the amount owing.
3. The Tenant may also make a motion at the LTB to void this order under section 74(11) of the Act, if the Tenant has paid the full amount owing as ordered plus any additional rent that became due after February 8, 2025 but before the Court Enforcement Office (Sheriff) enforces the eviction. The Tenant may only make this motion once during the tenancy.
4. **If the Tenant does not pay the amount required to void this order the Tenant must move out of the rental unit on or before February 8, 2025.**
5. If the Tenant does not void the order, the Tenant shall pay to the Landlord \$16,678.67. This amount includes rent arrears owing up to the date of the hearing and the cost of filing the application. The rent deposit and interest the Landlord owes on the rent deposit are deducted from the amount owing by the Tenant. See Schedule 1 for the calculation of the amount owing.
6. The Tenant shall also pay the Landlord compensation of \$22.19 per day for the use of the unit starting January 18, 2025 until the date the Tenant moves out of the unit.

7. If the Tenant does not pay the Landlord the full amount owing on or before February 8, 2025, the Tenant will start to owe interest. This will be simple interest calculated from February 9, 2025 at 6.00% annually on the balance outstanding.
8. If the unit is not vacated on or before February 8, 2025, then starting February 9, 2025, the Landlord may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.
9. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlord on or after February 9, 2025.

January 28, 2025
Date Issued



Julie Broderick
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.

In accordance with section 81 of the Act, the part of this order relating to the eviction expires on August 9, 2025 if the order has not been filed on or before this date with the Court Enforcement Office (Sheriff) that has territorial jurisdiction where the rental unit is located.

Schedule 1
SUMMARY OF CALCULATIONS

A. Amount the Tenant must pay to void the eviction order and continue the tenancy if the payment is made on or before January 31, 2025

Rent Owing To January 31, 2025	\$17,550.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount the Landlord owes the Tenant for an{abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total the Tenant must pay to continue the tenancy	\$17,736.00

B. Amount the Tenant must pay to void the eviction order and continue the tenancy if the payment is made on or before February 8, 2025

Rent Owing To February 28, 2025	\$18,225.00
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount the Landlord owes the Tenant for an{abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total the Tenant must pay to continue the tenancy	\$18,411.00

C. Amount the Tenant must pay if the tenancy is terminated

Rent Owing To Hearing Date	\$17,252.23
Application Filing Fee	\$186.00
NSF Charges	\$0.00
Less the amount the Tenant paid to the Landlord since the application was filed	- \$0.00
Less the amount the Tenant paid into the LTB since the application was filed	- \$0.00
Less the amount of the last month's rent deposit	- \$675.00
Less the amount of the interest on the last month's rent deposit	- \$84.56
Less the amount the Landlord owes the Tenant for an {abatement/rebate}	- \$0.00
Less the amount of the credit that the Tenant is entitled to	- \$0.00
Total amount owing to the Landlord	\$16,678.67
Plus daily compensation owing for each day of occupation starting January 18, 2025	\$22.19 (per day)