

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

File Number: CEL-27013-12-RV

Review Order

AGSPMI (the 'Landlord') applied for an order to terminate the tenancy and evict DJ (the 'Tenant') because he has been persistently late in paying his rent; because he has seriously impaired the safety of another person and this event occurred in the residential complex; and because he substantially interfered with the reasonable enjoyment of the rental unit by the Landlord or another tenant, or another lawful right, privilege or interest of the Landlord..

This application was resolved by order CEL-27013-12 issued on December 20, 2012. On December 28, 2012, the Tenant requested a review of the order.

On January 2, 2013 interim order CEL-27013-12 –RV-IN was issued, staying the order issued on December 20, 2012. The Member noted that “there appears to be a serious error in the order related to the termination of the tenancy for substantial interference with the reasonable enjoyment of the residential complex based on the second N5 notice of termination. The hearing member finds that the second N5 notice that the L2 application is based on is invalid since the first N5 notice was not voided. The first N5 notice became void 30 days after the termination date in that notice in accordance with Section 46 of the Act. Therefore, there was neither a first or second valid N5 notice of termination to base termination of the tenancy on.”

In his request for review the Tenant disputes the Member’s finding that he had smoked in the rental unit.

- The Tenant acknowledges that he smokes marijuana but that he had not been asked if he smoked for medical reasons. Had he been asked, he would have told the adjudicator that he did not possess a medical card. If he had such a card he would have been allowed to smoke marijuana inside as one cannot stop an individual from taking their medication.
- The Tenant acknowledged that he owns papers, 3 small personal pipes and a bong, which does not mean that he smokes inside his home. He added that he has never used the bong and explained why. He stated that he fills and rolls the joints inside and then takes them outside to smoke.
- The Tenant denies that incense is used to mask the smell of smoking and claims that marijuana smoke overpowers the scent of incense.
- The Tenant states that C.A.S. knows that he smokes marijuana and that it is not smoked inside. They do not have an issue with him smoking. He was granted custody of his 13-year-old daughter even though they know he smokes marijuana.
- The Tenant denies that he ever smoked marijuana in any home in which he has lived in the past 21 years, although he used to smoke tobacco in his home.
- The Tenant acknowledges that he blocked the vent in the bathroom but only to stop the air conditioner from freezing him and his daughter when they stepped out of the shower. The temperature in the rental unit is not maintained at 72° as required by law.

- Although he was not being evicted with respect to the “fire alarm” issue, he disputes the statements made by the Member regarding the alarm.

The request was scheduled to be heard in Barrie on January 17, 2013. The Landlord’s agent had attempted to reach the Tenant to obtain consent to reschedule the hearing because he would be out of the country during that week.

The Tenant and his Legal Representative, SM, attended the hearing on January 17, 2013. SK appeared on behalf of the Landlord’s Agent to request an adjournment. The request to adjourn was granted. The Tenant’s request for costs was denied based on the circumstances.

The request was heard in Barrie on February 12, 2013. The Landlord’s Agent, RH, and the Tenant attended the hearing. The Tenant was represented by his Legal Representative, SM.

Determinations:

1. The Tenant’s Legal Representative was unable to identify the serious error in the order or in the proceedings. He referred to the reasons in which the Member stated that it would not be appropriate to terminate the tenancy.
2. The Member found that the Tenant had persistently failed to pay the rent on the date it was due and had seriously impaired the safety of another person by removing the smoke alarm. However, she found that it would not have been appropriate to terminate the tenancy based on these issues. The Tenant is not disputing the Member’s decision with respect to these two issues.
3. With respect to the Member’s determination that the Tenant had substantially interfered with the reasonable enjoyment of the rental unit and the lawful right, privilege or interest of the Landlord, the Member stated the following in her reasons.

“The Landlord served a first and second N5 notice to terminate the tenancy regarding the Tenant’s smoking in the rental unit. The second notice is dismissed because the conduct described in the notice falls within the 7 day voiding period of the first notice.”
4. The Member did however terminate the tenancy based on the issue of substantial interference with reasonable enjoyment of the residential complex by another tenant or the lawful right, privilege or interest of the Landlord. She based this decision on the Tenant smoking in the rental unit.
5. I find that there is a serious error in this paragraph. A notice cannot be dismissed. The Tenant acknowledges that the first notice was voided in the 7-day voiding period of the first notice. The termination is based on the second N5 notice.
6. On the balance of probabilities I find that the Tenant did continue to smoke after being served the first notice after the initial 7-day voiding period and this seriously interfered with other tenants’ reasonable enjoyment of the rental unit which was to be a non-smoking unit.

7. Therefore, although there is a serious error in one paragraph, the result remains the same.

It is ordered that:

1. The request to review order CEL-27013-12 issued on December 20, 2012 is granted in part.

2. The paragraph in the Member's reasons which states,

"The Landlord served a first and second N5 notice to terminate the tenancy regarding the Tenant's smoking in the rental unit. The second notice is dismissed because the conduct described in the notice falls within the 7 day voiding period of the first notice."

is changed to,

"The Landlord served a first N5 notice to terminate the tenancy, which was voided when the Tenant did not continue smoking during the seven day period after the notice was served to him on April 11, 2012. The Landlord served a second N5 notice because the Tenant continued to smoke in the rental unit during the month of August 2012. This is contrary to the rental agreement and substantially interferes with the reasonable enjoyment of the rental complex by other tenants."

3. The balance of the order remains the same.
4. The interim order issued on January 2, 2013 is cancelled. The stay of order CEL-27013-12 is lifted.

February 27, 2013

Date Issued

Central-RO
3 Robert Speck Pkwy, Suite 520, 5th Floor
Mississauga ON L4Z2G5

Ieva Martin

Member, Landlord and Tenant Board

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

REASONS

In the matter of: 2, 16 SHAW CRESCENT
BARRIE ON L4N4Z2

Between: A G Secure Property Management Inc Landlord

and

Dave Johnston Tenant

Review Order

Although he does not explicitly acknowledge that he is smoking in the rental unit, it is evident from the Tenant's emails that he was not complying with the requirement to keep the premises as a non-smoking environment.

In an e-mail dated July 18, 2012, the Tenant stated, "And its not my issue that you rented out upstairs as a non smoking unit when downstairs is a smoking unit...you cant evic ,e for your mistakes." [sic]

On August 29, 2012, the Tenant stated, "Thx for applying to board finally...was just talking to them...theres nothing in act that prevents non smoking in a unit unless theres a signed lease stating so...which you don't have....also you cant evict me when you made upstairs non smoking when your longtime tenant downstairs is allowed to smoke in unit then try and evict the longtime tenant was your mistake not mine...I will be filing my N2 right after I win our hearing and the board sees your harassment...at that point they will award my N2...are you prepared to soon be paying me back all my rent paid from time harassment began...feb 22 Have a great day." [sic]

The tenancy began on November 1, 2007. The Tenants at that time were Kim Yelle and Dave Johnston. The tenancy agreement was signed by the former Landlord, Kim Yelle and Dave Johnston. Paragraph f) in the offer to lease states, "Landlord and Tenant agree to keep the premises a non-smoking environment." This page was initialled by the Tenant.

By smoking in the rental unit, the Tenant was not honouring the rental agreement to keep the rental unit as a smoke-free environment. This conduct substantially interfered with other tenants' enjoyment of the rental unit and the Landlord's lawful right.

February 27, 2013
Date Issued

Ieva Martin
Member, Landlord and Tenant Board