From: Mark W. Melchers [mailto:melchers@cohenhighley.com]

Sent: June 28, 2021 9:42 AM

To: Etobicoke Community Council <etcc@toronto.ca>

Subject: Additional Materials - Appeal in Folder No. 21 144071 PRS 00 IV - 1 Birchlea Avenue [CHLAW-DMS.FID845952]

Good Morning,

I am the lawyer for the appellant in the above-referenced matter, Milburne Investments Inc. c/o H D Property Management. Attached please find additional materials that the appellant intends to reference during tomorrow's hearing. Here is a summary of what is included:

(i) Tab 1 – Letter dated July 22, 2020 from landlord advising tenants that laundry room would be closed as of July 31, 2020;

(ii) Tab 2 – Current lease for unit 10-1 Birchlea Avenue dated December 23, 2019;

(iii) Tab 3 – Landlord and Tenant Board ("LTB") decision in CET-68554-17-RV – paragraphs 9-10 – confirming landlords are permitted to unilaterally discontinue a service or facility included in the rent;

(iv) Tab 4 – LTB decision in CEL-72207-17/CET-73173-18 – paragraph 34 - confirming landlords are permitted to unilaterally discontinue a service or facility included in the rent;

(v) Tab 5 – LTB decision in CET-77573-18 – paragraph 20 - confirming landlords are permitted to unilaterally discontinue a service or facility included in the rent;

(vi) Tab 6 – Onyskiw v. CLM Property Property Management Ltd. (Ontario Court of Appeal) – paragraphs 75-80 - confirming landlords are permitted to unilaterally discontinue a service or facility included in the rent;

(vii) Tab 7 – First Ontario Realty Corporation Ltd. v. Deng (Ontario Court of Appeal) – paragraphs 35, 51-58 - confirming landlords are permitted to unilaterally discontinue a service or facility included in the the rent;

(viii) Tab 8 – Cash Converters Canada Inc. v. Oshawa (City) (Ontario Court f Appeal) – paragraph 32 – legal test relative to section 14 of the Municipal Act/

I trust this is satisfactory, but if there are any questions or concerns, please feel free to contact me.

Yours Truly,

Mark W. Melchers, Partner (Profile)

Cohen Highley LLP Lawyers

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TAB 1

1179066 ONTARIO LIMITED O/A
H. D. PROPERTY & ASSET MANAGEMENT
INDUSTRIAL & COMMERCIAL REALTY MANAGEMENT AND CONSULTING

1500 Avenue Road P.O. Box 1358
Toronto Ontario M5M 0A1

Telephone 416.781.8162
Fax 416.781.1573

July 22, 2020

To the Tenants of 1 Birchlea Avenue – Toronto

Despite repeated requests, the laundry machines were again damaged due overloading. We will not incur the cost to repair these machines again.

Therefore, effective immediately, we will no longer be offering an in house laundry room for use by the tenants.

In addition, **all items in the laundry room must be removed by Friday July 31, 2020**.

After this date, the lock will be changed and all items in the room will be disposed of.

Thank you.

H. D. PROPERTY MANAGEMENT

Per. Howard Dixon

TAB 2

Ontario

Residential Tenancy Agreement (Standard Form of Lease)

Note

This tenancy agreement (or lease) is required for tenancies entered into on **April 30, 2018 or later.** It does not apply to care homes, sites in mobile home parks and land lease communities, most social housing, certain other special tenancies or co-operative housing (see Part A of General Information).

Residential tenancies in Ontario are governed by the *Residential Tenancies Act, 2006*. This agreement cannot take away a right or responsibility under the *Residential Tenancies Act, 2006*.

Under the Ontario *Human Rights Code*, everyone has the right to equal treatment in housing without discrimination or harassment.

All sections of this agreement are mandatory and cannot be changed.

1. Parties to the Agreement

Residential Tenancy Agreement between:

Landlord(s)

Landlord's Legal Name MILLBURNE INVESTMENTS

Landlord's Legal Name

Note:
See Part B in General Information

and Tenant(s)

Last Name	First Name
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

2. Rental Unit

The landlord will rent to the tenant the rental unit at:

Unit (e.g., unit 1 or basement unit)	Street Number	Street Name	
10	1	BIRCHLEA AVENUE	
City/Town		**Province**	**Postal Code**
TORONTO		ON	M8W 1E8

Number of vehicle parking spaces and description (e.g., indoor/outdoor, location)
NONE

The rental unit is a unit in a condominium.

☐ Yes ☒ No

If yes, the tenant agrees to comply with the condominium declaration, by-laws and rules, as provided by the landlord.

3. Contact Information

Address for Giving Notices or Documents to the Landlord

Unit	Street Number	Street Name	PO Box
	1500	AVENUE ROAD	1358

City/Town	Province	Postal Code/ZIP Code
TORONTO	ON	M5M 0A1

Both the landlord and tenant agree to receive notices and documents by email, where allowed by the Landlord and Tenant Board's Rules of Practice.

☐ Yes ☒ No

If yes, provide email addresses:

The landlord is providing phone and/or email contact information for emergencies or day-to-day communications:

☒ Yes ☐ No

If yes, provide information: 416-781-8162 (OFFICE)
416-890-1839 (CELL)

Note:
See Part B and E in General Information

4. Term of Tenancy Agreement

This tenancy starts on: 2020/01/01 Date (yyyy/mm/dd)

This tenancy agreement is for: (select an option below and fill in details as needed)

☒ a fixed length of time ending on: 2020/12/31 Date (yyyy/mm/dd)

☐ a monthly tenancy

☐ other (such as daily, weekly, please specify): ____________________

Note:
The tenant does not have to move out at the end of the term. See Parts C and D in General Information.

5. Rent

a) Rent is to be paid on the FIRST (e.g., first, second, last) day of each (select one):

- [X] Month
- [ ] Other (e.g., weekly) ______

b) The tenant will pay the following rent:

Base rent for the rental unit	$1,000.00
Parking (if applicable)	
Other services and utilities (specify if applicable):	
Total Rent (Lawful Rent)	

This is the lawful rent for the unit, subject to any rent increases allowed under the *Residential Tenancies Act, 2006*. For example, the landlord and tenant may agree to a seasonal rent increase for additional services of air conditioning or a block heater plug-in. This amount does not include any rent discounts (see Section 7 and Part G in General Information).

c) Rent is payable to:

MILLBURNE INVESTMENTS

d) Rent will be paid using the following methods:

CHEQUE, MONEY ORDER, BANK DRAFT

Note:
The tenant cannot be required to pay rent by post-dated cheques or automatic payments, but can choose to do so.

e) If the first rental period (e.g., month) is a partial period, the tenant will pay a partial rent of $ ______ on ______ Date (yyyy/mm/dd). This partial rent covers the rental of the unit from ______ Date (yyyy/mm/dd) to ______ Date (yyyy/mm/dd).

f) If the tenant's cheque is returned because of non-sufficient funds (NSF), the tenant will have to pay the landlord's administration charge of $ 20.00 plus any NSF charges made by the landlord's bank.

Note:
The landlord's administration charge for an NSF cheque cannot be more than $20.00

6. Services and Utilities

The following services are included in the lawful rent for the rental unit, as specified:

Gas	☐ Yes	☒ No		
Air conditioning	☐ Yes	☒ No		
Additional storage space	☐ Yes	☒ No		
On-Site Laundry	☐ Yes	☒ No	☐ No Charge	☐ Pay Per use
Guest Parking	☐ Yes	☒ No	☐ No Charge	☐ Pay Per use
Other ____________	☐ Yes	☐ No		
Other ____________	☐ Yes	☐ No		
Other ____________	☐ Yes	☐ No		
Other ____________	☐ Yes	☐ No		
Other ____________	☐ Yes	☐ No		

Provide details about services or list any additional services if needed (if necessary add additional pages):

The following utilities are the responsibility of:

Electricity	☐ Landlord	☒ Tenant
Heat	☒ Landlord	☐ Tenant
Water	☒ Landlord	☐ Tenant

If the tenant is responsible for any utilities, provide details of the arrangement, e.g. tenant sets up account with and pays the utility provider, tenant pays a portion of the utility costs (if necessary add additional pages):

TENANT IS TO SET UP THEIR OWN ACCOUNT WITH TORONTO HYDRO.

Note:

If the tenant will be responsible for paying for electricity measured by a meter or suite meter, the landlord must give the prospective tenant available information about the electricity usage in the rental unit over the last twelve months using the appropriate Landlord and Tenant Board form.

7. Rent Discounts

Select one:

☐ There is no rent discount.

or

☐ The lawful rent will be discounted as follows:

Provide description of rent discount (if necessary add additional pages):

Note:
See Part G in General Information for what types of discounts are allowed.

8. Rent Deposit

Select one:

☐ A rent deposit is not required.

or

☒ The tenant will pay a rent deposit of $ $1,000.00. This can only be applied to the rent for the last rental period of the tenancy. As the Tenant is transferring from another unit in the building, the deposit will be transferred from that unit to unit #10.

Note:
This amount cannot be more than one month's rent or the rent for one rental period (e.g., one week in a weekly tenancy), whichever is less. This cannot be used as a damage deposit. The landlord must pay the tenant interest on the rent deposit every year. See Part H in General Information.

9. Key Deposit

Select one:

☒ A key deposit is not required.

or

☐ The tenant will pay a refundable key deposit of $ ________________ to cover the cost of replacing the keys, remote entry devices or cards if they are not returned to the landlord at the end of the tenancy.

If a refundable key deposit is required, provide description and number of keys, access cards and remote entry devices:

Note:
The key deposit cannot be more than the expected replacement cost. See Part H in General Information.

10. Smoking

Under provincial law, smoking is not allowed in any indoor common areas of the building. The tenant agrees to these additional rules on smoking:

Select one:

[X] None

or

[ ] Smoking rules

Provide description of smoking rules (if necessary add additional pages):

Note:
In making and enforcing smoking rules, the landlord must follow the Ontario *Human Rights Code*. See Parts M and S in General Information.

11. Tenant's Insurance

Select one:

[ ] There are no tenant insurance requirements.

or

[X] The tenant must have liability insurance at all times. If the landlord asks for proof of coverage, the tenant must provide it. It is up to the tenant to get contents insurance if they want it.

12. Changes to the Rental Unit

The tenant may install decorative items, such as pictures or window coverings. This is subject to any reasonable restrictions set out in the additional terms under Section 15.

The tenant cannot make other changes to the rental unit without the landlord's permission.

13. Maintenance and Repairs

The landlord must keep the rental unit and property in good repair and comply with all health, safety and maintenance standards.

The tenant must repair or pay for any undue damage to the rental unit or property caused by the wilful or negligent conduct of the tenant, the tenant's guest or another person who lives in the rental unit.

The tenant is responsible for ordinary cleanliness of the rental unit, except for any cleaning the landlord agreed to do.

Note:
See Part J in General Information.

14. Assignment and Subletting

The tenant may assign or sublet the rental unit to another person only with the consent of the landlord. The landlord cannot arbitrarily or unreasonably withhold consent to a sublet or potential assignee.

Note:
There are additional rules if the tenant wants to assign or sublet the rental unit. See Part P in General Information.

15. Additional Terms

Landlords and tenants can agree to additional terms. Examples may include terms that:

- Require the landlord to make changes to the unit before the tenant moves in, and
- Provide rules for use of common spaces and/or amenities.

These additional terms should be written in plain language and clearly set out what the landlord or tenant must or must not do to comply with the term. If typed, the additional terms should be in a font size that is at least 10 points.

An additional term cannot take away a right or responsibility under the *Residential Tenancies Act, 2006.*

If a term conflicts with the *Residential Tenancies Act, 2006* or any other terms set out in this form, the term is void (not valid or legally binding) and it cannot be enforced. Some examples of void and unenforceable terms include those that:

- Do not allow pets (however, the landlord can require the tenant to comply with condominium rules, which may prohibit certain pets),
- Do not allow guests, roommates, any additional occupants,
- Require the tenant to pay deposits, fees or penalties that are not permitted under the *Residential Tenancies Act* 2006 (e.g., damage or pet deposits, interest on rent arrears), and
- Require the tenant to pay for all or part of the repairs that are the responsibility of the landlord.

See General Information for more details.

The landlord and tenant may want to get legal advice before agreeing to any additional terms.

Select one:

[X] There are no additional terms.

or

[ ] This tenancy agreement includes an attachment with additional terms that the landlord and tenant agreed to.

16. Changes to this Agreement

After this agreement is signed, it can be changed only if the landlord and tenant agree to the changes in writing.

Note:
The *Residential Tenancies Act, 2006* allows some rent increases and requires some rent reductions without agreement between the landlord and tenant. See Part I in General Information.

17. Signatures

By signing this agreement, the landlord(s) and the tenant(s) agree to follow its terms.

Unless otherwise agreed in the additional terms under Section 15, if there is more than one tenant, each tenant is responsible for all tenant obligations under this agreement, including the full amount of rent.

Landlord(s):

Name	Signature	Date (yyyy/mm/dd)
JARED KIRKLAND		2019/12/23

Tenant(s):

Name	Signature	Date (yyyy/mm/dd)
[redacted]	[redacted]	

Note:
All of the landlords and tenants listed on the first page in Section 1 (Parties to the Agreement) must sign here. The landlord must give a copy of this agreement to the tenant within 21 days after the tenant signs it.

Ontario

Appendix: General Information

This Appendix sets out basic information for landlords and tenants. It is not intended as legal advice, and it is not an official interpretation of the *Residential Tenancies Act, 2006* (the Act). Please refer to the Act for the specific rules.

The Landlord and Tenant Board also provides information about landlords' and tenants' rights and responsibilities under the Act.

Landlord and Tenant Board:
Toll free: 1-888-332-3234
Toronto area: 416-645-8080
TTY: Bell Relay Service at 1-800-268-9242
Website: www.sjto.ca/ltb

A. When to Use This Form

This form (standard form of lease) must be used for most residential tenancy agreements (leases).

This form should **not** be used for:

- care homes,
- sites in mobile home parks or land lease communities,
- social and supportive housing that is exempt from the rent increase guideline (see the regulation under the Act for specific exemptions),
- member units in co-operative housing, and
- any other accommodation that is exempt from the Act (see Section 5 of the Act).

B. Change of Landlord

A new landlord has the same rights and duties as the previous landlord. A new landlord must follow all the terms of this agreement unless the tenant and new landlord agree to other terms. A new landlord should provide the tenant with their legal name and address.

C. Renewing a Tenancy Agreement (Part V of the Act)

If the landlord and tenant agree that the tenancy will last for a specific period of time, this is called a fixed term tenancy. This is because both the start and end date are set out in the tenancy agreement.
The end of an agreement does not mean the tenant has to move out or sign a renewal or new agreement in order to stay. The rules of the agreement will still apply and the tenant still has the right to stay:

- as a monthly tenant, if the agreement was for a fixed term or monthly tenancy,
- as a weekly tenant, if the agreement was for a weekly tenancy, or
- as a daily tenant, if the agreement was for a daily tenancy.

The landlord and tenant can also agree to renew the agreement for another fixed term or enter into a new agreement. In any case, changes to the rent must follow the rules under the Act (see Part I below for further information).

D. Ending the Tenancy (Part V of the Act)

The landlord or tenant must follow the rules of the Act when ending a tenancy.

When the tenant can end the tenancy

The tenant may end a tenancy by giving the landlord proper notice using the appropriate Landlord and Tenant Board form. They must give:

- at least 60 days' notice if they have a monthly or fixed term tenancy, or
- at least 28 days' notice if they have a daily or weekly tenancy.

For a fixed term tenancy, the notice cannot be effective before the last day of the fixed term. For a monthly or weekly tenancy, the notice must be effective on the last day of a rental period (e.g. month or week).

In certain situations, a tenant who has experienced sexual or domestic violence can give 28 days' notice to end the tenancy at any time, even if the tenant has a fixed term agreement (e.g., one year agreement). They must use the notice form approved by the Landlord and Tenant Board.

When the landlord can end the tenancy

The landlord cannot evict the tenant unless the landlord follows the proper rules. In most cases, the landlord must give proper notice to end the tenancy using the right form. Forms are available on the Landlord and Tenant Board's website.

The landlord can only give the tenant notice to end the tenancy in certain situations. These situations are set out in the Act. A few examples include:

- tenant does not pay the full rent when it is due,
- tenant causes damage to the rental unit or building, and
- tenant substantially interferes with the reasonable enjoyment of other tenants or the landlord.

If the landlord gives a tenant notice to end the tenancy, the tenant does not have to move out.

If the tenant does not move out, the landlord must apply to the Landlord and Tenant Board in order to evict the tenant. The Landlord and Tenant Board will hold a hearing and decide if the tenancy should end. Both the landlord and the tenant can come to the hearing and explain their side to the Landlord and Tenant Board. If the Landlord and Tenant Board orders an eviction, the eviction order can only be enforced by the Sheriff (Court Enforcement Officer).

It is an offence for the landlord to evict a tenant without following this process. If convicted, the landlord could face a fine of up to $25,000 (for an individual) or $100,000 (for a corporation).

If the Landlord and Tenant agree to end the tenancy

The tenant and landlord can agree to end a tenancy at any time by using the proper Landlord and Tenant Board form. Some landlords may ask the tenant to sign this form when signing the agreement. In most cases, an agreement to end a tenancy signed at the beginning of the tenancy agreement is unenforceable and the tenant does not have to move out.

There is more information on how to end a tenancy and reasons for eviction in the Act and in a brochure on the Landlord and Tenant Board website.

E. Giving Notices and Documents (Part XII of the Act)

The landlord and tenant have to deliver some official notices and other documents in writing. These notices and documents can be:

- hand delivered,
- left in a mail box or a place where mail is ordinarily delivered, or
- mailed (this will count as delivered five days after mailing).

There are also other ways to serve notices and documents. For more information, contact the Landlord and Tenant Board or see the Rules of Practice on its website.

F. Rent and Rent Receipts (Part VII of the Act)

Rent is the amount the tenant pays to the landlord to occupy the rental unit and receive services or facilities agreed to in this agreement.

The tenant must pay their rent on time. If they do not, the landlord can give them notice to end the tenancy.

If the tenant asks for a receipt for rent or any payment or deposit, the landlord must give them one for free. This also applies to a former tenant who asks for a receipt within 12 months after the end of their tenancy.

G. Rent Discounts (Part VII of Act)

The landlord can offer the tenant a discount for paying rent on or before the date it is due. This discount can be up to two per cent of the lawful rent.

The landlord can also offer rent-free periods or discounts in one of three ways:

- Rent-free periods of up to three months within any 12-month period,
- A discount of up to one month's rent spread evenly over eight months, or
- A discount of up to two months' rent, with up to one month's rent spread evenly over the first seven months, and up to one month's rent discounted in one of the last five months.

These types of discounts must be agreed to in writing.

H. Deposits (Part VII of the Act)

The landlord can only collect a deposit for the last month's rent and a refundable key deposit. The tenant does not have to provide any other form of deposit, such as pet or damage deposits. If the tenant pays anything more, the tenant can apply to the Landlord and Tenant Board to get the money back.

Rent deposit (i.e. last month's rent): The landlord can require a rent deposit on or before the tenant enters into the tenancy agreement. The landlord must apply this money to the rent for the last period of the tenancy. The rent deposit must not be more than one month's rent or the rent for one rental period (e.g., one week in a weekly tenancy), whichever is less.

The landlord must pay the tenant interest on the rent deposit every year. If the rent increases after the tenant has paid a rent deposit, the landlord can require the tenant to top-up the rent deposit so that it is the same as the new rent. The landlord can use the interest on the rent deposit to top-up the rent deposit.

If the landlord is unable to let the tenant move into the rental unit, the landlord must return the deposit, unless the tenant agrees to rent a different unit.

Key deposit: If the landlord collects a deposit for key(s), remote entry devices or cards, the landlord must return the deposit when the tenant gives back their key(s) at the end of the tenancy.

The landlord can charge the tenant for additional keys that the tenant requests (for example, if the tenant wants an extra key or if the tenant has lost their key), but the charge cannot be more than actual cost of the keys. This is not a key deposit.

I. Rent Increases and Decreases (Part VII of the Act)

Most Ontario tenants are protected by rent controls that limit how much rent can increase year-over-year. The rent payable by tenants may also decrease in limited situations.

Guideline Rent Increases

Normally, the landlord can increase the rent only once every 12 months. The landlord must use the proper Landlord and Tenant Board form and give the tenant at least 90 days' notice before the rent increase is to take effect. The rent can be increased by no more than the rent increase guideline unless the Landlord and Tenant Board approves a rent increase above the guideline. The guideline for each year can be found on the Landlord and Tenant Board's website.

Rent Increases above the Guideline

The landlord can apply to the Landlord and Tenant Board for approval to raise the rent by more than the rent increase guideline. Affected tenants can oppose this application at the Landlord and Tenant Board.

This kind of rent increase is called an above-guideline rent increase. The Landlord and Tenant Board can allow this kind of rent increase if:

- the landlord's municipal taxes and charges have increased significantly,
- the landlord has done major repairs or renovations, or
- the costs of external security services (i.e. not performed by the landlord's employees) have increased, or external security services are being provided for the first time.

The landlord and tenant can also agree to an above-guideline rent increase, if the landlord agrees to renovate or add a new service for the tenant. Certain rules apply.

Rent Reductions:

The landlord **must** reduce the rent if:

- the municipal property tax goes down by more than 2.49 per cent, or
- the rent was increased above the guideline to pay for repairs or renovations and the costs have been fully paid for (this only applies to tenants who were living in the unit when the above guideline rent increase happened).

The tenant can apply to the Landlord and Tenant Board to reduce their rent if:

- municipal property taxes or charges on the rental property go down,
- the landlord reduced or removed a service without reducing the rent, or
- the landlord did not keep a promise they made in an agreement for a rent increase above the guideline.

J. Maintenance and Repairs (Part III, IV, V and XIV of the Act)

The landlord must keep the rental unit and property in good repair and comply with all health, safety and maintenance standards. This includes the maintenance and repair of things that came with the unit, such as appliances, and of common areas, such as parking lots, elevators, and hallways.

The tenant must pay their rent, even if they have problems with the maintenance and repair of their unit or property. If the tenant is having a maintenance or repair problem, the tenant should let the landlord know. If needed, the tenant can apply to the Landlord and Tenant Board.

The tenant is responsible for any damage to the rental property caused by the tenant, the tenant's guest or another person who lives in the rental unit. This applies to any damage caused on purpose or by not being careful enough. This does not include damage that results from normal use of the rental unit over time ("wear and tear"). The landlord can apply to the Landlord and Tenant Board if the tenant has not repaired such damage.

The tenant is responsible for ordinary cleanliness of the rental unit, except for any cleaning the landlord agreed to do.

K. Vital Services (Part I and III of the Act)

"Vital services" include hot or cold water, fuel, electricity, gas and heat.

The landlord must ensure that a rental unit has heating equipment capable of maintaining a minimum temperature of 20° Celsius from September 1 to June 15. Some municipal by-laws may have stricter requirements.

The landlord cannot withhold or shut off the reasonable supply of a vital service, care service or food that the landlord must supply under the tenancy agreement. If a vital service is cut-off because the landlord failed to pay their bill, the landlord is considered to have withheld that service. However, if a vital service is cut-off or disconnected because the tenant failed to pay their own utility bill, the tenant cannot claim that the landlord withheld a vital service.

The landlord cannot deliberately interfere with the reasonable supply of any vital service, care service or food, whether or not the landlord is obligated to supply it under the tenancy agreement.

L. Harassment (Part III and IV of the Act)

It is against the law for the landlord (or anyone acting for the landlord, such as a superintendent or property manager) to harass the tenant, or for the tenant to harass the landlord. If the landlord or the tenant is experiencing harassment they can apply to the Landlord and Tenant Board.

M. Discrimination

If the landlord (or anyone acting for the landlord) discriminates against the tenant based on prohibited grounds of discrimination under the Ontario *Human Rights Code* (the *Code*), they may be violating the tenant's rights under the Code. The Landlord and Tenant Board may be able to consider discrimination if it relates to an application under the *Residential Tenancies Act*, 2006. In other situations, the tenant may have to take their case to the Human Rights Tribunal of Ontario.

N. Landlord's Entry into Rental Unit (Part III of the Act)

The tenant is entitled to reasonable enjoyment of the rental unit (e.g. quiet enjoyment, reasonable privacy, freedom from unreasonable disturbance and exclusive use of the rental unit).

The landlord can enter the rental unit with 24 hours' written notice only for the following reasons:

- make repairs,
- inspect the unit to see if repairs are needed, if the inspection is reasonable,
- show the rental unit to a possible buyer, insurer or mortgage lender,
- let a real estate agent show the unit to a possible buyer,
- have a property inspection done before converting the residential building into a condominium, or
- for any reasonable purpose listed in the tenancy agreement.

The written notice must include the reason for the entry and state the date and time (between 8 a.m. and 8 p.m.) that the landlord will enter the unit. With proper notice, the landlord can enter the unit when the tenant is not at home.

The landlord does not need to give a notice to enter:

- in case of emergency,
- if the tenant consents to entry,
- if the tenancy agreement requires the landlord to clean the unit, or
- if the tenancy is coming to an end and the landlord wants to show the unit to a potential new tenant – the landlord can only show the unit between 8:00 a.m. and 8:00 p.m. and must make a reasonable effort to let the tenant know when this will happen.

O. Locks (Part III and IV of the Act)

The landlord cannot change the locks of the rental unit unless the landlord gives the new keys to the tenant. The tenant cannot change the locks of the rental unit without the consent of the landlord.

P. Assign or Sublet (Part VI of the Act)

The tenant may assign or sublet the rental unit to another person only with the consent of the landlord. The landlord cannot arbitrarily or unreasonably withhold consent to a potential assignee or sublet of the rental unit.

1. **Assignment**: In an **assignment**, the tenant transfers their right to occupy the rental unit to someone else. The new person takes the place of the tenant, and the tenancy agreement stays the same.

2. **Sublet**: A **sublet** occurs when the tenant moves out of the rental unit, lets another person (the 'sub-tenant') live there until a specified date, and can return to live in the unit before the tenancy ends. The tenancy agreement and the landlord-tenant relationship do not change.

   A tenant who sublets a rental unit cannot:

   - charge a higher rent than the landlord does for the rental unit,
   - collect any additional fees for subletting the rental unit, or
   - charge the sub-tenant for additional goods or services.

Q. Guests (Part III of the Act)

The landlord cannot stop tenants from having guests, require the tenant to notify the landlord or get the landlord's permission before having guests. The landlord cannot charge extra fees or raise the rent due to guests in the rental unit. However, the tenant is responsible for the behaviour of their guests.

The landlord cannot prevent the tenant from having a roommate, as long as municipal by-laws on occupancy standards are respected.

R. Pets (Part III of the Act)

A tenancy agreement cannot prohibit animals in the rental unit or in or around the residential building.

There are some cases where the landlord can apply to the Landlord and Tenant Board to evict a tenant who has a pet. These are some common examples:

- the pet makes too much noise, damages the unit or causes other tenants to have allergic reactions,
- the breed or species is inherently dangerous, or
- the rules of the condominium corporation do not allow pets.

S. Smoking (Part V of the Act)

The Act does not discuss smoking in a rental unit. The landlord and tenant can use Section 10 of this lease to agree to either allow or prohibit smoking in the unit, and/or on the landlord's property.

Even if the lease doesn't prohibit smoking, the landlord may apply to the Landlord and Tenant Board to end the tenancy if the smoking:

- substantially interferes with reasonable enjoyment of the landlord or other tenants,
- causes undue damage,
- impairs safety, or
- substantially interferes with another lawful right, privilege or interest of the landlord.

If the tenant believes that other people smoking in their building affects their health or safety, contravenes maintenance standards, or substantially interferes with their reasonable enjoyment of the rental unit, they should discuss it with their landlord before contacting the Landlord and Tenant Board.

T. Smoke and Carbon Monoxide Alarms

The landlord must provide the rental unit with working smoke alarms and, where applicable, carbon monoxide alarms.
The landlord is responsible for keeping smoke and carbon monoxide alarms in working condition, which includes replacing the batteries. The tenant must not disconnect or tamper with any smoke or carbon monoxide alarm and must notify the landlord immediately of any alarms not working properly.

U. Resolving Disputes

The landlord and tenant are required to follow the law. If they have problems or disagreements, the landlord and tenant should first discuss the issue and attempt to resolve it themselves. If the landlord or tenant feels that the other is not obeying the law, they may contact the Landlord and Tenant Board for information about their rights and responsibilities, including whether they may apply to the Landlord and Tenant Board to resolve the dispute.

TAB 3

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

File Number: CET-68554-17-RV

Review Order

M S F and F S F (the 'Tenants') applied for an order determining that K C P I (the 'Landlord') or the Landlord's agent substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household (T2 application).

The Tenants' T2 application was resolved by order CET-68554-17, issued on September 1, 2017.

On October 20, 2017, the Tenants requested an extension of time to file a review as well as a review of the order. The extension of time was granted and the review request was considered.

A preliminary review of the review request was completed without a hearing in accordance with Rule 29.11 of the Board's Rules of practice.

Determinations and Reasons:

1. The September 1, 2017 order dismissed the Tenants' T2 application since the Member determined that the loss of free visitor's parking did not amount to a substantial interference with the Tenants' reasonable enjoyment of the rental unit or residential complex.

2. The Tenants allege a number of errors in the order or proceedings and disagree with the Member's dismissal of the T2 application.

3. On the basis of the submissions made in the request, I am not satisfied that there is a serious error in the order or that a serious error occurred in the proceedings.

4. There was no dispute that there used to be free visitor's parking at the building. The Landlord converted that free visitor's parking to paid visitor's parking on August 9, 2016. This was a unilateral change on the Landlord's part. The Tenants did not agree to this change. As a result of the change, there was a reduction or discontinuance in a service or facility at the building.

5. The Member determined that the Landlord's obligation to ensure that there is no substantial interference with the reasonable enjoyment of the rental unit or residential complex does not extend to the Tenants' guests.

6. It would primarily be the Tenants' guests that would be inconvenienced or out of pocket for the cost of the visitor's parking at the building.

7. Subsection 29(1) of the *Residential Tenancies Act*, 2006 (the 'Act') states that a tenant may apply to the Board if the landlord or their agent has substantially interfered with the reasonable enjoyment of the rental unit or residential complex for all usual purposes by the tenant or a member of his or her household. (emphasis added)

8. Given the wording in subsection 29(1) of the Act, the Member's determination that the Landlord's obligation does not extend to visitors was not unreasonable.

9. Furthermore, the T2 application that the Tenants filed was not the relevant application to address the issue in the application.

10. Section 130 of the Act specifically contemplates that a landlord may unilaterally reduce or discontinue a service or facility that was originally provided and formed part of the tenancy agreement. If a landlord removes a service or facility the tenant may file the applicable application with the Board and request a rent reduction. That application is a T3 application.

11. Section 2 of the Act states in part:

"services and facilities" includes,

(b) parking and related facilities,

12. Section 130 of the Act states:

130 (1) A tenant of a rental unit may apply to the Board for an order for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.

Same, former tenant

(2) A former tenant of a rental unit may apply under this section as a tenant of the rental unit if the person was affected by the discontinuance or reduction of the services or facilities while the person was a tenant of the rental unit.

Order re lawful rent

(3) The Board shall make findings in accordance with the prescribed rules and may order,

(a) that the rent charged be reduced by a specified amount;

(b) that there be a rebate to the tenant of any rent found to have been unlawfully collected by the landlord;

(c) that the rent charged be reduced by a specified amount for a specified period if there has been a temporary reduction in a service.

Same

(4) An order under this section reducing rent takes effect on the day that the discontinuance or reduction first occurred.

Same, time limitation

(5) No application may be made under this section more than one year after a reduction or discontinuance in a service or facility.

13. The amount of the rent reduction that a tenant may be entitled to is determined in accordance with the prescribed rules that are set out in section 39 of Ontario Regulation 516/06 (the 'Regulation') made under the Act.

14. The Regulation sets out different rules for determining an appropriate rent reduction depending on whether a landlord's removal or discontinuance of a service was reasonable or unreasonable.

15. Therefore, whether a landlord's removal of a service was reasonable or unreasonable, a tenant's remedy is a rent reduction which is determined in accordance with the prescribed rules.

16. The Tenants did not file a T3 application. They filed a T2 application claiming substantial interference. That claim is governed by sections 29 and 31 of the Act which permit different remedies to be requested and ordered.

17. In this case, the Tenants were requesting that the free visitor's parking be re-instated. That is not an available remedy under section 130 of the Act.

18. I acknowledge that there may be circumstances where a reduction or discontinuance in a service or facility could potentially be characterized as a substantial interference with a tenant's reasonable enjoyment of the rental unit or residential complex. However, in my view, it is not appropriate to permit that type of claim to be filed under a T2 application so that a tenant may circumvent section 130 of the Act and request a different remedy than what is provided for under the Act or to get around the one year limitation period set out in subsection 130(5) of the Act.

19. Substantial interference with reasonable enjoyment is very broad and general claim and could potentially encompass any number of issues that could arise during a tenancy. However, when an issue raised in an application falls under a more specific and applicable section of the Act, the issue should be determined under that specific and applicable section.

20. This is similar to the situation that arises when a tenant does not pay the rent that is due. There is an applicable process, remedy and application for rent arrears. Although a tenant's failure to pay the rent could potentially be characterized or claimed as a substantial interference with a landlord's reasonable enjoyment of the residential complex, the Board does not determine rent arrears issues under that type of claim. It requires a landlord to follow the applicable process and sections in the Act regarding rent arrears.

21. The Tenants state that they orally requested reasons at the hearing and the order fails to provide those reasons. This does not amount to a serious error <u>that would change the outcome in the order.</u>

22. The Tenants also state that the hearing was only partially, but not fully recorded. Again, this does not amount to a serious error that would change the outcome in the order.

23. Although the order is quite sparse with respect to reasons and analysis, the outcome in the order (dismissal of the application) is reasonable given my determinations above and will not be interfered with on review.

24. The review request is denied in accordance with Rule 29.11(c) of the Board's Rules of Practice because the grounds for considering a review are not satisfied.

It is ordered that:

The request to review order CET-68554-17, issued on September 1, 2017, is denied. The order is confirmed and remains unchanged.

October 26, 2017
Date Issued

Karen Wallace
Vice Chair, Landlord and Tenant Board

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

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

This order contains all reasons for the determinations and order made. No further reasons will be issued.

TAB 4

File Number: CEL-72209-17
CET-73173-18

Order under Sections 30, 31 and 69
Residential Tenancies Act, 2006

SH and MH (the 'Landlords') applied for an order to terminate the tenancy and evict DM and JM (the 'Tenants') because the Landlord requires possession of the rental unit for the purpose of residential occupation (CEL-72209-17).

The Tenants applied for an order determining that the Landlords harassed, obstructed, coerced, threatened or interfered with them, substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household and withheld or deliberately interfered with the reasonable supply of a vital service, care service, or food that the Landlords are obligated to supply under the tenancy agreement (T2).

The Tenants also applied for an order determining that the Landlords failed to meet the Landlords' maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards (T6) (CET-73173-18).

These applications were heard together in Mississauga on February 27, 2018.

One of the Landlords, MH, the Landlords’ Legal Representative, DY, the Tenants, and the Tenants’ Legal Representative, RS, attended the hearing.

The following witnesses testified at the hearing:
EG (MH’s friend) (on behalf of the Landlords)
BT (MH’s brother) (on behalf of the Landlords)

Determinations:

Regarding CEL-72209-17

1. The N12 notice of termination at the root of the Landlords’ application was served on the Tenants on December 15, 2017 pursuant to section 48 of the *Residential Tenancies Act, 2006* (the ‘Act’) and stated that the Landlords require possession of the rental unit for the purposes of residential occupation by their daughter.

2. The Landlords’ daughter did not testify at the hearing. The Landlords’ relied on their daughter’s sworn affidavit. In her affidavit, she confirmed that she intends to move into the rental unit; will live there for at least one year; the rental unit is closer to her university; and that she will be able to study in a quiet and more independent environment.

3. MH also confirmed that the rental unit is closer to her daughter’s university, as well as her daughter’s place of employment and the church where her daughter regularly volunteers. MH stated that since her daughter started university in September, she has complained

about her travel time back and forth to school and her inability to properly study. Her daughter currently lives with the Landlords and their other two daughters.

4. The Tenants did not dispute the reasons for the Landlords' daughter moving into the rental unit. But argued that the reasonableness of their plans is not the test for good faith. The Tenants submitted that the N12 notice was served in bad faith, as it was in response to an email they sent on December 14, 2017 regarding legal action they plan to take regarding the inadequate replacement appliances at the rental unit.

5. The Tenants also stated that they had a good relationship with the Landlords until the Landlords attempted to raise the rent by $300.00-$400.00. The Tenants further stated that the Landlords also demanded an additional rent deposit of $7,800.00 prior to the commencement of the tenancy. According to the Tenants, their refusal to pay the rent increase was also a reason the Landlords served the N12 notice. The Tenants submitted this is the only way the Landlords could terminate the tenancy.

6. Based on the evidence before me, I am satisfied that the Landlords in good faith require possession of the rental unit for the purpose of residential occupation. The affidavit filed by the Landlords complies with section 72 of the Act. And while the Landlords' daughter did not testify at the hearing, there was no dispute regarding her reasons for occupying the rental unit.

7. The evidence before me did not support a finding that the N12 notice was served only as a response to the Tenants' email of December 14, 2017 or to the Tenants' refusal to pay an unlawful rent increase. The uncontested evidence supported a finding that the Landlords' daughter has a genuine intention to move into the rental unit.

8. The Tenants' Legal Representative relied on and submitted order TSL-54279-14. Other decisions of the Board are not binding on me. Furthermore, the decision can be distinguished from this case, especially since the member in order TSL-54279-14 found that the occupancy by the Landlord's child "may be, in the end, a temporary occupancy until she purchases a home in the area." This is not the fact in this matter. The Landlords' daughter intends to reside in the rental unit until she completes her university program and signed an affidavit that it will be a minimum of one-year, a time frame the Legislature has contemplated does not amount to temporary by amending subsection 48(1) of the Act to specifically state for a period of at least one year.

9. There was no dispute that the Tenants sent an email to the Landlords on December 14, 2017 at 10:41 p.m. demanding action from the Landlords by December 20, 2017 or the Tenants will commence an application before the Board. The Tenants submitted that the N12 notice served on December 15, 2017 was the Landlords' direct response to this email. However, the Landlords' witness, EG, confirmed that MH on Wednesday December 13, 2017 requested EG's assistance with delivering the N12 notice to the Tenants that Friday, being December 15, 2017. EG's testimony was candid and consistent. Therefore, I found her evidence to be credible.

10. Consequently, if the Landlords contemplated giving a N12 notice to the Tenants as of at least December 13, 2017, then the N12 notice was not served in response to the Tenants email received in the late evening of December 14, 2017.

11. The Tenants also submitted that the N12 notice was given because the Tenants refused to pay a substantial rent increase requested by the Landlords. The Tenants claimed that the Landlords wanted to increase the rent by $300.00 to $400.00 after the term of their initial written tenancy expired.

12. The parties initially signed a five year lease term commencing May 1, 2010. Therefore, the period of time that any discussion of a rent increase would have occurred was when the lease expired in May 2015. I find it unlikely that the Landlords waited until December 2017 to serve a N12 notice as retribution for the Tenants not agreeing to a substantial rent increase approximately two and half years prior.

13. The Tenants have resided in the rental unit with their four children since May 2010. The Tenants relied on their bad faith argument with respect to the N12 notice and have not found alternate accommodations. DM stated she suffers from PTSD which causes severe anxiety and agitation.

14. The Landlords' daughter would like to reside at the rental unit as soon as possible. She continues to commute to university, work and her volunteer position.

15. Having considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), I find that it would not be unfair to postpone the eviction until June 30, 2018 pursuant to subsection 83(1)(b) of the Act.

16. The Tenants have resided in the rental unit for almost eight years. Their children attend the local schools and they require additional time to find alternate housing given DM's health issues. I am satisfied that a delay until the end of June 2018 provides a sufficient time frame for the Tenants to find accommodation without significant prejudice the Landlords' daughter. The Landlords' daughter is still able to attend university, her employment and her volunteer position from her current residence in the interim.

17. The Landlords have paid the Tenants the required compensation pursuant to section 48.1 of the Act.

Regarding CET-73173-18

T2 application

18. In this application, the Tenants alleged that the Landlords harassed the Tenants, substantially interfered with the Tenants' reasonable enjoyment of the rental unit and withheld or deliberately interfered with a vital service. A number of the Tenants' issues in this application also related to the Tenants' T6 application with respect to the Landlords'

failure to maintain the appliances and the furnace. Those allegations will be addressed in regards to the T6 application below.

Harassment and Substantial Interference

19. The Tenants stated that they had a good relationship with the Landlords until the Landlords tried to increase the rent by $300.00-$400.00 in 2015. The Tenants were also upset that the Landlords demanded that the Tenants pay a rent deposit of $7,800.00 representing three months' rent at the time at the commencement of the tenancy. As well, according to JM, in every conversation with the Landlords after the initial term of the tenancy, the Landlords complained that the "rent is too low" or "I am losing money."

20. JM stated that they had to take care of everything on their own. It has only been in the last year that they put their foot down and now they feel like the Landlords are bullying them. The Tenants were extremely upset that MH made a racist comment towards DM when MH attended the rental unit on December 7, 2017. The comment to DM was something to the effect that MH only decided to replace the appliances "because you are married to a white man." DM was concerned how she would be treated if she were not married to a white man.

21. MH denied making the above comment. MH provided her own version of the events on that day, December 7, 2017, when she attended the rental unit. She stated that DM grabbed her arm and stated that she is not leaving until she gives permission to replace the stove. MH also stated that it was on this day when she first advised the Tenants that her daughter wants to move into the rental unit. MH said she left the unit shaking.

22. The Landlords' brother, BT, testified that he received a call from MH, who was crying, and advised that the Tenants wouldn't allow her to leave. BT subsequently went to the rental unit that night. According to BT, DM was aggressive towards MH when they returned to the rental unit. BT also testified that DM said that MH "can't speak English properly and she is a pharmacist."

23. There was no dispute that the Landlords collected three months as a deposit in the initial tenancy agreement. The Tenants confirmed that at the time of entering the tenancy, they were going through bankruptcy proceedings and they paid the amount requested. The Landlords are no longer retaining these moneys and haven't been for over one year, which is the time limitation for a tenant to make an application for illegal collection or retention of moneys by a landlord.

24. The Tenants have only raised the collection of the three month deposit and the demand for an unlawful increase after receiving the N12 notice. I am not satisfied that these two issues amount to a pattern of harassment. Not only are they separated by a time span of five years, but these issues most likely formed part of negotiations between the parties which in the end led to agreements. In the first instance, the written tenancy agreement and in the second instance, a guideline increase. JM confirmed after the Landlords initial request for a large increase, that he annually calculated the lawful increase in accordance with the guideline for the Landlords.

25. As far as the comments made by the Landlords regarding the rent being too low, I find it probable that the Landlords have made this comment in the past, however I am not satisfied that in any context it rose to the level of harassment. The Landlords never demanded more rent after the initial discussion in 2015, always accepted and allowed the Tenants to deduct repairs from the rent and addressed the Tenants concerns (other than the issue with the new appliances being inadequate according to the Tenants).

26. Based on the evidence before me, I find it more likely than not that this application for harassment and substantial interference only arose as a result of the Tenants' displeasure with the new appliances at the rental unit and because they received the N12 notice of termination.

27. JM confirmed under cross examination that the parties' agreement was for the Tenants to arrange and effect repairs as needed at the rental unit. The Tenants wanted some autonomy at the rental unit and didn't want the Landlords attending the premises regularly. There was a demonstrated pattern of the Tenants contacting repair and service contractors, paying for the repair/service, then deducting the amounts from the rent as agreed.

28. Also, I am not satisfied that because the Landlords requested the Tenants help with measuring the old appliances, disconnecting them or having to store the old fridge for five days amounted to harassment or a substantial interference with their reasonable enjoyment of the premises. While it is the Landlords' obligation to maintain the rental unit, asking or requiring the Tenants co-operation in achieving that does not amount to a substantial interference, especially not in the circumstances of this case.

29. As well, based on the evidence before me, I find it more likely than not that both parties made inappropriate and racist comments to one another during their confrontation at the rental unit on December 7, 2017. As such, I am not satisfied that only the Landlords should be held accountable for this shared inappropriate conduct. Especially since DM's conduct was also physically aggressive towards MH.

30. Finally, I find it more likely than not that the Tenants conduct on December 7, 2017 was a result of finding out that the Landlords' daughter would like to reside in the rental unit. The parties had a good relationship and understanding regarding the tenancy up to this date. MH testified that she rarely attended the rental unit and in fact prior to December 7, 2017 it had been months. The Tenants did not provide any specific dates regarding other confrontations with the Landlords, yet suggested that the Landlords are bullies.

31. The evidence before me did not support a finding that the Landlords bullied the Tenants. The Tenants complained about the appliances being too old and constantly breaking down at the end of October 2017, the Landlords replaced the appliances by mid-December 2017. This short timeframe does not demonstrate that the Landlords were refusing to act or holding out against the Tenants. Even after the physical confrontation between MH and DM on December 7, 2017, the Landlords decided to replace the stove and did so the following week.

32. The Landlords replaced the dishwasher and fridge at the rental unit on December 7, 2017. The stove was replaced on December 14, 2017 at the rental unit. According to the Tenants, these new appliances are inadequate for a family of six. They are smaller than the original appliances, the dishwasher cycle takes longer, and the stove is not self-cleaning. These issues with the new appliances were the subject of the Tenants' email sent to the Landlords on December 14, 2017. The Tenants believe that the Landlords refusal to address these issues has led to a substantial interference with their reasonable enjoyment of the premises.

33. The Tenants' Legal Representative argued that the Tenants are entitled to compensation as the Tenants' had contracted for specific appliances that were subsequently replaced by the Landlords with diminished ones. While this argument may be correct, it must be made pursuant to section 130 of the Act. This T2 application filed pursuant to section 29 of the Act with remedies available pursuant to section 31 of the Act is not the relevant application.

34. Section 130 of the Act specifically contemplates that a landlord may unilaterally reduce or discontinue a service or facility that was originally provided and formed part of the tenancy agreement. If a landlord removes a service or facility the tenant may file the applicable application with the Board and request a rent reduction. That application is a T3 application.

35. Subsection 2(1) of the Act states:

"services and facilities" includes,

(a) furniture, appliances and furnishings,

36. I agree with and adopt the following reasoning as set out in order CET-68554-17-RV:

a) Section 130 of the Act states:

***130** (1) A tenant of a rental unit may apply to the Board for an order for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.*

Same, former tenant

(2) A former tenant of a rental unit may apply under this section as a tenant of the rental unit if the person was affected by the discontinuance or reduction of the services or facilities while the person was a tenant of the rental unit.

Order re lawful rent

(3) The Board shall make findings in accordance with the prescribed rules and may order,

(a) that the rent charged be reduced by a specified amount;

(b) that there be a rebate to the tenant of any rent found to have been unlawfully collected by the landlord;

(c) that the rent charged be reduced by a specified amount for a specified period if there has been a temporary reduction in a service.

Same

(4) An order under this section reducing rent takes effect on the day that the discontinuance or reduction first occurred.

Same, time limitation

(5) No application may be made under this section more than one year after a reduction or discontinuance in a service or facility.

b) The amount of the rent reduction that a tenant may be entitled to is determined in accordance with the prescribed rules that are set out in section 39 of Ontario Regulation 516/06 (the 'Regulation') made under the Act.

c) The Regulation sets out different rules for determining an appropriate rent reduction depending on whether a landlord's removal or discontinuance of a service was reasonable or unreasonable.

d) Therefore, whether a landlord's removal of a service was reasonable or unreasonable, a tenant's remedy is a rent reduction which is determined in accordance with the prescribed rules.

e) The Tenants did not file a T3 application. They filed a T2 application claiming substantial interference. That claim is governed by sections 29 and 31 of the Act which permit different remedies to be requested and ordered.

f) In this case, the Tenants were requesting that the free visitor's parking be re-instated. That is not an available remedy under section 130 of the Act.

g) I acknowledge that there may be circumstances where a reduction or discontinuance in a service or facility could potentially be characterized as a substantial interference with a tenant's reasonable enjoyment of the rental unit or residential complex. However, in my view, it is not appropriate to permit that type of claim to be filed under a T2 application so that a tenant may circumvent section 130 of the Act and request a different remedy than what is provided for under the Act or to get around the one year limitation period set out in subsection 130(5) of the Act.

h) Substantial interference with reasonable enjoyment is very broad and general claim and could potentially encompass any number of issues that could arise during a tenancy. However, when an issue raised in an application falls under a more specific and applicable section of the Act, the issue should be determined under that specific and applicable section.

i) This is similar to the situation that arises when a tenant does not pay the rent that is due. There is an applicable process, remedy and application for rent arrears. Although a tenant's failure to pay the rent could potentially be characterized or claimed as a substantial interference with a landlord's reasonable enjoyment of the residential complex, the Board does not determine rent arrears issues under that type of claim. It requires a landlord to follow the applicable process and sections in the Act regarding rent arrears.

37. Consequently, to make a finding based on an application under section 29 of the Act instead of a finding based under section 130 disregards the statutory framework as the

Act contemplates a change in a service or facility that is provided as part of the tenancy and the Act provides rules and remedies for such a change.

Vital Services / T6 application

Furnace

38. The Tenants stated that the house wasn't heating properly. They believed there was an issue with the furnace. JM stated that in March 2017, the furnace broke down. A Reliance Home Services (Reliance) repairperson attended at that time and fixed the furnace. According to JM, they suggested the furnace be replaced. On April 29, 2017, the Tenants wrote to the Landlords that the furnace has rust on the inside and should be examined by a professional.

39. On December 7, 2017, the Tenants raised the issue with the furnace again while BT was at the unit. He testified that the Tenants complained about rust on the furnace. BT further testified that he asked them if they lost heat, but they just mentioned the rust.

40. On January 15, 2018, according to the Tenants, the furnace stopped working. The Tenants contacted the Landlords and called Reliance to attend to issue with the furnace. There was no dispute that the furnace was replaced within four days. The Tenants stated that they were without heat for those four days.

41. The Tenants stated that the appliances at the rental unit were old and not working properly. On October 30, 2017, they sent a letter to the Landlords advising that the fridge is not working properly, the dishwasher top rack can no longer be used as the side rollers are worn, and that the stove works but can still be "unpredictable." In this letter, the Tenants asked if the Landlords would consider replacing the appliances.

42. There was no dispute that the fridge and dishwasher were replaced and installed on December 7, 2017. On December 7, 2017, while at the rental unit, the Tenants asked MH about the stove. According to the Tenants, the repair person advised them that the stove was a fire hazard, so they stopped using the stove at that point.

43. According to MH, only DM said that the stove was a fire hazard. The electrician installing the other appliances, inspected the stove and told MH to save yourself some problems and buy a new stove. BT stated that when he was at the unit that night, the Tenants complained about the knobs on the stove having no numbers; that it doesn't work properly; and that it is a fire hazard because the kids can't tell if the stove is on or not. According to BT the electrician told him there is a repair kit and the switch issue can be fixed but whatever fixes are done will not satisfy the Tenants.

44. Subsection 20(1) of the Act states the following:

> *A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards*.

45. Subsection 21(1) of the Act states the following:

> *A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed, withhold the reasonable supply of any vital service, care service or food that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfere with the reasonable supply of any vital service, care service or food.*

46. The evidence before me did not support a finding that the Landlords withheld or deliberately interfered with the vital service of heat. Although, it was not disputed that the Tenants did not have any heat for four days, this was related to the repair issue with the furnace not the actions of the Landlords.

47. The Ontario Court of Appeal in *Onyskiw v. CJM Property Management Ltd*. (2016 ONCA 477) has determined that landlord is not automatically in breach of their maintenance obligations as soon as a problem arises and a contextual approach is necessary in determining whether or not a landlord has breached their maintenance obligations under section 20 of the Act. That approach involves a consideration of the "entirety of the factual situation" before determining that a landlord is in breach of their maintenance obligations.

48. The evidence before me was insufficient to find that there was an issue with the heat at the rental unit prior to the furnace breaking down on January 15, 2018. The Tenants' letter to the Landlords in April 2017 only stated an issue with rust and a concern that the furnace needed to be inspected. There were no other complaints verbally or in writing regarding any lack of heat in the rental unit until the furnace broke down.

49. The Landlords responded to the issue with the furnace, they immediately authorized a replacement. However, there was no dispute that there was no heat in the rental unit between January 15, 2018 and January 18, 2018 while the furnace was being replaced. Therefore, I find that the Landlord was in breach of their maintenance obligations under section 20 of the Act.

50. The Landlord did not ignore the issue, but the Tenants did not get what they paid for. The Tenants requested an abatement of rent of $400.00 for the four days they were without heat.

51. The monthly rent is $2,734.85. Therefore, the per diem (daily) rate is calculated at $89.91 ($2,734.85 x 12/365). Consequently, I find an abatement of rent of $359.64 equal to 100% for four days to be appropriate given that no heat at the rental unit in the month of January had a significant impact on the Tenants.

52. The Landlords were on notice as of October 30, 2017 that the Tenants were experiencing various issues with the dishwasher, fridge and stove. The Landlords decided to replace the dishwasher and fridge instead of repairing them. The new dishwasher and fridge were installed on December 7, 2017. At that time, the Landlords also decided to replace the stove and a new stove was installed on December 14, 2017.

53. The Landlords responded to the Tenants' complaints regarding the issues with the appliances by ordering new appliances. However, there was no dispute that the Tenants had improperly working appliances for a period of approximately six weeks as no repairs were completed while the appliances were ordered and installed. Therefore, I find that the Landlord was in breach of their maintenance obligations under section 20 of the Act.

54. The Tenants requested an abatement of rent of $500.00 for the six weeks in which the appliances were not working properly and $500.00 for out of pocket expenses related to having no working stove for seven days. The Tenants failed to substantiate their claim for any out of pocket expenses related to not having a working stove. There were no receipts provided to support their claim of purchasing pre-cooked food.

55. I find that an abatement of $500.00 for the six week period in which the Tenants did not have full functioning appliances is appropriate in these circumstances. There were various inconveniences associated with the issues the dishwasher, fridge and stove which would impact the Tenants full use of the rental unit.

56. As stated above the Tenants' issues with the replacement appliances being inadequate and/or diminished in some capacity is also not relevant under a T6 application, as there was no dispute that the new appliances were operational.

It is ordered that:

1. The tenancy between the Landlords and the Tenants is terminated, as of June 30, 2018. The Tenants must move out of the rental unit on or before June 30, 2018.

2. If the unit is not vacated on or before June 30, 2018, then starting July 1, 2018, the Landlords may file this order with the Court Enforcement Office (Sheriff) so that the eviction may be enforced.

3. Upon receipt of this order, the Court Enforcement Office (Sheriff) is directed to give vacant possession of the unit to the Landlords on or after July 1, 2018.

4. The T2 application is dismissed.

5. The Landlords shall pay to the Tenants a rent abatement of $859.64.

6. The Landlords shall also pay to the Tenants $50.00 for the cost of filing the application.

7. The total amount the Landlords owe is $909.64.

8. The Landlords shall pay the Tenants the full amount owing by April 1, 2018.

9. If the Landlords do not pay the Tenants the full amount owing by April 1, 2018, they will owe interest. This will be simple interest calculated from April 2, 2018 at 3.00% annually on the balance outstanding.

10. If the Landlords does not pay the Tenants the full amount owing by April 1, 2018, the Tenants may recover this amount by deducting $909.64 from the rent for April 2018.

March 22, 2018
Date Issued

Lisa Del Vecchio
Member, Landlord and Tenant Board

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

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 January 1, 2019 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.

TAB 5

File Number: CET-77573-18

Order under Section 30 and 31
Residential Tenancies Act, 2006

PB (the 'Tenant') applied for an order determining that HB (the 'Landlord') failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards (T6 Application).

The Tenant also applied for an order determining that the Landlord entered the rental unit illegally and substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant or by a member of the Tenant's household (T2 Application).

This T6/T2 application was heard in Mississauga on September 18, 2018.

The Tenant, Tenant's Legal Representative, RB, the Landlord's Legal Representative, KK and the Landlord attended the hearing.

Determinations:

1. The Tenant rents a room in the basement of a house. He shares kitchen, bathroom and other commons spaces with other tenants. The monthly rent is $350.00. There is no rent deposit.

2. The parties agreed to terminate the tenancy as of October 31, 2018.

Regarding T2 tenant rights application

Illegal entry

3. The Tenant testified that the Landlord or her agents illegally entered the unit. He said the entries occurred four to five times in a two month period with not notice. The Tenant said a contractor hired by the Landlord walks into the unit at any time. The Tenant also said the house is for sale and in July there were several visits by real estate agents and prospective buyers without any notice. The Tenant submitted a log he kept for the visits in July 2018.

4. The Landlord denies entering the unit and said no contractor she hired entered the unit. The Landlord said she asked her real estate agent to provide the Tenant with proper notice and he said that he did.

5. The Landlord breached subsection 27(2) of the Act by failing to provide the Tenant with written notice to allow potential purchasers to view the unit. The Tenant provided a detailed written log which identifies six entries without notice between July 7th and July 31, 2018. The Landlord did not provide sufficient evidence that her real estate agent gave notice to the Tenant in accordance with the Act. The Tenant is entitled to $87.50 representing a 25% abatement for July 2018. The impact to the Tenant of the illegal entries was amplified because it was prospective buyers and real estate agents who

entered unannounced and almost daily during the week of July 20th. The Tenant did not provide sufficient details regarding other illegal entries such as dates and times.

Unit cleanliness after repair

6. The Landlord verbally informed the Tenant about a minor repair to the unit which involved the replacement of ceiling tiles and installation of a furnace room door. She said the contractor cleaned the unit after the repair and she checked the living room area which was not too messy. The Landlord submitted a receipt from Home Depot which indicates the purchase of a door and ceiling tiles.

7. The Landlord breached subsection 27(1)(1) by failing to provide the Tenant with at least 24 hours written notice to carry out a repair. The repair lasted for a few hours and as such was a minor inconvenience to the Tenant. Therefore an abatement is not appropriate.

8. The Tenant's claim that the unit was dusty on November 1, 2017 after the repair is dismissed. The Tenant complained that the living room area was very dusty after a repair. He said some food items were paint stained. The Tenant's photos do not establish that the unit was significantly dusty. In any event, it is improbable that it would take 3-4 days to clean the room depicted in the Tenant's photos. This issue does not constitute a breach of section 20 nor does it amount to substantial interference

Regarding T6 application regarding maintenance

9. Section 20(1) of the Act obligates a Landlord to maintain a unit in a good state of repair.

10. In *Onyskiw v. CJM Property Management*, 2016 ONCA 477, the Court of Appeal determined that a contextual approach should be adopted when considering a landlord's potential breach of subsection 20(1) of the Act and a breach will not be found if the landlord's response to a maintenance issue was reasonable in the circumstances.

11. I must also apply subsection 30(2) of the Act, and consider whether the tenant advised the landlord of the alleged breaches before applying to the Board, and the parties' duty to mitigate found in section 16 of the Act.

Closet

12. The Tenant's claim that the Landlord failed to repair the unit because she did not provide him with a closet is dismissed. The Tenant did not provide sufficient evidence that the absence of a closet breaches a health, safety or housing standard.

Missing light and vent covers (bedroom)

13. The Landlord breached section 20 by failing to provide the Tenant with two light covers and a vent cover in his room. The Tenant submitted photos of the missing covers. I am satisfied that the Tenant reported these issues to the Landlord. The Landlord testified that the covers were in place when the tenancy commenced however the best evidence

is the photos which show that they are missing. The impact to the Tenant is minimal. The Tenant said he could not shut off the vent however he could have covered it with paper or a similar item. Therefore no abatement is appropriate.

Kitchen vent cover

14. The Tenant testified that the kitchen vent cover was removed as of October 2017 and it leaks and permits pests to enter. He submitted a photo of the vent. The Landlord said the vent was previously covered.

15. The Landlord breached section 20 by failing to provide a vent cover. The best evidence is the photo submitted by the Tenant. The Tenant has a duty to minimize losses pursuant to section 16 and I am not satisfied that he could not have placed a temporary cover over the vent. Therefore, an abatement is not appropriate for this issue.

Kitchen exhaust and stove, kitchen island

16. The Tenant testified that the Landlord provided him with a stove when the tenancy commenced which was removed as of mid-October 2017. He said the Landlord gave him two hot places as of November 2017 but both did not work. He claims he had to eat out from mid-October 2017 to January 12, 2018 when he purchased a used stove.

17. The Landlord testified that she never provided the Tenant with a stove. She said she gave him a microwave and also gave him two hot places and a convection oven.

18. It is more probable that the Landlord provided the Tenant with a stove when the tenancy commenced. The Landlord's evidence that she purchased a convection oven on October 30, 2017 and two induction hot plates on October 20, 2017 support a finding that there was a stove in the unit prior to this purchase as it is unlikely the Landlord would purchase these appliances if there was already a stove in the unit.

19. However the issue claimed by the Tenant does not amount to a breach of section 20.

20. I agree with and adopt the following reasoning as set out in Order CET-68554-17-RV:

    a) Furthermore, the T2 application that the Tenants filed was not the relevant application to address the issue in the application.

    b) Section 130 of the Act specifically contemplates that a landlord may unilaterally reduce or discontinue a service or facility that was originally provided and formed part of the tenancy agreement. If a landlord removes a service or facility the tenant may file the applicable application with the Board and request a rent reduction. That application is a T3 application.

    c) Section 2 of the Act states in part:

        a. "services and facilities" includes,

            i. (b) parking and related facilities,

d) Section 130 of the Act states:

> **130** (1) A tenant of a rental unit may apply to the Board for an order for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.
>
> **Same, former tenant**
>
> (2) A former tenant of a rental unit may apply under this section as a tenant of the rental unit if the person was affected by the discontinuance or reduction of the services or facilities while the person was a tenant of the rental unit.
>
> **Order re lawful rent**
>
> (3) The Board shall make findings in accordance with the prescribed rules and may order,
>
> a) that the rent charged be reduced by a specified amount;
>
> b) that there be a rebate to the tenant of any rent found to have been unlawfully collected by the landlord;
>
> c) that the rent charged be reduced by a specified amount for a specified period if there has been a temporary reduction in a service.
>
> **Same**
>
> (4) An order under this section reducing rent takes effect on the day that the discontinuance or reduction first occurred.
>
> **Same, time limitation**
>
> (5) No application may be made under this section more than one year after a reduction or discontinuance in a service or facility.

e) The amount of the rent reduction that a tenant may be entitled to is determined in accordance with the prescribed rules that are set out in section 39 of Ontario Regulation 516/06 (the ‘Regulation’) made under the Act.

f) The Regulation sets out different rules for determining an appropriate rent reduction depending on whether a landlord’s removal or discontinuance of a service was reasonable or unreasonable.

g) Therefore, whether a landlord’s removal of a service was reasonable or unreasonable, a tenant’s remedy is a rent reduction which is determined in accordance with the prescribed rules.

h) The Tenants did not file a T3 application. They filed a T2 application claiming substantial interference. That claim is governed by sections 29 and 31 of the Act which permit different remedies to be requested and ordered.

i) Substantial interference with reasonable enjoyment is very broad and general claim and could potentially encompass any number of issues that could arise during a tenancy. However, when an issue raised in an application falls under a more specific and applicable section of the Act, the issue should be determined under that specific and applicable section.

j) This is similar to the situation that arises when a tenant does not pay the rent that is due. There is an applicable process, remedy and application for rent arrears. Although a tenant’s failure to pay the rent could potentially be characterized or claimed as a substantial interference with a landlord’s reasonable enjoyment of the residential complex, the Board does not determine rent arrears issues under that type of claim. It requires a landlord to follow the applicable process and sections in the Act regarding rent arrears.

21. To make findings based on an application under sections 29 and 31 of the Act instead of findings based under section 130 disregards the statutory framework of the Act because the Act contemplates a change in a service or facility that is provided as part of the tenancy and the Act provides rules and remedies for such a change.

22. In this case subsection 2(1)(a) includes appliances in the definition of service or facility. Therefore in seeking an abatement for the removal of a stove, the Tenant ought to have filed a T3 application such that the relevant rules and remedies for such a change could be applied.

23. However, I have also considered whether the removal of the stove amounts to substantial interference. The evidence does not establish that the removal of the stove amounts to substantial interference. The Landlord provide the Tenant with multiple appliances (two hot plates, a microwave and a convection oven) to replace the stove. It is unlikely that the Tenant would be unable to prepare most meals with these appliances. The Tenant has an obligation pursuant to section 16 to minimize losses in the event of a breach. I am not satisfied that the removal of the kitchen exhaust which probably occurred when the stove was removed impacted the Tenant with the use of the replacement appliances provided to him. His photo of the kitchen shows a window above the sink which provides the Tenant with a means to air out any cooking odours or smoke.

24. The Tenant’s complaint that the Landlord removed the kitchen island is dismissed. There is insufficient evidence to establish that the Landlord removed this island.

It is ordered that:

1. The tenancy between the Landlord and the Tenant is terminated. The Tenant must move out of the rental unit on or before October 31, 2018.

2. The Landlord shall pay the Tenant $87.50 for an abatement regarding illegal entry to the unit.

3. The Landlord shall refrain from entering the unit without providing the Tenant with proper, prior notice in accordance with the Act.

4. The Landlord shall perform the following repairs on or before October 15, 2018:

   a) The Landlord shall install light covers and a vent cover in the Tenant’s room.

   b) The Landlord shall install a vent cover for the kitchen vent.

5. The Landlord shall also pay the Tenant $50.00 for the cost of filing the application.

6. The total amount the Landlord owes the Tenant is $137.50.

7. The Landlord shall pay the Tenant the full amount owing by October 12, 2018.

8. If the Landlord does not pay the Tenant the full amount owing by October 12, 2018 the Landlord will owe interest. This will be simple interest calculated from October 13, 2018 at 3.00% annually on the outstanding balance.

9. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.

October 1, 2018
Date Issued

Avril Cardoso
Member, Landlord and Tenant Board

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

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 May 1, 2019 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.

TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: Onyskiw v. CJM Property Management Ltd., 2016 ONCA 477
DATE: 20160616
DOCKET: C61131

Weiler, Cronk and Benotto JJ.A.

BETWEEN

Tammy Onyskiw, Sherrie Giroux et al.
[Betty Prendergast, Danielle Deptuck, Luc Deptuck, Wilhelmina Diepeveen, Eileen Parsons, Cora McDonald, Garfield McDonald, Jeff Gill, William Harmer, Jamie Pelletier, John Diepeveen, Kathy Szabadka, Lorne Helman, Joyce Martin, Paula Woodland, Marion Pollard, Sandra Racine, Antonio Valdez, Maria Castro, Kathleen Fraser, Kimberley George, Ilona Berthiaume, Janet Allis, Katherine Gail Reid, Velma Laine, Joyce Marsden, Peter Thuot, Raymond, Gamble, Glynn Wheaton, Gordie Ainsworth]

Tenants (Appellants)

and

CJM Property Management Ltd.

Landlord (Respondent)

Lesli Bisgould and Kenneth Hale, for the appellants

S. David Lyman, for the respondent

Brian A. Blumenthal and Eli Fellman, for the Landlord and Tenant Board

Heard: April 12, 2016

On appeal from the order of the Divisional Court (Justices Catherine D. Aitken, Thomas R. Lederer and James A. Ramsay), dated January 26, 2015, with reasons reported at 2015 ONSC 606, affirming an order of the Landlord and Tenant Board, dated January 3, 2014.

Weiler J.A.:

A. OVERVIEW

[1] This appeal concerns the interpretation of s. 20(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 (“RTA”) which provides as follows:

> 20. (1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.[1]

[2] The appellant tenants submit that the respondent CJM Property Management Ltd. (the “landlord”) failed to comply with its duties to provide and maintain under s. 20 because the elevator that services their building was out of service for 96 days in one year. They submit that the Landlord and Tenant Board (the “Board”) erred in denying their application for an abatement of rent. The Board found that the landlord had at all times acted reasonably in having a program of preventive maintenance for the elevator, in repairing it when it broke down and in installing a new elevator. The Divisional Court dismissed the tenants’ appeal. Leave to appeal to this court was granted on October 5, 2015.

[3] The Divisional Court did not err in selecting or applying the reasonableness standard of review. For the reasons that follow, I agree with the

---

[1] Section 20(2) provides: “Subsection (1) applies even if the tenant was aware of a state of non-repair or a contravention of a standard before entering into the tenancy agreement.” However, in the event it is determined the landlord is in breach of its obligations under s. 20(1), a consideration in determining the remedy granted by the Board is whether the tenant or former tenant advised the landlord of the alleged breaches before applying to the Board: see RTA, s. 30(2).

Divisional Court that the Board's decision was reasonable, and I would dismiss the appeal.

B. FACTS

[4] The agreed statement of facts contains the following facts.

[5] The appellants are tenants in a sixty three unit six-story building in Kingston. The building was not required by building code requirements to have an elevator at the time it was built, but one was nevertheless installed when the building was built in 1983.

[6] The elevator was under a maintenance contract and the elevator company performed regular maintenance on it. The elevator passed all annual and monthly inspections and the license for the elevator had been renewed when it broke down on November 28, 2012. The reason the elevator broke down was a latent defect with the brake drum.

[7] When the elevator broke down in November 2012, the landlord decided to begin the process to replace the elevator. In the interim, it took steps to get the elevator back in operation as quickly as possible. It paid in excess of $30,000 in costs to a third party elevator company in this regard.

[8] The elevator was out of service for a total of 96 days between November 28, 2012 and October 4, 2013. During the entire period May 8-20, 2013, the elevator was not functioning at all on the fourth floor.

[9] The landlord attempted to keep the tenants updated about service interruptions. However, three periods of interrupted service totalling 36 days were unplanned and therefore unannounced.

[10] At one point during the relevant time period, there was a province-wide elevator technician strike. The elevator was originally scheduled to be shut down for a six-week period from May 13 to June 21, 2013 in order to replace the elevator, but due to the strike the scheduled shut down was pushed back until August 6, 2013.

[11] The tenants, some of whom are elderly or have mobility issues, experienced a great deal of difficulty living in a building without a functioning elevator, and often lived in a state of uncertainty not knowing if or when the elevator would cease functioning.

[12] The landlord paid $15,400 in labour costs for runners to assist tenants who had difficulty climbing stairs with day-to-day tasks and a further $5,200 to obtain an evacuation chair for use in emergencies while the elevator was out of operation.

C. DECISIONS BELOW

(1) Landlord and Tenant Board, January 3, 2014

[13] The Board stated that the primary issue was the interference and inconvenience that the tenants had experienced as a result of ongoing repairs to

the elevator and the installation of a new elevator and whether the tenants were entitled to an abatement of rent because the landlord failed to meet its obligations under the Act or comply with health, safety, housing or maintenance standards.

[14] After reviewing the evidence of three tenants who testified at the hearing, the Board found that the interference that the tenants experienced because of problems and repairs to the old elevator and the installation of a new elevator caused serious inconvenience and disruption to the lives of the tenants of the residential complex. However, the Board noted that the tenants did not present any evidence to substantiate their claim that the interference caused by the shut-down of the elevator was unreasonable in the circumstances or that they asked for and were refused accommodation by the landlord. The Board found that, on a balance of probabilities, the landlord responded to these circumstances in the best way it could have, and the interference and inconvenience caused to the tenants was reasonable in the circumstances.

[15] The Board found further that the landlord took reasonable steps to keep the tenants informed, to provide them with assistance while the elevator was not working, and also to ensure that staff was ready and available to assist the tenants, occupants, and guests, so as to mitigate any hardship caused to the tenants by the elevator problems.

[16] Because the application was brought pursuant to s. 29(1)1 of the RTA based on an alleged breach of s. 20(1), the Board observed that the requirements of O. Reg. 516/06, s. 8, did not apply in this case as that section of the regulation applies only to applications under ss. 22, 29(1)3 and 31(1) of the RTA. Nonetheless, the Board found that the landlord met the notice requirements contained in s. 8(4)(1) of the regulation and, with reference to s. 8(5)(1), that "the work was absolutely necessary to protect the physical integrity of the residential complex and the safety and security of the tenants, and the work was carried out in a reasonable timeframe."

[17] Turning to O. Reg. 517/06, s. 43, the Board observed that that provision required that "Elevators intended for use by tenants shall be properly maintained and kept in operation except for such reasonable time as may be required to repair or replace them." The Board agreed with the landlord that the landlord's obligation was "to have a proper maintenance schedule and to act reasonably in repairing or replacing deficient items."

[18] The Board noted that the tenants did not enter any evidence to demonstrate that the landlord failed in its obligation to repair or maintain the elevator, but that the landlord did present evidence, and the parties agreed in their statement of facts, that service contracts were in place and that proper maintenance was being done up until a latent defect caused the elevator to break down.

[19] The Board found that the landlord acted in a proactive manner and against its economic interest by spending $30,000 so that the original elevator could provide service until a new elevator could be installed, and by spending over $15,400 in labour costs for runners and $5,200 for an evacuation chair. The landlord changed service providers when it determined that this was the best thing to do, then arranged to have the elevator replaced as quickly as possible.

[20] The Board observed that none of the cases filed by the tenants resulted in an order for a rent abatement where the landlord rectified maintenance problems fully, effectively, and in a reasonable time frame.

[21] The Board chose to apply the Board's Interpretation Guideline 5, which applies to ss. 20 and 29(1) of the RTA – the sections under which this application was made. The Board observed that Guideline 5 provides that no abatement ought to be awarded where: a deficiency has occurred due to a latent defect; the landlord has taken reasonable steps to remediate the deficiency; the landlord has a reasonable programme of maintenance; and, the landlord has acted responsibly to rectify a problem that required extensive repairs.

[22] The Board found the criteria in Guideline 5 had been met, that the tenants had not proven the merits of their claim for an abatement of rent on a balance of probabilities, and that the landlord fulfilled all of its contractual and statutory obligations.

[23] The Board dismissed the tenants' application.

(2) Divisional Court, January 26, 2015

[24] The Divisional Court first observed that s. 210 of the RTA provided for a right of appeal on a question of law, and that the standard of review was reasonableness. The court noted that the parties agreed that the landlord acted reasonably in maintaining the elevator until it was replaced. The court concluded that the Board "was entitled to construe its home statute in a fashion that enabled it to consider the landlord's actions, in the circumstances that were presented, in deciding whether the landlord had fulfilled its responsibility under [s. 20 of the RTA]." Having found no error of law, the Divisional Court dismissed the appeal.

D. ISSUES

[25] This appeal raises two issues:

1. Did the Divisional Court err in its selection and application of the standard of review?
2. Did the Board err in its interpretation of s. 20 of the RTA; specifically, was it an error of law to refuse to order an abatement of rent to tenants who had suffered serious inconvenience and disruption on the basis that the landlord's behaviour was reasonable?

E. DISCUSSION AND ANALYSIS

(1) Did the Divisional Court err in its selection and application of the standard of review?

(a) General principles

[26] As the Divisional Court observed, s. 210 of the RTA provides for a statutory right of appeal from the Board's decisions on a question of law.

[27] Where there is a statutory right of appeal from the decision of an administrative tribunal to the Divisional Court, this court must decide whether the Divisional Court identified the appropriate standard of review and applied it correctly. To do so, the court steps into the shoes of the Divisional Court and focuses on the administrative decision: see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 46-47; *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495, 126 O.R. (3d) 481, at para. 39. This administrative law principle also applies when leave has been granted in this context for a further appeal to this Court, given that the applicable standards of review are those that apply on judicial review, not on an appeal: see *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 29.

[28] Where an administrative tribunal interprets or applies its home statute, the standard of review is presumptively reasonableness: *Alberta (Information and*

Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39. A correctness standard may apply if the question at issue is both of central importance to the legal system and outside the adjudicator's specialized area of expertise: *Alberta (Information and Privacy Commissioner)*, at para. 46. However, this exceptional category must be interpreted conjunctively and not as separate and distinct factors: see *Loewen v. Manitoba Teachers' Society*, 2015 MBCA 13, 315 Man. R. (2d) 123, at para. 48.

[29] Where, as here, the jurisprudence has already determined the standard of review and thus the degree of deference to be accorded to a particular category of question before a given administrative tribunal, this will end the inquiry: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62; *First Ontario Realty Corporation v. Deng*, 2011 ONCA 54, 274 O.A.C. 338, at para. 20. Subject to the exception stated above, decisions of the Board are subject to review on a standard of reasonableness: *Deng*, at para. 21. In *Deng*, this Court held, at para. 21, that the Board administers a specialized adjudicative regime for resolving residential tenancy disputes, and where it is required to interpret its "home statute" (the RTA) and regulations, with which it has particular familiarity, in making determinations with respect to its core functions, deference is owed to its decisions.

[30] In the present case, determining whether to order an abatement of rent based on a breach of the landlord's duties to repair and maintain under s. 20(1)

is one of the Board's core functions and required the Board to interpret the RTA and related regulations.

[31] Applying these general principles, unless the tenants can persuade the court that the issue before us is both of central importance to the legal system <u>and</u> outside the Board's expertise, the standard of review to be applied to the Board's decision is reasonableness.

(b) The tenants' position

[32] The tenants' position is that the Divisional Court erred in not applying a standard of correctness to the Board's interpretation of s. 20. Their position may be summarized as follows.

[33] This is a statutory appeal in which the Court has broad appellate powers. There are no facts in dispute. A discrete question of law is raised.

[34] The Divisional Court relied on *Deng* in holding that the standard of review was reasonableness, but that case does not stand for the proposition that the standard of review for all decisions of the Board is reasonableness or that reasonableness means absolute deference. Even assuming deference is owed to a tribunal's interpretation of its home statute, there are circumstances in which no deference is appropriate. One circumstance is where the question of law is of central importance to the legal system. This is such a circumstance. Appellate direction regarding the significance of statutory duties will foster consistency in

the law and predictability in litigation outcomes, important goals in all cases, but particularly in the context of remedial legislation with a tenant protection focus. Correctness is the appropriate standard of review when a tribunal undertakes an exercise in statutory interpretation in which it has no more expertise than an appellate court, and where the issue on appeal deals with the distinction between the legal principles of contract and tort.

(c) The Divisional Court did not err in its selection of the appropriate standard of review

[35] The same reasoning as in *Deng* applies to the appeal before us: the scope of the landlord's maintenance and repair obligations and the remedy for any breach of those obligations, such as rent abatement, are wholly within the Board's specialized expertise. The issue before the Board involved a highly contextual and fact-based exercise relating to its core function; accordingly, deference is owed to its decision.

[36] Given that the issue for determination by the Board was within its specialized area of expertise, the tenants are unable to meet at least one of the two conjunctive requirements to bring this case within the exceptional category of cases to which a standard of correctness applies, it is unnecessary to consider the second requirement, namely, whether the question was also of central importance to the legal system.

[37] The tenants' assertion that the standard of review of the Board's decision is correctness fails. The Divisional Court did not err in selecting reasonableness as the standard of review.

(2) Did the Divisional Court err in holding that the Board's interpretation of s. 20 of the Act was reasonable?

(a) General principles of statutory interpretation

[38] The current state of the law of statutory interpretation recognizes that meaning flows at least partly from context and that a statute's purpose is an integral element of that context: see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters, 2011), at p. 300-01.

[39] The question as to how a statutory provision should be interpreted has been answered definitively by the Supreme Court of Canada. On numerous occasions, the court has adopted the approach to statutory interpretation espoused by E.A. Driedger as the only applicable approach, namely:

> [T]he words of an Act are to be read 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 Parliament.

See *Rizzo and Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, 2006

SCC 24, [2006] 1 S.C.R. 865, at para. 36; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 108.

[40] In determining Parliamentary or legislative intent, courts are reluctant to accept interpretations that would violate established legal norms: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014), at pp. 8-9.

[41] In her chapter on coherence, Sullivan states the governing principle, at p. 337, as follows:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. [Citation removed.]

[42] Sullivan also points out, at pp. 340-41, that it is not unusual for an administrative body to be given overlapping powers by the legislature; when this happens, each is meant to apply, and overlap between powers is not a basis for narrowing their scope.

[43] The interpretation given to a statutory provision must produce harmony both within the statute itself and with other legislation dealing with the same subject matter: see *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30; *Bell ExpressVu*, at para. 27; *R. v. Stucky*, 2009 ONCA 151, 256

O.A.C. 4, at para. 37; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 55, leave to appeal to S.C.C. refused, 2015 CarswellOnt 2680, 2015 CarswellOnt 2681. This is known as the principle of harmonization.

(b) The tenants' position

[44] The tenants advance several arguments under this ground of appeal. In sum, they submit that, in dismissing the tenants' application for rent abatement, the Board's decision did not fall within a range of reasonable outcomes. The tenants ask that their appeal be allowed, the order of the Board set aside, and their case remitted back to another Board member to consider with such directions as this court considers appropriate.

[45] First, the tenants submit that even if a reasonableness standard of review is appropriate, deference does not mean that the Divisional Court should simply endorse the Board's interpretive approach without undertaking its own analysis and providing its own reasons.

[46] Second, the tenants challenge the Board's adoption of a reasonableness standard in assessing the difficulties suffered by the tenants and the conduct of the landlord. In that respect, the Board erred in its interpretation of s. 20 because it conducted its analysis using a faulty legal premise, applying principles from tort law instead of contract law when the duties in s. 20 are implied terms of every

tenancy agreement and contractual in nature. The Board erred in holding that where the landlord made reasonable efforts to comply, the statutory duty was negated, as under contract law, non-compliance is not excused by the reasonableness of the landlord's conduct. The tenants did not receive a service that was part of their statutory contract.

[47] In support of their submission that the reasonableness of the landlord's conduct is not a factor to be considered under s. 20, the tenants rely on *Offredi v. 751768 Ontario Ltd.* (1994), 72 O.A.C. 235 (Div. Ct.), decided under similar predecessor legislation. In that case, the application judge found that although the landlord had taken steps to clean up the building and to keep it that way, an abatement of rent should be paid to the tenants. In *Offredi*, in dismissing the landlord's appeal, the Divisional Court stated:

> In our judgment, <u>this is not a case that turns on whether the landlord can be said to have acted reasonably.</u> What the tenants claim is a breach of contract. The tenants were paying full rent for premises which the landlord was under an obligation, under the Landlord and Tenant Act, to keep in a good state of repair and fit for habitation. The landlord failed to do that. That is the basis of the clam for an abatement. [Emphasis added.]

[48] Third, the tenants also rely on *Harris v. Toronto Community Housing Corporation*, 2009 CanLII 34989 (Ont. Div. Ct.). In that case the court held, at paras. 14-17, that the use of the terms "absolute liability" and "strict liability" from the criminal, regulatory, or tort context had "no application in the interpretation

and application of a remedial statutory provision governing residential tenancies."[2] The section at issue in *Harris* allowed a landlord to give a tenant an eviction notice if the tenant's act or omission seriously impaired the safety of any person. Bryant J., writing for the court, held that the section did not incorporate a fault element as do regulatory offences which allow a due diligence defence, and contrasted the section with other sections of the legislation which specifically included a fault element.

[49] In the case before us, counsel for the tenants points out that the landlord's obligation to maintain premises in good repair found in s. 20(1) does not refer to reasonable efforts. They submit that as soon as the elevator went out of service the landlord was in breach of its obligation to maintain. The time period for the landlord to repair or to replace the elevator meant that the elevator was not in a good state of repair during that time and the landlord was accordingly in breach of its obligations. Consequently, the Board erred in taking into consideration the landlord's maintenance and repair efforts and whether they were reasonable.

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[2] In *Harris*, the Divisional Court was dealing with s. 65(1) of the *Tenant Protection Act, 1997*, S.O. 1997, c. 24, now repealed, which provided: "A landlord may give a tenant notice of termination of the tenancy if, (a) an act or omission of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant seriously impairs or has seriously impaired the safety of any person; and (b) the act or omission occurs in the residential complex."

(c) The Divisional Court did not err in holding that the Board's interpretation of s. 20 of the Act was reasonable

[50] For the reasons that follow, I would agree with the conclusion of the Divisional Court that the Board's interpretation of its home statute and its decision in refusing to award an abatement of rent to the tenants was reasonable.

(i) The tenants' proposed interpretation of s. 20(1) would offend the general principles of statutory interpretation

[51] The interpretation of s. 20(1) proposed by the tenants would result in the legislation not functioning logically to form a rational, internally consistent framework, and thus offends the general principles of statutory interpretation.

[52] For example, s. 21(1) of the RTA states that a landlord shall not, "withhold the reasonable supply of any vital service, care service or food that it is the landlord's obligation to supply under the tenancy agreement…" If a landlord is obligated to pay another person to provide the vital service, care service, or food and the landlord fails to do so, s. 21(2) deems the landlord to have failed to provide the service. A vital service is defined in s. 2(1) as "hot or cold water, fuel, electricity, gas or, during the part of each year prescribed by the regulations, heat." The landlord does not breach s. 21(1) simply because the landlord is

unable to provide a vital service, care service, or food. It is the "reasonable supply" of these things that is required.

[53] An elevator is included within the definition of "services and facilities" in s. 2(1). To interpret s. 20(1) such that a landlord is in breach of the obligation to maintain elevator service as soon as any interruption in that service occurs would be to place a higher obligation on the landlord to provide a non-vital service than to provide a vital service. Such an interpretation is not rational.

[54] There is an overlap between s. 20(1) and s. 22 of the RTA. Section 22 provides:

> A landlord shall not at any time during a tenant's occupancy of a rental unit … substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household.

[55] In this case the tenants allege that the landlord's breach of s. 20(1) resulted in a substantial interference with their use and enjoyment of the premises. In oral argument, the tenants acknowledged that they could also have brought their application under s. 22, which obliges a landlord not to interfere with a tenant's reasonable use and enjoyment of the premises. However, O. Reg. 516/06, s. 8(3)(b), states that, "the Board shall not determine that an interference was substantial unless the carrying out of the work constituted an interference that was unreasonable in the circumstances with the use and enjoyment of the rental unit…." Further, s. 8(4) provides that even if the Board finds that there was

substantial interference with the tenant's reasonable use and enjoyment, the Board shall not order an abatement of rent if the landlord has complied with 10 listed conditions, including notifying the tenants of upcoming work. Because the application was brought under s. 20(1), the Board acknowledged that s. 8 did not apply but it found, pursuant to the agreed statement of facts, that the landlord had complied with the notice requirements set out in s. 8. With respect to the other conditions in s. 8, the Board held that the work was necessary to protect the physical integrity of the complex and that, "the work was carried out in a reasonable time frame." This leads to the conclusion that, had the tenants brought their application for rent abatement under s. 22, it would not have succeeded.

[56] To interpret s. 20(1) as the tenants propose would result in an interpretation that places the provisions of s. 20(1) and s. 22 in conflict or disharmony with one another and disregard the intent of the legislature that where, as here, there is an overlap, both provisions should apply. The tenants' reading of the RTA does not result in the legislation functioning as an internally consistent whole.

[57] The contextual approach required when interpreting the provisions of a statute leads me to also consider the wording of s. 29(1) which states:

> A tenant or former tenant of a rental unit may apply to the Board for any of the following orders:

> 1. An order determining that the landlord has breached an obligation under subsection 20 (1) or section 161….[3]

[58] If the legislature intended an automatic breach of the landlord's duty to maintain and repair as soon as a service was interrupted, there would be no need for the Board to make a determination as to whether the landlord had breached its obligation. The legislation would instead simply provide that where a service has been interrupted the landlord is in breach of its duty to maintain and repair and provide that the Board "may" award a remedy under s. 30(1) which authorizes a range of remedies including an abatement of rent.

[59] The tenants' position that the landlord is automatically in breach of its statutory obligation to maintain and repair even while something is being repaired also offends the legal maxim *lex non cogit ad impossibilia:* that the legislature does not intend compliance where, for all practical purposes, it is impossible: see Côté, *The Interpretation of Legislation in Canada*, at p. 479.

[60] Applying general principles of statutory interpretation, I would reject the tenants' submission that, when the RTA is properly interpreted, a landlord is automatically in breach of its obligation to repair and maintain under s. 20(1) as soon as an interruption in service occurs.

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[3] Section 161 is found in Part X of the RTA, "Mobile Home Parks and Land Lease Communities"; it assigns duties to a landlord of a mobile home park in addition to s. 20(1) and is not relevant to this appeal.

(ii) Existing jurisprudence must be viewed through a contextual lens

[61] The tenants' position also ignores important aspects of existing jurisprudence.

[62] In *Stephos Management Services v. McGregor*, 1993 CarswellOnt 3655 (Gen. Div.), Charron J., as she then was, dealt with a situation in which a tenant claimed a rent abatement for the time he was out of his apartment when the landlord undertook an extermination procedure to rid the building of cockroaches. After notice was given to the tenants, the extermination procedure in the 134 units took place with the tenants being required to be out of the building from 8:30 a.m. to 6 p.m. on one of two days when their half of the building was treated.

[63] In her recitation of the facts in para. 8, Charron J. noted that the landlord made other units available for tenants who indicated a need for alternate accommodation during the process. In addition the "party room" at a neighboring building was made available.

[64] At para. 15 of her reasons, Charron J. held that the landlord was not in breach of its obligation to provide premises fit for habitation:

> While it is beyond dispute that the responsibility to rid premises of cockroaches rests on the landlord, the problem is an interesting one since it is not likely to be caused by any actions of a landlord unless he or she is also an inhabitant of the building in question. On the other hand, the tenants can be and are often the source

> of the problem. They usually bring in the pests into the building with their belongings or with food that they carry in, albeit quite inadvertently, and then, in the case of some tenants (not necessarily the same who are afflicted by the problem) foster their existence by their particular living habits. A finding that a landlord not only has the responsibility to attend to a problem, the existence of which is essentially out of his control, but that he is automatically in breach of his statutory obligations the moment the problem does arise defies common sense and is grossly unfair. [Emphasis added.]

[65] So too, here, the latent defect in the elevator, the difficulty obtaining replacement parts, the province-wide elevator technician strike, and the length of time it took to install the new elevator were all matters beyond the landlord's control, and were acknowledged as such by the tenants in the agreed statement of facts before the Board: "The landlord's efficacy, efficiency, diligence or reasonableness of its actions regarding the elevator problem is agreed to be deemed satisfactory by the tenants."

[66] A subsidiary submission of the tenants is that *Pajelle Investments Ltd. v. Herbold*, [1976] 2 S.C.R. 520, entitles them to an abatement of rent because of the length of time the elevator was out of service. In *Pajelle*, the court was dealing with the landlord's obligation "…for providing and maintaining the rented premises in a good state of repair…." under s. 96(1) of *The Landlord and Tenant Act*, R.S.O. 1970, c. 236. The appellant landlord had advertised that the premises were air-conditioned and that there was an indoor swimming pool and sauna bath available for the tenants. These amenities were not provided for a

period of time. The County Court Judge, upheld by the Court of Appeal, granted an abatement of rent for temporary loss of common facilities and the landlord appealed.

[67] In delivering judgment on behalf of the court, Spence J. stated, at p. 528:

> I am ready to agree that it would be only in the most exceptional circumstances that a court should grant an abatement for rent because of the failure to provide repairs and services during a short period required for necessary repairs and renovations. That is not, however, the allegation or the evidence in the present case. On the other hand, the evidence is that the air-conditioning was not supplied at all during the mid-summer month of July in the year 1971 and that no use of the sauna bath or swimming pool was provided from November 1971 to March 1972. Those are important and long continuing delays in providing the facilities which it was the responsibility of the landlord to provide and the learned County Court Judge was perfectly justified in considering they would have to be compensated for by an abatement in rental.

[68] I disagree with the tenants that the reasoning in *Pajelle* applies to this case. As the landlord points out in its factum, the word “delay” means more than a lengthy passage of time. Used as a noun, “delay” is defined in The Shorter Oxford English Dictionary as, “1. The action or process of delaying; procrastination; lingering; putting off. 2. Hindrance to progress; (a period of) time lost by inaction or inability to proceed.”

[69] In this case, the Board found that the landlord acted diligently in effecting repairs to the elevator and arranged to have the elevator replaced as quickly as

possible when that became necessary. These are findings of fact by the Board not subject to review on appeal: see RTA, s. 210; *Jemiola v. Firchuk* (2005), 206 O.A.C. 251 (Div. Ct.), at para. 12.

[70] Further, in light of the evolution of the law since the decision of the Supreme Court in *Pajelle*, I read that decision as indicating that context is important, with only one of the factors being the length of time a facility or service was interrupted or never provided. Such a reading is appropriate having regard to the interpretive principle that legislation enacted to regulate an activity that is ongoing over an extended period of time invites a dynamic, as opposed to a fixed, interpretation: *Sullivan*, Construction of Statutes, at pp. 171-72.

[71] Other jurisprudence on which the tenants rely, such as *Offredi*, also supports the conclusion that a contextual approach is necessary. In *Offredi*, the tenants' application for rent abatement was based on alleged deficiencies in maintenance, including: a five-day power outage in December; a shortfall in parking facilities resulting from a number of repairs to the underground garage over a period of approximately twelve months; an inadequate hot water supply; and, an elevator service that fell far short of what could have been expected in a 20-story building which was characterized as a "serious problem" rather than a mere inconvenience. In addition, the premises were kept in a dirty and poorly maintained state, including the stairwells being littered with a myriad of alien objects and garbage rooms where garbage was allowed to collect for days.

Inadequate security was provided for the building. There does not appear to have been any evidence that the landlord offered the tenants any accommodation in return. On the contrary, in relation to the repairs to the parking garage, some of the tenants were forced to park in prohibited areas thereby incurring parking tickets and in one case a tenant had his car vandalised.

[72] Thus, *Offredi* was not a case that turned on whether the landlord could be said to have acted reasonably because there was no evidence that it had done so. It was instead forced to act. While the landlord ultimately complied with its obligations, it had failed to do so in the past and it was in respect of occupation for the period of time in which the deficiencies existed in the past that rent abatement was ordered.

[73] The comment of the Divisional Court, that "…this is not a case that turns on whether the landlord can be said to have acted reasonably," should not be read as indicating that the reasonableness of the landlord's actions should never be taken into consideration in any case dealing with a claim for rent abatement, because that is not what the court said. Rather, the court held that the tenants had not received what they bargained for. Part of the context in which the decision must be read is that the landlord did not provide any *quid pro quo* to the tenants when a facility, parking, was undergoing repair over an extended period of time. Furthermore, the landlord was in a position to exercise a high degree of control over aspects of the problems such as the prior maintenance of the

parking facility, general maintenance of walls and carpets, garbage removal, and security.

[74] Moreover, the decision in *Offredi* is congruent with Guideline 5. Under the heading, "Is There Liability for Abatement During Repairs or Replacements?", Guideline 5 states:

> If a landlord has done little maintenance for an extended period, and a serious condition results that takes some time to rectify, the landlord should be responsible for the tenants' loss of use of their unit or the common facilities during the repairs. However, if the landlord has a reasonable program of maintenance, including preventative maintenance, and is acting responsibly to rectify a problem that requires extensive repairs, an abatement of rent should not be ordered.

[75] In *Deng*, this court dealt with a related provision in the RTA, s. 130, which permits tenants to seek a rent reduction from the Board if services or facilities provided for a unit or residential complex are reduced or discontinued. At para. 35 of her reasons, Karakatsanis J.A. observed, on behalf of the court:

> In the context of this legislative scheme, it is presumed that a reasonable charge for the "services and facilities" is included in the rental value of the units and that the rent reduction is equal to a reasonable charge for the reduction or discontinuance of those services and facilities. The Regulation provides that the reasonable charge is determined, if possible, by the cost of that service or facility to the landlord. In other words, the Act and Regulation seek to ensure that if tenants lose some part of the services or facilities that were provided to them as part of their rent, any cost savings by the landlord is passed on to the tenants. However, the Regulation also provides for a rent reduction even

> where there are not cost savings to the landlord, or where they cannot be determined. In these circumstances, the tenant is still entitled to a rent reduction that is equal to what would be a reasonable charge for the service or facility based on their value.

[76] In *Deng*, the landlord had permanently removed a significant portion of the garden, lawn and walkways behind a residential complex because it intended to build townhouses on this land and the Board held that, as a result, there had been a reduction of a recreational facility and it ordered a rent reduction of 2.5%. On appeal, the Divisional Court held that the land in question did not constitute a "service or facility", but that even if it was, it was questionable whether the facility had been reduced.

[77] On further appeal, this court upheld the result reached by the Divisional Court using a different analysis. Applying a standard of reasonableness to review of the Board's decision, this Court held that the Board's conclusion on the definition of a "common recreational facility" was reasonable and then considered whether there had been a reduction in the provision of a facility. The court held, at para. 54, that while the size of the recreational facility was clearly relevant to a determination of whether there had been any reduction in the facility, "it cannot reasonably be the only factor <u>in these circumstances</u>" (emphasis added), going on to explain that "[n]ot every change in a 'service or facility' or in 'common recreational facilities', viewed objectively, will necessarily be a reduction of the common recreational facility, even if some aspect of it is removed or changed."

[78] In a negotiated process involving the landlord, the city and the tenants, the city attached conditions to the severance of the lands requiring the landlord to invest significant funds to the overall improvement of the complex, including the remaining landscaped areas, and the landlord agreed not to seek a rent increase based on these improvements. This court held, at para. 55, that the Board's failure to consider the nature of the changes in the remaining landscaped areas in addition to the reduction in the metes and bounds of the recreational facility resulted in its decision not meeting the criteria of a reasonable decision-making process. Thus, the Board's decision was not an outcome that was within the range of reasonable possible outcomes. The facilities had been changed, but not reduced, and this court held, at para. 58, that as a result the Board erred in awarding a rent reduction.

[79] An important point arises out of *Deng*. It is this: the court did not read the word "reasonable" into a provision where none existed; it simply adopted a contextual approach and held it was necessary to consider all of the particular factual circumstances in reaching a decision. Because the Board only had regard to one factor, namely the reduction in the size of the facility, it had not adopted a contextual approach, and so its decision was not within the range of reasonable outcomes.

[80] *Deng* illustrates that tenants do not bargain for a particular service or facility that can never be changed or interrupted. Looking at the jurisprudence as

a whole, it appears that a landlord ought to provide something in exchange for a significant interruption or discontinuation of a particular facility or service. The adequacy of what is provided is to be adjudged by regard to the legislation and regulations under the RTA, the Board's Guidelines and the particular factual circumstances, including the reasonable expectations of the parties viewed objectively.

(iii) Analysis of alleged errors in the Board's approach

[81] In this case, the Board took into consideration the impact of the interruption in service on the tenants, that the tenants' main complaint was interference with their use and enjoyment of the premises, the statutory provision (s. 22) that specifically dealt with use and enjoyment, and the fact that had the application been brought under that section it would not have succeeded.

[82] Similarly, the Board took into consideration the provincial legislation applicable to elevators, O. Reg. 517/06, s. 43 of which states that, "Elevators intended for use by tenants shall be properly maintained and kept in operation except for such reasonable time as may be required to repair or replace them." The Board considered the fact that the landlord did provide accommodation to the tenants during the service interruption and held this was a factor that distinguished this case from the jurisprudence put forward by the tenants. Finally,

the Board took into consideration that this was a latent defect and applied Guideline 5. In other words, the Board adopted a contextual approach.

[83] The tenants are critical of the contextual approach adopted by the Board and allege four resulting errors which I now propose to specifically address. They are: 1) consideration of the reasonableness of the landlord's actions; 2) consideration of s. 8 of O. Reg 516/06; 3) reference to provincial maintenance standards which did not govern because there was a municipal by-law in place; and, 4) application of Guideline 5.

(i) Reasonableness

[84] The tenants submit that the Board read into s. 20(1) a requirement that the tenants must prove the landlord acted unreasonably before a breach of the section could be found. I disagree that this is what the Board did. In adopting a contextual approach the Board was not reading wording into the legislation that was never intended, but was instead considering the entirety of the factual situation before it in determining whether a breach of the landlord's obligation under s. 20(1) occurred.

(ii) O. Reg. 516/06, s. 8

[85] The tenants submit that, in considering O. Reg 516/06, s. 8, the Board adopted a test from regulations which did not apply. While the Board acknowledged that the regulation did not apply because the application was

brought under s. 20, the tenants submit that the Board was not entitled to adopt the considerations embodied by s. 8, including the consideration that no abatement of rent is payable when the work is necessary and carried out in a reasonable timeframe.

[86] I disagree. It was entirely reasonable for the Board to take into consideration the real basis of the tenants' complaint, being the impact on their use and enjoyment of the premises, and the specific section and regulation that deals with interference with use and enjoyment because, as indicated above, one of the general principles of statutory interpretation is the principle of harmonization which requires that legislation dealing with the same subject matter in a statute be given a consistent interpretation.

(iii) Provincial maintenance standards

[87] The tenants submit that the Board erroneously relied on O. Reg. 517/06, s. 43, dealing with the provincial maintenance standards for elevators, because that section only applies where there is no by-law in existence, and here, the City of Kingston has a by-law. In their factum, the tenants state that the wording of the relevant Kingston by-law is: "Elevators intended for use by tenants shall be properly maintained and kept in operation." In other words, the tenants say that the Kingston by-law omits the exception for "such reasonable time as may be required to repair or replace them" found in the provincial regulation.

[88] The landlord objects to any consideration of the wording of the Kingston by-law because, at the hearing before the Board, the tenants' counsel noted that the City of Kingston may have different language in its property standards by-law, and although the adjudicator gave the tenants the opportunity to provide evidence of the by-law, they did not do so. As a result, the landlord submits that the Kingston by-law is not properly before this Court.

[89] It appears that the weight of the authorities is that, unlike other domestic legislation, judicial notice cannot be taken of a municipal by-law: see *R. v. Dowslay* (1890), 16 O.R. 622 (H.C. (Div. Ct.)), at p. 622-23; *R. v. Snelling*, [1952] O.W.N. 214 (Ont. H.C.), at p. 215; *R. v. "Evgenia Chandris"*, [1977] 2 S.C.R. 97, at p. 100, *per* Laskin C.J. (dissenting, but not on this point); Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014), at para. 19.40; David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015), at p. 515.

[90] That said, I do not think that anything turns on this point. As I have indicated, the principle of harmonization applies not only within the same statute but across legislative instruments dealing with the same subject matter. Both the provincial maintenance standards and the Kingston by-law deal with the same subject matter. Applying the principle of harmonization, I would be inclined to interpret the Kingston by-law in the same manner as the provincial standard, but,

as the by-law was not adduced in evidence before the Board and we did not hear submissions on its proper interpretation, I do not purport to come to any definitive conclusion. Suffice it to say that, in the circumstances, the Board's consideration of provincial maintenance standards was not an error.

(iv) Guideline 5

[91] I turn now to the tenants' objection to the Board's application of Guideline 5. Section 176(1) of the RTA provides that the Chair of the Board shall establish a Rules and Guidelines Committee. Section 176(3) states: "The Committee may adopt non-binding guidelines to assist members in interpreting and applying this Act and the regulations made under it." Guideline 5, entitled "Breach of Maintenance Obligations", was developed to assist in matters arising under ss. 20, 29 and 30 of the RTA. Although not binding, it is expected that Board members will follow the guideline. Rule 26.3 of "The Landlord and Tenant Board's Rules of Practice" states: "…the [Board] shall give reasons for departing from a guideline whether or not reasons are requested."

[92] The tenants submit that it was an error of law for the Board to treat the commentary in this non-binding Guideline as establishing the elements of the test for whether the landlord had met its duties under s. 20. They submit that, instead, the Board should have applied the "clear words" of the statute.

[93] As I have indicated earlier, the interpretation of s. 20(1) for which the tenant's argue, that the landlord is automatically in breach of its obligation to maintain and repair whenever there is an interruption in elevator service, is not at all clear. Indeed, for the reasons given above, I have rejected the tenants' proposed interpretation having regard to both general principles of statutory interpretation and the existing jurisprudence. The approach advocated by the tenants would focus only on the length of time the elevator was out of service and the resulting inconvenience to the tenants, and not on the entire factual context in which the interruptions in service took place. The Board rejected that approach and adopted a contextual one. The tenants' incorrect interpretation of s. 20(1) does not provide the base from which to attack Guideline 5. The Board was entitled to have regard to Guideline 5.

F. DISPOSITION AND COSTS

[94] For the reasons I have given, I would dismiss the appeal. The parties agree that irrespective of the outcome of this appeal, no costs should be awarded. Accordingly, I would not order any costs.

Released: "EAC" June 16, 2016

"K.M. Weiler J.A."
"I agree E.A. Cronk J.A."
"I agree M.L. Benotto J.A."

TAB 7

CITATION: First Ontario Realty Corporation Ltd. v. Deng, 2011 ONCA 54
DATE: 20110121
DOCKET: C51723

COURT OF APPEAL FOR ONTARIO

Weiler, Watt and Karakatsanis JJ.A.

BETWEEN

First Ontario Realty Corporation Ltd.

Landlord/Respondent

and

Liangrui Deng, Guizhi He, Dustin Yang, Jenny Yang and Yi Yang

Tenants/Appellants

Richard A. Fink, for the tenants/appellants

Chris G. Paliare and Michael Fenrick, for the landlord/respondent

Heard: December 16, 2010

On appeal from the order of Associate Chief Justice Cunningham, and Justices Swinton and Smith of the Superior Court of Justice (Divisional Court), dated October 29, 2009.

Karakatsanis J.A.:

[1] This is an appeal from the decision of the Divisional Court, reversing the decision of the Landlord and Tenant Board that the tenants were entitled to a 2.5% reduction in

rent due to the reduction of facilities provided in respect of the rental unit in a residential complex.

[2] This appeal involves the interpretation of "facilities" and "common recreational facilities" within the meaning of the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 (the Act) and the proper method of calculating rent reduction prescribed under s. 30 of *Tenant Protection Act, 1997*, O. Reg. 194/98 (the Regulation).

[3] The Board found that the landlord's removal of fenced-in gardens, lawns and walkways from the apartment complex was a "reduction" in "common recreational facilities" within the definition of "services and facilities" under ss. 1(1) and 142(1) of the Act (now ss. 2(1) and 130(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17). In determining the rent reduction prescribed under s. 30 of the Regulation, the Board based the quantum of its order upon the amount claimed by the tenants, discounted to reflect partial success.

[4] Applying a standard of review of correctness, the Divisional Court held that the Board erred in finding that the former landscaped areas of the apartment complex were "common recreational facilities" under the Act. The Divisional Court further stated that the Board erred in its approach to calculating the amount of rent reduction under s. 30 of the Regulation.

[5] This appeal raises the following issues:

i) What standard of review applies to the Board’s decision?

ii) Was the Board’s decision that the former landscaped areas were a “common recreational facility” reasonable?

iii) Was the Board’s decision that there was a “reduction” in the recreational facility reasonable?

iv) Was the Board’s calculation of the rent reduction reasonable?

[6] I have concluded that the Divisional Court erred in reviewing the Board’s decision on a standard of correctness. For the reasons that follow, I conclude that the Board’s decision that the former landscaped areas were “common recreational facilities” was reasonable. However, the Board’s failure to determine the extent to which the tenants’ loss was a “reduction” in the “common recreational facilities” and the Board’s determination of the amount of the rent reduction were unreasonable. I have concluded, however, that there was no reduction in the facilities. Therefore, I agree with the result and would dismiss the appeal.

Background facts

[7] The appellants are family members renting a unit in a large apartment complex at 50 Rosehill Avenue in Toronto. The appellants have leased a unit in this building since December 13, 2003.

[8] In 2005, the landlord entered into an agreement with the City of Toronto to amend the City's Official Plan in order to permit the construction of 32 townhouses on the same property as the residential complex. This required a severance of a portion of the landscaped land at the rear of the complex. That land was formerly fenced in for the tenants' use and included two lawns, approximately 20 mature trees, pedestrian pathways, a garden and a stone bench.

[9] There was a public consultation process initiated as a result of the proposed construction. It provided the tenants, as well as the broader community, with the opportunity to express their concerns. As part of the agreement reached with the City, the landlord was required to make improvements on the remaining grounds of the complex at 50 Rosehill Avenue and to contribute over $250,000 to improve the community facilities. The landlord further agreed not to seek an above-guideline rent increase from the tenants to recover the cost of such improvements.

[10] As a result of the ongoing construction of the new townhouses, the appellants applied for a 10% reduction of their rent pursuant to s. 142(1) of the Act on the basis of a reduction or discontinuance of the following services or facilities: a quiet and clean living environment; visitor and tenant parking; and building safety.

[11] The Board found that the tenants had failed to establish a reduction in services or facilities on the three grounds set out in their application. However, the Board assessed a fourth and separate ground for a rent reduction and found that the loss of the fenced-in

garden, lawns and walkways constituted a reduction in "common recreational facilities", within the definition of "services and facilities" in s. 1 of the Act. The Board ordered that the rent be reduced by 2.5%.

[12] The landlord filed a request to review the Board's decision, pursuant to rule 29 of the Board's Rules of Practice and s. 21.2 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Upon review, the Board upheld the rent reduction.

[13] On appeal to the Divisional Court, the court determined that the former landscaped areas did not constitute a "service or facility" within the meaning of the Act and set aside the rent reduction. The Divisional Court further noted that the Board had erred in its calculation of the reduction in rent under s. 30 of the Regulation.

Standard of Review

[14] The Divisional Court found that the appropriate standard of review was correctness.

[15] Counsel for the respondent quite fairly submitted that the Divisional Court erred in applying a standard of correctness to the issue of whether the severed land constituted a "service or facility" under the Act. The respondent submits, however, that the court did not err in applying a correctness standard to the issue of the quantum of rent reduction because that issue involved a pure question of law; the Board was asked to apply general principles of statutory interpretation and consider mandatory language in the Regulation.

[16] The standards of review established by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 apply not only to judicial review but also to statutory appeals from tribunals: see *Coffey v. College of Licensed Practical Nurses (Manitoba)* (2008), 291 D.L.R. (4th) 723 (C.A.), at para. 34; *Salway v. Assn. of Professional Engineers & Geoscientists (British Columbia)* (2010), 3 B.C.L.R. (5th) 213 (C.A.), at para 22; and *Flora v. Ontario Health Insurance Plan* (2008), 238 O.A.C. 319 (C.A.), at paras. 36-37. Indeed, prior to *Dunsmuir*, the Supreme Court noted that "[t]he term 'judicial review' embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal.": *Dr. Q. v. College of Physicians & Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 21 (emphasis added).

[17] As noted in *Dunsmuir* at paras. 54-55 and para. 60, the standard of review for questions of law may depend upon the nature of the legal question in issue. Where the question is one of true jurisdiction or one of general law that is of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. However, deference will usually be afforded where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory

context. Finally, deference applies to questions of fact, discretion or policy and where the legal and factual issues are intertwined and cannot be readily separated: *Dunsmuir*, at para. 53.

[18] Although the Divisional Court relied upon the fact that previous courts had consistently applied the standard of correctness to decisions of the Board on questions of law, decisions prior to *Dunsmuir* may be of limited assistance. Prior to *Dunsmuir*, questions of law generally attracted a correctness standard of review. As noted by this court in *Investment Dealers Assn. of Canada v. Taub* (2009), 255 O.A.C. 126, at para. 27, the Supreme Court in *Dunsmuir* recognized the difficulty that courts may have in applying the reasonableness standard of review to a question of law, since traditionally courts are used to deciding questions of law and statutory interpretation on the basis that the interpretation must be correct. Furthermore, while it is clear under a *Dunsmuir* analysis that the exercise of statutorily-mandated discretion attracts a standard of review of reasonableness, it does not necessarily follow that where the language of a statutory provision is mandatory, the standard of review is correctness.

[19] It is important to identify the category of question under review. A tribunal may attract different standards of review, depending on the issue involved.

[20] In *Dunsmuir*, the Supreme Court noted at paras. 55, 62 and 64 that the process of determining the standard of review involves two steps. It may be that the jurisprudence has already satisfactorily examined the standard of review in light of the factors set out in

Dunsmuir. A post-*Dunsmuir* analysis that has determined the degree of deference to be accorded with regard to a particular category of question will end the inquiry. If not, the court should assess: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal under the enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal relating to the issue. At para. 55, the Supreme Court in *Dunsmuir* observed that the court should determine whether the legislation establishes a discrete and special administrative regime in which the decision maker has special expertise.

[21] In this case, the Board was required to interpret its "home statute" and Regulation in determining a tenant application for a rent reduction. The Board's governing statute provides for a specialized adjudicative regime for resolving disputes. Under the Act, the determination of whether services or facilities to tenants have been reduced by the landlord and the determination of the corresponding rent reduction are core functions of the Board. It applied statutory and regulatory provisions with which it has particular familiarity. As well, with respect to whether the facts established a "common recreational facility", the legal and factual issues are intertwined and cannot be readily separated. Although there is no privative clause, appeals are limited to questions of law. The interpretation of "service and facility" as it relates to the former landscaped areas or the calculation of the "value" of that service or facility is not one of central importance to the legal system. In these circumstances, I am satisfied that the deferential standard of reasonableness applies to these determinations. While the use of mandatory language in

the Regulation prescribes the Board's approach to its calculation of the appropriate rent reduction, it does not, in these circumstances, convert the standard of review from one of deference to one of correctness.

[22] As a result, I conclude that the Divisional Court erred in applying a standard of review of correctness. The Board's decision in this case should be reviewed on the basis of reasonableness. As explained in *Dunsmuir* at para 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

Relevant Legislation

[23] The Act permits tenants to seek a rent reduction if a service or facility that was provided for the unit or residential complex is reduced or discontinued. This is achieved by way of application to the Board.

[24] Section 142(1) of the Act provides:

> **142.** (1) A tenant of a rental unit may apply to the Tribunal for an order for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.

[25] “Services and facilities” is defined in s. 1(1) of the Act to include “common recreational facilities”:

> “services and facilities” includes,
>
> (a) furniture, appliances and furnishings,
>
> (b) parking and related facilities,
>
> (c) laundry facilities,
>
> (d) elevator facilities,
>
> (e) common recreational facilities,
>
> (f) garbage facilities and related services,
>
> (g) cleaning and maintenance services,
>
> (h) storage facilities,
>
> (i) intercom systems,
>
> (j) cable television facilities,
>
> (k) heating facilities and services,
>
> (l) air-conditioning facilities,
>
> (m) utilities and related services, and
>
> (n) security services and facilities;

[26] “Residential complex” is also defined in s. 1(1) of the Act to include all “common areas and services and facilities”:

> “residential complex” means,
>
> (a) a building or related group of buildings in

which one or more rental units are located,

…and,

includes all common areas and services and facilities available for the use of its residents;

[27] Finally, s. 30 of the Regulation provides the remedy for a finding that services and facilities have been reduced or discontinued:

30. (1) The provisions of this section are prescribed as rules for making findings relating to a reduction of the rent charged under section 142 of the Act, based on a discontinuance or reduction in services or facilities. O. Reg. 194/98, s. 30 (1).

(2) If a service or facility is discontinued, the rent shall be reduced by an amount that is equal to what would be a reasonable charge for the service or facility based on the cost of the service or facility to the landlord or, if the cost cannot be determined or if there is no cost, on the value of the service or facility. O. Reg. 194/98, s. 30 (2).

…

(4) If a service or facility is reduced, the amount of the reduction of rent shall be a reasonable proportion, based on the degree of the reduction of the service or facility, of the amount determined under subsection (2) or (3). O. Reg. 194/98, s. 30 (4).

(5) If the discontinuance or reduction is temporary and its duration is reasonable, taking into account the effect on the tenant, there shall be no reduction of rent. O. Reg. 194/98, s. 30 (5).

Was the Board's decision that the former landscaped areas constituted "common recreational facilities" reasonable?

[28] The evidence before the Board was that the sizable former landscaped areas were severed from the residential complex to create 32 new townhouses. The tenant Deng described the landscaped areas as two large pieces of lawn with approximately 20 mature trees, small pedestrian paths and a stone bench. She testified that the area was fenced in so that all the tenants had full access to that land. She also testified that in the summer they probably used the landscaped areas every day and that her young son would run and play on the grass. After construction started, if the appellant's son wanted to play, she would take him to a nearby public park.

[29] Although the respondent suggested that the only evidence of the tenants' use of those landscaped areas was incidental to their use of the pathway as access to the street and that there was no evidence that other tenants used the area for recreational purposes, the tenant's evidence was un-contradicted. In any event, an appeal from the Board's decision is restricted to questions of law.

[30] The Board concluded:

> The definition of "services and facilities" set out in the Act is not an exhaustive list but explicitly includes "common recreational facilities". A facility is generally speaking, something that is built or installed to perform some particular function. Clearly the gardens, lawns and walkways around the

> residential complex were installed to perform particular functions. One of the common functions of a lawn is for recreational purposes – for children to run across and play on. The lawn herein was part of the common areas formerly enjoyed by the Tenants and it is uncontested it was used by them for recreational purposes. Therefore, I find that the grass, garden and walkways around the residential complex are a "service and facility" as defined in the Act with respect to these Tenants.

[31] Applying the standard of correctness, the Divisional Court found at para. 21 that the Board had erred in its finding that the severed areas constituted a "recreational facility" within the meaning of "services and facilities" defined in s. 1 of the Act:

> Read in its ordinary sense, common recreational facility would entail something that is built or installed to serve a recreational function. The lands surrounding a building, while they may be used for recreation, do not meet the requirement of being built or installed to fulfill that particular function. We accept the Landlord's submission that these lands are a "necessary incident" to the construction of the building itself. Unless the lands surrounding a building have been specifically landscaped to serve a recreational purpose, by adding a playground, for instance, they will not meet the definition of common recreational facility.

[32] The appellants submit that the Divisional Court erred in substituting its own interpretation for that of the Board and in holding that additional facilities, such as a playground, were required before fenced-in gardens with lawns, trees, pathways and a bench could be considered a "common recreational facility".

[33] The respondent's position is that the Divisional Court's decision was correct and that when viewed objectively, the fence, lawns, pathways and bench were not built or

installed for a recreational function. The respondent submits that the Board's decision was unreasonable for the following reasons: the set-back areas were a necessary incident to the construction of the building; the Board failed to view the functionality of the landscaped areas from an objective basis and instead permitted the tenants' use of the areas to unilaterally convert the areas to a recreational facility; the Board equated common areas with common recreational facilities; and "common recreational facilities" encompass purpose built amenities such as pools, spas or exercise rooms.

[34] As noted by the Divisional Court, the accepted approach to statutory interpretation is that "the words of an Act are to be read 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 Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, at para 26.

[35] The Act permits tenants to seek a rent reduction from the Board if services or facilities provided for the unit or residential complex are reduced or discontinued. Conversely, the Act permits the landlord to seek a rent increase for capital expenditures made with respect to the creation of new and additional services or facilities. The definition of "services and facilities" is not exhaustive and enumerates a wide range of residential benefits to tenants that are maintained and paid for by the landlord. In the context of this legislative scheme, it is presumed that a reasonable charge for the "services and facilities" is included in the rental value of the units and that the rent

reduction is equal to a reasonable charge for the reduction or discontinuance of those services or facilities. The Regulation provides that the reasonable charge is determined, if possible, by the cost of that service or facility to the landlord. In other words, the Act and Regulation seek to ensure that if tenants lose some part of the services or facilities that were provided to them as part of their rent, any cost savings by the landlord is passed on to the tenants. However, the Regulation also provides for a rent reduction even where there are no cost savings to the landlord, or where they cannot be determined. In these circumstances, the tenant is still entitled to a rent reduction that is equal to what would be a reasonable charge for the service or facility based on their value.

[36] The definition of “facility” is not in dispute. Both the Board and the Divisional Court accepted that in the context of the Act and in accordance with dictionary definitions, a “facility” is “something that is built or installed upon to perform some particular function” and, therefore, that “recreational facility” would entail “something that is built or installed to serve a recreational function.”

[37] While the parties agree on the definition of “facility”, they disagree as to whether the facts of this case meet that definition, and specifically whether the facts are capable of meeting the definition of “common recreational facilities”.

[38] The Divisional Court accepted the landlord’s submission that the lands, as a required set-back, were a necessary incident to the construction of the residential

complex. However, the fact that a set-back was required did not preclude the landlord from building or installing features on the lands to serve a recreational function.

[39] Further, the Divisional Court accepted the landlord's submission that the tenants' unilateral choice to use the common area for recreational purposes did not convert it into a facility within the meaning of the Act. I would also agree with this submission. However, the key issue of whether the common area included facilities which were built or installed for a recreational use or function remains.

[40] In this case, the Board found that the lawns, trees, walkways and the fence that excluded the public had been built or installed to fulfill a recreational function. The Board noted that a common function of a lawn is for children to run across and play on – an observation of the objective functionality of lawns. The installation of a bench made the area more than a means of egress and ingress to the street but a place that was meant for people to enjoy. The Board also relied upon its factual finding that the tenants previously enjoyed the lawn area.

[41] I do not agree with the respondent's submission that the Board equated or conflated the concepts of common areas and common recreational facilities. The respondent argues that the distinction drawn between "common areas" and "services and facilities" in the definition of "residential complex" in s. 1 of the Act, supports the conclusion that common areas are separate and distinct from services and facilities. A common area is not necessarily a facility or a recreational facility; however, there is no

reason why a common area cannot also constitute or include services or facilities available to the rental units or residential complex. Indeed, common recreational facilities, by their very nature, would be common areas for the tenants.

[42] In effect, the Divisional Court disagreed with the Board's factual characterizations and its conclusion that fenced-in areas with landscaped lawns, walkways and mature trees constituted a "common recreational facility". The court held at para. 21 that "[u]nless the lands surrounding a building have been specifically landscaped to serve a recreational purpose, by adding a playground, for instance, they will not meet the definition of common recreational facility." Implicit in this reasoning is that the fences, lawns, bench and pathways were not specifically built or installed by the landlord for the particular purpose of recreation.

[43] The Divisional Court observed that its conclusion was supported by reference to the list of other services and facilities found in s. 1(1) of the Act. The court emphasized at para. 22: "All of the items on the list are features of residential complexes that are installed or built to perform a particular function, such as security, laundry, elevators, garbage, and parking facilities."

[44] The respondent argues that the Divisional Court was correct because the evidence could not reasonably support the conclusion that the areas were built or installed to perform a recreational function. The respondent submits that the enumerated list of services and facilities as defined in the Act all have operating costs associated with them

which, upon discontinuance, would result in a cost savings to the landlord and a corresponding loss of rental value to tenants, which can be measured on an objective basis. Thus, it argues, when read in the immediate context of the features listed under the definition of “services and facilities”, the term “common recreational facilities” encompasses purpose built amenities such as pools, spas or exercise rooms that have operating costs associated with them.

[45] The appellants submit that the Board’s finding that the tenants’ enjoyment of the areas represented recreational functions, including the fact that their son ran on and played on the lawns and that their infant daughter could be expected to do so in the future, is supported by the ordinary definition of the word “recreation”.

[46] Webster’s defines recreation as: “1. Refreshment in body or mind, as after work, by some form of play, amusement or relaxation. 2. Any form of play amusement, or relaxation used for this purpose, as games, sports, hobbies, reading, walking, etc.” (Webster’s New Twentieth Century Dictionary, 2d ed., *s.v.* “recreation”). The Concise Oxford English Dictionary definition of recreation is “enjoyable leisure activity” (Concise Oxford English Dictionary, 11th ed., *s.v.* “recreation”).

[47] The Board was entitled to find as a fact that the sizable landscaped lands, fenced in for the use of the tenants, with the lawns, pathways and trees, were built and installed for a recreational function. The Board’s findings of fact are not subject to appeal. Whether

these facts, as found, are reasonably capable of meeting the definition of recreational facilities within the meaning of the Act is the question of law to be determined.

[48] The Board's determination that the landscaped areas were a common recreational facility was reasonable. The Board was entitled to, and did, consider the objective nature and function of what was "built or installed" on the landscaped areas as well as evidence of its actual use. As counsel for the appellants submitted, residential gardens and lawns provide space for relaxation and leisure activity. Residential landscaped areas available to tenants require installation and upkeep and thus have costs to the landlord and corresponding value to the residents as recreational facilities.

[49] The Board's determination is entitled to deference. The Board articulated its decision-making process with reasons which were justified, transparent and intelligible. Its legal conclusion was within the range of reasonable outcomes defensible upon the facts and the law. I conclude that the Divisional court erred in holding that the Board's conclusion that the severed landscaped areas constituted common recreational facilities was incorrect. The Board's decision on that issue was reasonable.

[50] The appellants submitted before this court that a breach of the covenant for quiet enjoyment in the demised premises under the common law and pursuant to s. 23 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 (as distinct from the reasonable enjoyment under s. 26 of the Act) entitled the tenants to a rent reduction. They submitted that the "right to quiet enjoyment" was a "service or facility" in an application

under s. 142(1) of the Act. This argument was not made before the Board or before the Divisional Court. Accordingly, it is not open to the appellants to raise this additional ground on appeal.

Was the Board's decision that there was a reduction in the recreational facility reasonable?

[51] The Divisional Court stated that even if the land in question was a common recreational facility, it was questionable whether the facility had been reduced. It noted at para. 25: "Reduction can refer to a reduction of the quality, quantity, or both of a service or facility." The court observed that although the quantity of the land had clearly been reduced, the landlord had an obligation by its agreement with the City to improve the remaining land.

[52] On this issue, the Board held:

> Furthermore, I do not agree that the permanent loss of a significant portion of the garden, lawn and walkways behind the residential complex is not a reduction. It may well be that the loss of this recreational area is not a "discontinuance" as landscaped areas around the building continue to exist and will in fact be improved, but as a matter of logic, the significant decrease in recreational space available to the Tenants is clearly a "reduction".

[53] Having noted that the remaining common landscaped lands would be improved following the construction, the Board did not consider the effect of the landlord's obligation to improve those lands. The Board did not consider the extent of the reduction

in the common recreational facility, even though it was required to do so in order to determine the rent reduction under s. 30(4) of the Regulation.

[54] While the size of the recreational facility is clearly relevant in determining the extent of any reduction in the facility, it cannot reasonably be the only factor in these circumstances. Not every change in a “service or facility” or in “common recreational facilities”, viewed objectively, will necessarily be a reduction of the common recreational facility, even if some aspect of it is removed or changed. Thus, the Board was required to consider not only the reduction in the metes and bounds of the recreational facility but also the nature of the changes in the remaining landscaped areas in order to determine the extent of the reduction of the “common recreational facilities”.

[55] Given the Board’s failure to consider the relevance of the landlord’s obligation to improve the remaining lands, and to consider the extent, if any, of the reduction in the common recreational facilities, the Board’s decision on this issue does not meet the criteria of a reasonable decision-making process; it is not an outcome that is within the range of reasonable possible outcomes.

[56] In this case, there was a negotiated process, between the landlord and the City of which the tenants were given notice and in which they were entitled to participate. This process bears upon the issue of whether and to what extent a reduction in rent was warranted because the size of the common recreational facility was reduced. The agreement between the landlord and the City ultimately required that in return for the

severance and the loss of the land to the residential complex, the landlord was required to invest significant funds on improvements to the complex, including the remaining landscaped areas. The agreement also provided that the landlord would not seek to recoup those expenditures from its tenants by seeking an above-guideline rent increase before the Board.

[57] In these circumstances, the negotiated settlement is evidence that the loss of the landscaped area to the tenants was compensated for by the investment in the remaining landscaped areas. The amenities, including the common recreational facilities have been changed, rather than reduced. The process reflects the interests of the tenants of the apartment complex as a whole and is therefore a better reflection of the value and compensation for the lost common recreational lands, rather than the evidence of the impact upon individual use by the tenants of one unit.

[58] The Divisional Court opined that it was questionable whether the lands in this case should be considered "reduced" based on a reduction in quantity alone, given the fact that the landlord was obliged to spend a significant amount on improving the remaining land. In these circumstances, there is ample evidence in the record to find that the common recreational facility was not "reduced" but was replaced with other upgrades. As a result, the Board erred in ordering a rent reduction.

Was the Board’s calculation of the rent reduction reasonable?

[59] Although it is not necessary to the appeal, it is nonetheless appropriate to provide some guidance with respect to the Board’s calculation of the rent reduction.

[60] Section 30 of the Regulation sets out a mandatory approach to determining the amount of rent reduction. The Board is directed to determine the “reasonable charge” for the service or facility based on the cost of the service or facility to the landlord. If the cost cannot be determined or if there is no cost, then the Board is directed to determine the reasonable charge for the service or facility based on the value of the service or facility. If the service or facility is reduced, the amount of the rent reduction will be a reasonable proportion of that “reasonable charge”, depending on the degree to which the service or facility was reduced.

[61] The evidence at the hearing was that the annual costs of operating the green space had consisted of property taxes, insurance and landscaping costs, and that the costs for each of these did not change as a consequence of the severance. The tenants led no evidence on the value of the facility in the context of their monthly rent payment nor did this claim form part of the original application before the Board.

[62] The Board found that because the evidence of the landlord was that there was no reduction in its costs once the landscaped area was reduced, the cost to the landlord of the reduced portion of the service or facility was zero, or could not be determined. Based

upon the limited evidence before it, it was reasonable for the Board to conclude in these circumstances that the cost to the landlord was zero, or could not be determined.

[63] However, upon making that determination, the Regulation required the Board to determine the “reasonable charge” for the service or facility based on the “value of the service or facility”. Instead, the Board concluded:

> The only evidence of the value of the reduced common recreational area to the Tenants was the statement that they believed they were entitled to a 10% reduction in the rent because of <u>all</u> of their claims. It seems to me from the evidence before me that the claim with respect to the reduction in the common recreational area constituted was one-quarter of the Tenants’ total claims. Therefore, I find that an appropriate reduction in the rent for the reduction in the common recreational area is 2.5% of the rent charged. [Emphasis in original.]

[64] The respondent submits that in the context of the language of s. 30 of the Regulation, the “value of the facility” must be determined in relation to the cost savings or resulting benefit to the landlord rather than on the value of the service to the tenants. It argues that if there was no cost savings to pass on to the tenants, there should be no rent reduction.

[65] However, such an interpretation ignores the plain language of s. 30. By prescribing an alternative approach where there are no cost savings to pass on to the tenants, the Regulation clearly contemplates a rent reduction even where there is no resulting benefit to the landlord. Thus, the value of the service or facility must be based

upon the rental value of such service or facility. In any event, the landlord benefited from the construction and sale of 32 townhouses upon the former recreational lands.

[66] The appellants submit that the Board acted reasonably and in accordance with the Regulation when it relied on the tenants' perceived value of the loss of the former landscaped area in arriving at a figure of 2.5% for rent reduction. They referenced other decisions in which the Board has assessed the value of the rebate without a formula. Counsel submitted that over time, the decisions of the Board have established a 'tariff' based upon the nature and extent of the reduction in services or facilities. It was submitted that the Board's assessment in this case represented a type of rough justice based upon its expertise.

[67] However, this is not such a case. The Board did not purport to rely upon past precedent or upon its expertise. Nor did the appellants provide any evidence of their perceived value of a reasonable charge for the lost landscaped lands. Instead, the Board's reasoning related entirely to the initial amount of the claim made by the tenants, for grounds that were not successful. In doing so, the reasoning of the Board was deeply flawed.

[68] The appellants further submit that the result itself was reasonable given the value of the severed land. On the review hearing, the appellants filed a valuation opinion that the severed land had a value of $3.84 million, representing almost 12% of the total value of the apartment complex.

[69] The appellants' submission that the Board's outcome was reasonable based on the valuation of the land, or the best and highest value of the land, must also fail. The Regulation mandates an inquiry into a reasonable charge for the service or facility based upon its cost to the landlord or the value of the service or facility. The Board does not have discretion to adopt an alternative method of calculating the quantum of rent reduction, regardless of whether the amount arrived at is reasonable.

[70] As a result, the Board's decision on quantum is not reasonable.

Conclusion

[71] In conclusion, I agree with the decision of the Divisional Court, although for different reasons. I would dismiss the appeal.

RELEASED: January 21, 2011 "KMW"

"Karakatsanis J.A."

"I agree K. M. Weiler J.A."

"I agree David Watt J.A."

TAB 8

Cash Converters Canada Inc. et al. v. The Corporation of The City of Oshawa, and The Attorney General of Ontario and Information and Privacy Commissioner of Ontario, Intervenors

[Indexed as: Cash Converters Canada Inc. v. Oshawa (City)]

86 O.R. (3d) 401

Court of Appeal for Ontario,
O'Connor A.C.J.O., Feldman and Rouleau JJ.A.
July 4, 2007

Municipal law -- By-laws -- Validity -- Licensing by-law requiring dealers of second-hand goods to submit daily reports to police including detailed personal information about vendors of each item -- By-law being authorized under s. 150(2) of Municipal Act as "consumer protection" legislation -- By-law conflicting with s. 28(2) of Municipal Freedom of Information and Privacy Protection Act -- Impugned sections of by-law being of no force or effect -- Municipal Act, 2001, S.O. 2001, c. 25, s. 150 -- Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 28(2).

In 2004, the City replaced its licensing by-law for second-hand goods dealers with a new by-law which requires dealers of second-hand goods to submit daily reports to the police, electronically, which include detailed personal information about the vendors of each item. The applicants brought an application attacking the validity of the by-law. The application was dismissed. The applicants appealed.

Held, the appeal should be allowed.

The by-law was enacted under s. 150(1) of the Municipal Act, 2001. Section 150(2) of the Act provides that a municipality may only exercise its licensing powers for one or more of three purposes, namely, health and safety, nuisance control and consumer protection. The City submitted that collecting information about goods and vendors may deter unscrupulous vendors from attempting to sell stolen goods and that this can be seen as a form of consumer protection by helping to keep stolen goods out of the marketplace.

Under s. 14 of the Municipal Act, 2001, to the extent of any conflict with a provincial or federal Act or regulation, a by-law is "without effect". Section 28(2) of the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA") provides that no person shall collect information on behalf of an institution (which includes a municipality) unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. The application judge erred in finding that the collection of personal information was "expressly authorized by statute" on the basis that the by-law itself was authorized under s. 150(2) of the Municipal Act, 2001. The phrase "expressly authorized by statute" means that the specific types of personal information collected must be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. It was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected. Although some of the information collected might ultimately be used for law enforcement, the purpose of the by-law was consumer protection, not law enforcement. In order to show that the collection of personal information is "necessary to the proper administration of a lawfully authorized activity", an institution is required to show that each item or [page402] class of personal information that is to be collected is necessary to properly administer that activity. Where the personal information would merely be helpful to the activity, it is not "necessary" within the meaning of the MFIPPA. Similarly, where the purpose could be accomplished another way, the institution is obliged to choose the other route. In this case, the City failed to demonstrate that the impugned provisions of the new by-law were necessary for an effective consumer protection regime to license second-hand dealers. The impugned provisions did not come within the exceptions in s. 28(2) of the MFIPPA. The provisions were of no force or effect.

Cases referred to

Toronto Taxi Alliance Inc. v. Toronto (City) (2005), 77 O.R. (3d) 721, [2005] O.J. No. 5460, 205 O.A.C. 160, 18 M.P.L.R. (4th) 89 (C.A.), affg (2005), 74 O.R. (3d) 447, [2005] O.J. No. 320 (S.C.J.), consd

Other cases referred to

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Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, ss. 10(2), 14(1)(a) [as am.], 28(2), 29(1) [as am.], 31(a), 32(b) [as am.], 46(a)
Pawnbrokers Act, R.S.O. 1990, c. P.6, as am. by S.O. 2002, c. 17, Sched. F, ss. 9, 13
Privacy Act, R.S.C. 1985, c. P-21

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APPEAL from the judgment of Belobaba J., [2006] O.J. No. 490, [2006] O.T.C. 120 (S.C.J.), dismissing an application for declaration that parts of a municipal by-law were invalid.

David Sterns, for appellants.

David J. Potts, for respondent.

William S. Challis and Stephen L. McCammon, for the Information and Privacy Commissioner.

The judgment of the court was delivered by

[1] FELDMAN J.A.: -- The City of Oshawa replaced its licensing by-law for second-hand goods dealers on April 24, 2004. The new by-law requires dealers of second-hand goods to submit electronically to police daily reports of all transactions, including detailed personal information about the vendors of each item. The by-law also requires dealers to pay an administrative fee for each report submitted. The application judge held that the by-law was validly enacted and did not contravene provincial privacy legislation. For the reasons that follow, I would allow the appeal.

Background

[2] The City of Oshawa has been licensing dealers of second-hand goods since 1974. The original licensing by-law required every licensed dealer to maintain at the store a register of daily transactions. The record included particulars of each item purchased as well as the name, address and description of the person from whom the purchase was made. Between 1974 and 1983, these records were open to police inspection and the dealer was also required to deliver the information to the local police by 9 a.m. each day. In 1983, the by-law was amended to require dealers simply to maintain

the register, which was subject to inspection by police. The purposes of the record inspection system were to help monitor by-law compliance and to assist police in the investigation and recovery of stolen property. [page404]

[3] By 2003, there were 33 licensed second-hand goods dealers operating in Oshawa. In order to improve enforcement of the by-law, it was recommended that the City eliminate both the manual recording of information and the need for police officers to attend the second-hand stores to review the records by replacing those procedures with a system of electronic collection and reporting of information by the dealers.

[4] On April 26, 2004, the City replaced the former by-law regulating second-hand shops with By-Law 46-2004, which requires that comprehensive electronic records be maintained and transmitted to police at least daily, and in some cases in real time. The impugned provisions, found in Schedule "A" to the by-law, are as follows.

10. No second hand dealer shall permit the acquisition of a second hand good unless a record respecting the second hand good is created at the time of acquisition that includes the following particulars:

    a. Date and time of acquisition

    . . . . .

    c. The identity of the person from whom the second hand good was acquired including each of the following:

        i. Name;

        ii. Gender;

        iii. Date of birth;

        iv. Residential address;

v. Telephone number; and

vi. Approximate height

d. Personal identification to verify the person's identification . . . in accordance with section 15 . . .

. . . . .

15. For the purposes of paragraph 10(d) . . . a second hand dealer must review an original, current, valid copy of at least three of the following types of personal identification, one of which must include a photograph of the person from whom the second hand good is acquired:

a. Driver's licence issued by a province or territory of Canada including a photograph of the person;

b. Birth certificate issued by a province or territory of Canada;

c. Canadian passport including a photograph of the person;

d. Canadian citizenship card including a photograph of the person;

e. Certificate of Indian Status issued by the government of Canada; [page405]

f. Conditions Release card issued by the government of Canada;

g. Canadian Armed Forces identification card; and

h. "Bring Your Identification" card issued by the Alcohol and Gaming Commission.

. . . . .

20. Each second hand dealer shall transmit to Durham Regional Police Service as soon as is practicable but, in any event, no less frequently than weekly, copies of the records contemplated by sections 10, 12 and 13 of this Schedule.

. . . . .

22. For the purposes of section 21 of this Schedule, the following are the standards that the City Clerk may prescribe for a particular second hand dealer, at any time during the term of the licence and to the City Clerk's satisfaction:

    a. Daily transmission of each record to Durham Regional Police Service, provided, however, that in the event that the second hand dealer is determined by a court of competent jurisdiction to have failed to comply with any provision of this Schedule, the City Clerk may require real time transmission of each such record;

    b. Maintenance of each record in a particular digitized electronic format capable of transmission via the internet within a secure environment including 128-bit encryption;

. . . . .

    f. Payment on a monthly basis in the manner from time to time prescribed by the City Clerk of a fee up to $1.00 for each record required pursuant to section 10 and 12 of this Schedule . . .

[5] The by-law was enacted under s. 150(1) of the Municipal Act, 2001, S.O. 2001, c. 25, which provides that a municipality may license, regulate and govern any business wholly or partly carried on within the municipality. Section 150(2) of the Act provides that a municipality may only exercise its licensing

powers for one or more of three purposes, namely health and safety, nuisance control and consumer protection.

[6] Schedule "B" to the by-law sets out the City's explanation of its reasons for licensing. Although the City makes reference to health and safety and nuisance control, it relies primarily on the consumer protection purpose as follows:

> The City of Oshawa has chosen to licence [sic], regulate and govern owners of second hand goods and salvage yard to enhance and encourage equal, fair and courteous treatment of customers, protect the property of customers, ensure products made available for resale are not stolen, promote accountability, and support proper and good business practices. [page406]
>
> This reason relates to consumer protection as licensing and regulation aim to prevent, mitigate or redress losses to, or practices which might negatively impact on second hand goods and salvage yard owners and members of the public.

[7] The appellant Cash Converters Canada Inc. is the Canadian franchisor or the Cash Converters chain of second-hand stores. The appellant 1151245 is a Cash Converters franchisee and carries on business as a licensed dealer of second-hand goods in the City of Oshawa. The appellants brought an application to quash the provisions of the by-law set out above on the ground that they exceed the statutory and constitutional authority of the municipality. The appellants also argued that the impugned provisions conflict with both federal and provincial privacy legislation and that they are discriminatory insofar as they apply only to some dealers of second-hand goods. Finally, the appellants submitted that the transaction fee is invalid because it exceeds the cost of administering and enforcing the by-law.

[8] The application judge rejected all of the appellants' arguments. He held that the by-law was properly rooted in the province's property and civil rights power and was not in relation to criminal law; that it was authorized under s. 150 of the Municipal Act, 2001; and that it was not discriminatory.

He further held that the by-law did not conflict with federal or provincial privacy laws, and that the challenge to the transaction fee was premature.

[9] On appeal to this court, the appellants maintain that the by-law exceeds the city's legislative competence and violates provincial privacy legislation. The appellants also maintain that the transaction fee is not authorized. The appellants do not appeal the application judge's findings that the by-law was properly grounded in the province's power over property and civil rights and that it was not discriminatory.

[10] The Attorney General intervened in the application in support of the constitutionality of the provisions. As no constitutional issue was raised on appeal, the Attorney General did not intervene before this court. The Information and Privacy Commissioner of Ontario intervened in the appeal as a friend of the court.

Issues

[11] The appellants challenge three conclusions reached by the application judge as the basis for upholding the validity of the by-law and raises them as issues on this appeal: [page407]

(1) Is the by-law authorized under the Municipal Act, 2001?

(2) Does the by-law conflict with s. 28(2) of the Municipal Freedom of Information and Privacy Protection Act, R.S.O. 1990, c. M.56?

(3) Is the transaction fee authorized under the Municipal Act, 2001?

Analysis

(1) Is the by-law authorized under s. 150(2) of the Municipal Act, 2001 as "consumer protection" legislation?

[12] Subsections 150(1) and (2) of the Municipal Act, 2001 provide:

150(1) Subject to the Theatres Act and the Retail Business Holidays Act, a local municipality may license, regulate and govern any business wholly or partly carried on within the municipality even if the business is being carried on from a location outside the municipality.

(2) Except as otherwise provided, a municipality may only exercise its licensing powers under this section, including imposing conditions, for one or more of the following purposes:

1. Health and safety.

2. Nuisance control.

3. Consumer protection.

Although in Schedule "B" to the by-law, titled, "Explanation of Reasons for Licensing", the city relies on all three purposes to support the by-law, on this application, it says that the essential purpose of the by-law is consumer protection.

[13] In her affidavit, the deputy city clerk states that the record-keeping requirements imposed on second-hand dealers by the impugned by-law and its predecessor by-laws are:

. . . integral to its consumer protection objective as they are regulatory in nature and effect and are aimed at the suppression of conditions that may lead to the commission of crimes. Specifically, the identification of the person from whom a second hand dealer acquires a second hand good, the matching of that information to particulars of the second hand good acquired and the collection of the record on behalf of the city are intended to discourage unscrupulous individuals from transacting business with second hand dealers. These measures are intended to protect second hand dealers as purchasers of second hand goods and to also protect the dealers' customers.

[14] The deputy clerk also points to timely and effective assistance to dealers and their customers where the dealer acquires [page408] and resells a stolen good as an ancillary benefit of the record collection function.

[15] She then states that the effectiveness of the record collection function is directly related to the consumer protection objective of the by-law because vendors of second-hand goods "are less likely to be unscrupulous if they know the records are being collected in a timely and effective fashion". She identifies para. 22(a) of the impugned by-law, which is the paragraph that allows the city clerk to require a dealer to transmit the records to the police daily or in some circumstances, in real time, as a provision directly aimed at improving the record collection component of the record-keeping requirements.

[16] In other words, the city justifies the new by-law on the same basis as the one it replaced, as consumer protection legislation that protects dealers and their customers by collecting information about the vendors of second-hand goods. It is the collection of this information that deters those who deal in stolen property from trying to sell such goods to licensed dealers. The new features of the by-law enhance or improve the information collection function and therefore the consumer protection purpose of the by-law.

[17] The appellants' objection to the new licensing conditions is that dealers are now obliged to collect personal, private information about the vendor of the second-hand goods, including a photograph and three pieces of official identification that many people would not ordinarily carry, and to transmit that information electronically to the police at least daily if not in real time. The appellants state that in this way, "the by-law gives the police access to sensitive profiling information on a targeted, partly low-income group of consumers, for unlimited uses including criminal investigation and prosecution, without search warrant protection, judicial supervision or any legal safeguards whatsoever".

[18] The appellant 1151245 Ontario Inc. is the Oshawa franchisee of the Cash Converters group of stores. These stores buy and sell second-hand goods. They are not pawn-brokers nor do they provide pay-day loans. Of the over 28,000 items the Oshawa franchisee purchased in 2003, 30 items valued at approximately $1,200 were seized in connection with police investigations, and the store was not told whether any of these items was later found to be stolen. The city adduced no evidence of any actual problem involving the purchase and sale of stolen goods by second-hand dealers.

[19] The appellants submit that the new by-law is not intended to protect consumers, but rather to assist the police in [page409] investigating and prosecuting crimes related to stolen property. The evidence is that a software dealer called BWI promoted the system described in the by-law for use by the city and the local police. Its system allows the police to collect for their own use the data required by the by-law about each person who sells any second-hand good to a dealer. The fees proposed to be charged for each transmittal are to defray the cost of the system to the city.

[20] The proper approach to the interpretation of municipal powers has recently been discussed by the Supreme Court and followed by this court in such cases as 114957 Canada Lte (Spraytech, Socit d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42; Croplife Canada v. Toronto (City) (2005), 75 O.R. (3d) 357, [2005] O.J. No. 1896 (C.A.), leave to appeal denied [2005] S.C.C.A. No. 329; Toronto Taxi Alliance Inc. v. Toronto (City) (2005), 77 O.R. (3d) 721, [2005] O.J. No. 5460 (C.A.); United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, [2004] S.C.J. No. 19. The question whether a by-law is ultra vires the jurisdiction of the enacting municipality is a question of law which is reviewed on the standard of correctness. However, in determining the question, courts are to take a broad and purposive approach to the construction and interpretation of municipal powers. See United Taxi at para. 6.

[21] It is common ground that under the 2001 version of the Municipal Act pursuant to which this by-law was passed, the

municipality's licensing power can be exercised only for the three purposes set out in s. 150(2). In Toronto Taxi, the application judge [at para. 50] had concluded that the city had not shown that Toronto's new taxi cab licensing by-law was enacted for the purposes of health and safety and consumer protection as asserted by the city and that the real purpose was to "re-engineer the taxi-cab industry in order to eliminate middlemen and to redistribute revenues generated by the industry in favour of active participants". This court disagreed with the narrow approach taken by the application judge. The court reviewed the Task Force Report that led to the enactment of the by-law and concluded that the report provided both a factual basis and a rational connection between the means chosen to overhaul the taxi licensing system and the health and safety and consumer protection objectives of the city. The court acknowledged that these objectives would only be indirect effects of the new system, but deferred to the municipality on the issue of the potential effectiveness of its legislative initiatives. [page410]

[22] In my view, a similar approach should be taken in this case. I agree with the applicants that there is no suggestion that the former licensing by-law was ineffective or that the new and much more onerous provisions regarding the collection and transmittal to the police of personal information about vendors of second-hand goods is a necessary addition to the by-law for the consumer protection purpose. It appears that what drove the adoption of this new licensing by-law was the initiative of the BWI software vendor together with the desire of the police to be able to obtain this information for their database electronically without attending personally at the dealers' premises.

[23] However, the fundamental premise that collection of information about the goods and the vendors may deter unscrupulous vendors from attempting to sell stolen goods can be seen as a form of consumer protection by helping to keep stolen goods out of the marketplace and possibly thereby deterring those who may be inclined to steal goods for that purpose. As this court stated in Toronto Taxi, referring to the Supreme Court of Canada decision in Nanaimo (City) v. Rascal

Trucking Ltd., [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14, "A reviewing court should not second-guess the municipality as to whether the by-law will be more or less effective in achieving the intended purpose or purposes" (para. 46).

[24] Giving "consumer protection" a broad and generous interpretation that allows the municipality to achieve its legitimate interests (see Croplife at para. 37), I am satisfied that the enactment of this by-law fell within the municipality's authority and is not ultra vires. I would therefore not give effect to this ground of appeal.

(2) Does the by-law conflict with s. 28(2) of the Municipal Freedom of Information and Privacy Protection Act?

[25] Under s. 14 of the Municipal Act, 2001, to the extent of any conflict with a provincial or federal Act or regulation, a by-law is "without effect". Section 28(2) of the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA") provides:

> 28(2) No person shall collect personal information on behalf of an institution [which includes a municipality: s. 2] unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

[26] The appellants submit that the provisions of the by-law that mandate the collection of personal information about vendors of goods to licensed second-hand goods dealers and the daily [page411] transmission of that information electronically to the police, conflict with s. 28(2).

[27] The Information and Privacy Commissioner of Ontario intervened on the appeal as friend of the court, for the purposes of providing the court with the history of privacy legislation, the role of the Commissioner under that legislation and the case law and jurisprudence on privacy issues, including the interpretation and application of MFIPPA. In that role, the Commissioner took no position on the specific question to be decided by the court.

[28] The Commissioner has recognized expertise in the interpretation and application of the statutes relating to personal information and the protection of privacy. The Commissioner is given primary responsibility under the privacy statutes (MFIPPA, Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("FIPPA")) for supervising compliance. Most frequently, privacy issues arise by way of a complaint relating to the collection of personal information by or on behalf of a government or institution. In most cases, therefore, it is the Commissioner, not the courts, who determines whether the collection of private information contravenes MFIPPA, and if so, orders the information destroyed. Where collection is authorized under s. 28(2), the Commissioner may still determine whether the information has been properly collected in accordance with other provisions of the Act and make appropriate orders.

[29] The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and of the treatment of that right by the courts. The Supreme Court of Canada has characterized the federal Privacy Act, R.S.C. 1985, c. P-21 as quasi-constitutional because of the critical role that privacy plays in the preservation of a free and democratic society. In Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, [2002] S.C.J. No. 55, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras. 30-31). In Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the Charter, and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66 and 71). And in H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), [2006] 1 S.C.R. 441, [2006] S.C.J. No. 13, [page412] Deschamps J. stated [at para. 26]:

> [I]n a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation.

[30] In Ontario, the Williams Commission Report led to the enactment of FIPPA in 1987 and MFIPPA in 1991. The Williams Commission identified three specific concerns respecting government data banks: (1) where government collects personal information, the individual is unlikely to have an effective choice to refuse to supply the information; (2) because its activity is so broad, government holds very extensive personal information about individuals; (3) there is public anxiety about government agencies sharing their holdings of personal information and building comprehensive personal files on individuals (Public Government for Private People: The Report of the Commission on Freedom of Information and Protection of Individual Privacy/1980, Vol. 3 (Toronto: Queen's Printer, 1980) at pp. 504-05). The commission [at p. 667] concluded that:

> a privacy protection policy intended to preserve informational privacy would therefore attempt to restrict personal data-gathering activity to that which appears to be necessary to meet legitimate social objectives and would attempt to maximize the control that individuals are able to exert over subsequent use and dissemination of information surrendered to institutional records keepers.

[31] This approach underlies the three standards for the collection of personal information that are set out in s. 28(2) of MFIPPA: the collection must be either expressly authorized by statute, used for the purposes of law enforcement, or necessary to the proper administration of a lawfully authorized activity.

[32] In Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, [2005] S.C.J. No. 1, the Supreme Court set out a two-pronged test to determine how to apply the paramountcy doctrine where federal and provincial legislation

overlaps: (1) can a person simultaneously comply with both provisions (the "impossibility of dual compliance" test), and (2) does the provincial provision frustrate Parliament's purpose in enacting the federal provision? In Croplife, supra, this court held that the same two-pronged test should be used to interpret and apply s. 14 of the Municipal Act, 2001 (at para. 63).

[33] Applying that test, the application judge found that the by-law does not conflict with s. 28(2) of MFIPPA. He cited three rationales for his conclusion. He first found that the first prong of the test is met so long as the information is collected on consent. [page413] He also concluded, based on s. 22(e) of Schedule "A" to the by-law, which provides that the City Clerk may prescribe procedures "to ensure compliance with MFIPPA . . .", that the by-law expressly anticipates and provides for compliance with privacy laws. He found that the second prong of the test was met because there was no evidence that the information transmission requirements of the by-law frustrated the legislative purpose of MFIPPA. Finally, he concluded that the collection of personal information by licensed second-hand dealers complies with s. 28(2) on the basis that it is "expressly authorized by statute", because the by-law is authorized by s. 150(2) of the Municipal Act, 2001.

[34] It is conceded on the appeal that the application judge erred in law by finding that s. 28(2) does not apply where the information is collected on consent. Consent is not one of the three conditions set out in s. 28(2) that allow the collection of personal information by or on behalf of a municipality. This was observed by the Commissioner in Investigation I94-068P, Institution: Ministry of Community and Social Services, [1995] O.I.P.C. No. 534. In contrast, where the legislature wishes any aspect of the Act to operate based on consent it has so provided. See, for instance, the provisions regarding disclosure of certain information under s. 10(2), 14(1)(a) and 32(b), the manner of collection under s. 29(1) or the use of certain information under s. 31(a). I also agree with the appellants that contrary to the observation of the application judge, there is evidence in the record that some people who sell second-hand goods require the proceeds to meet their daily

needs and therefore, when faced with the choice of providing the information or not selling the goods, cannot confidently be said to be giving their consent freely.

[35] The application judge also erred in law when he found that the collection of personal information was "expressly authorized by statute" on the basis that the by-law itself was authorized under s. 150(2).

[36] The phrase "expressly authorized by statute" has been interpreted by the Commissioner to mean that the specific types of personal information collected be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. See Investigation I95-030P, Institution: A College of Applied Arts and Technology, [1995] O.I.P.C. No. 546; Investigation I96-057M, Institution: A Board of Education, [1996] O.I.P.C. No. 449, at paras. 17-18.

[37] For example, s. 9 of the Pawnbrokers Act, R.S.O. 1990, c. P.6 specifically obliges a pawnbroker to keep a book with the [page414] full name, address and description of the person who pawns an article sufficient to identify the person as well as details of the person's identification or a note that the person did not produce identification, and s. 13 requires pawnbrokers to make a daily report of the information to the chief of police or the person designated by by-law. There is no similar provision in the Municipal Act, 2001. The structure of the Act indicates that it was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected.

[38] Section 28(2) also allows personal information to be collected on behalf of an institution if the information is "used for the purposes of law enforcement". Of significant concern in this case is the wholesale transmission to the police of a significant amount of personal information about individuals. This transmission occurs before there is any basis to suspect that the goods that were sold to the second-hand dealer were stolen and is made with no limit as to its use by

the police or by those to whom the police may share the information. Although some of the information collected may ultimately be used for law enforcement, the purpose of the by-law and its intent in obliging vendors of second-hand goods to disclose so much personal information and transmitting all of it to the police is for consumer protection and not law enforcement.

[39] The City's main position on the appeal is that the reason the by-law does not conflict with s. 28(2) of the MFIPPA is because it meets the third criterion of the section: the collection of the personal information under the by-law is "necessary to the proper administration of a lawfully authorized activity", that is, the administration of the licensing of second-hand goods dealers.

[40] Again, the jurisprudence developed by the Privacy Commissioner interpreting this provision is both helpful and persuasive of the proper approach to be taken by the courts as well. In cases decided by the Commissioner's office, it has required that in order to meet the necessity condition, the institution must show that each item or class of personal information that is to be collected is necessary to properly administer the lawfully authorized activity. Consequently, where the personal information would merely be helpful to the activity, it is not "necessary" within the meaning of the Act. Similarly, where the purpose can be accomplished another way, the institution is obliged to choose the other route.

[41] The Commissioner's approach in complaints that come before her office is to examine in detail the types of information [page415] being collected and to determine whether each type is necessary for the collecting institution's activity. For example, in Re Toronto Community Housing Corp., [2004] O.I.P.C. No. 196, the Commissioner received a complaint from a tenant that the housing corporation was requiring tenants who wanted parking stickers to provide copies of vehicle insurance and ownership papers which the tenant said was not authorized by the lease. The corporation justified its action because it wanted to address problems of break-ins, vandalism and illegally parked cars. These problems were caused

by tenants who abused the parking system by renting out spaces to non-residents who then gained access to the building and parked in other residents' allocated parking spots. Also people were vandalizing the entry system mechanism, which then required costly repairs.

[42] The Commissioner considered individually the requirements to provide vehicle ownership documentation and vehicle insurance verification. The Commissioner determined that the ownership documents were necessary so that corporation staff could see that cars parked in the garage were owned by the tenants themselves. However, the Commissioner was not satisfied that the corporation needed the insurance information to properly administer the parking program and found that collection of the insurance information was not in compliance with s. 28(2) of the Act.

[43] The same approach is taken by other provincial privacy commissions. For example, in Re Rick Arsenault Enterprises Inc., [2005] A.I.P.C.D. No. 45, the Alberta Information and Privacy Commissioner received a complaint that a Canadian Tire store, a provincially regulated organization under the jurisdiction of the Commissioner, had refused to complete a return of goods without obtaining certain personal information including the driver's licence number of the person returning the goods. As in the case on appeal, the stated purpose of collecting the information was to deter fraud. The evidence was that the store acknowledged that simply authenticating and confirming the identity of the individual returning the goods was sufficient for their purposes. The commission viewed this as a concession that the collection and retention of driver's licence numbers was not necessary for deterring fraud and therefore was not permitted under the Act. See also Re K.E. Gostlin Enterprises Ltd., [2005] B.C.I.P.C.D. No. 18.

[44] The intervenor provided the court with many examples of decisions of the Ontario Commissioner under the necessity criterion where the Commissioner examined each piece or category of personal information being collected by the public institution and [page416] the reason for collecting it, and determined for each whether that collection was necessary in

order to properly administer the activity that the institution was carrying on. If it was not, the institution was prohibited from collecting the information. See for example: Institution: A Public School Board, [1994] O.I.P.C. No. 457; Institution: A College of Applied Arts and Technology, supra; Institution: A Board of Education, supra; Institution: Ministry of Natural Resources, [1994] O.I.P.C. No. 447; Re Sarnia Police Service, [2005] O.I.P.C. No. 28; Institution: Ministry of Housing, [1995] O.I.P.C. No. 315; Institution: A Municipality, [1993] O.I.P.C. No. 381; Re Regional Municipality of Niagara, [2004] O.I.P.C. No. 261.

[45] In my view, this same approach to the interpretation and application of the necessity criterion in s. 28(2) ought to be employed by the court. The Commissioner's approach is both logical and effective in implementing the purposes of the privacy legislation. By using the same approach, the effect is to apply the Act in the same way whether an issue arises by complaint to the commission or in this context, where the court is asked to determine a conflict between, in this case, a by-law and MFIPPA.

[46] Using that approach, the issue is whether the city has satisfied its onus to demonstrate that both the collection of all of the information and identification required by the by-law, as well as the daily transmission of that information to the police for storage in their data bank, is necessary for an effective consumer protection regime to license second-hand dealers that deters people from dealing in stolen goods. Both must be justified because it is clear that the by-law is structured to operate as a co-ordinated scheme that includes both the collection and the daily transmission of all the information to the police for storage in their data bank.

[47] In her affidavit filed on behalf of the city, the Deputy City Clerk deposes that in a 2003 report for the city by its Commissioner of Corporate Services, the Commissioner identified two issues, manual record-keeping and the burden on the police, as reasons to consider electronic-computerized procedures to improve the enforcement of the by-law then in existence.

[48] The Deputy City Clerk states that the collection of identity information from vendors of second-hand goods is aimed at suppressing crime and is intended to discourage unscrupulous people from transacting business with second-hand dealers. If such people know that the records are being collected in a timely and effective fashion, they are less likely to be unscrupulous. [page417]

[49] The effect of this evidence is that the new provisions are intended to improve the old system by modernizing the recording of the information using computers and by making the system easier for the police to administer because they receive the information electronically on a daily basis without travelling to the second-hand stores. However, it is clear that there is no attempt to say that the new provisions are necessary for administering the licensing system or for its effectiveness. In contrast, in Toronto Taxi Alliance Inc. v. Toronto (City), supra, the city had two task force reports that discussed the problem with taxi licenses and how the new by-law would address the problem.

[50] The appellants point out that there is no evidence to suggest that there is a growing problem in the municipality regarding the sale of stolen goods to second-hand dealers. On the contrary, there were only 30 suspected stolen items with a total value of $1,200, out of the 28,000 items dealt with by the Oshawa franchisee in 2003. Nor is there evidence that unscrupulous persons are more deterred by the electronic collection and transmission of personal information than by manual collection and transmission to the police.

[51] The effect of the new by-law is to facilitate the collection and electronic recording of detailed, identifying information about persons, mostly innocent but some unscrupulous, including their photograph and details of three pieces of identification as well as the time of their visit to the store and the nature of the goods offered for sale. This information is then transmitted and stored in a police database and available for use and transmission by the police without any restriction and without any judicial oversight. The intent of MFIPPA is to ensure that the collection and retention of

private information is strictly controlled and justified.

[52] Based on the evidence in this application, the city has not demonstrated that the impugned provisions of the new by-law that mandate the collection and electronic transmission to police of detailed personal information about vendors of second-hand goods, is necessary for an effective consumer protection regime to license second-hand dealers. Given my conclusions that the impugned provisions in the new by-law do not come within the exceptions in s. 28(2) of MFIPPA, I am of the view that the application judge erred in law in his application of the Rothman's test.

[53] In this application, the city effectively took an "all or nothing approach" to the by-law, and did not seek to justify the provisions clause by clause. As a result, I would declare the challenged [page418] sections of Schedule A to the by-law: ss. 10(c), (d), 15, 20, 22(a), and (b) to be "of no effect" under s. 14 of the Municipal Act, 2001.

[54] This conclusion does not preclude the city from enacting a new second-hand goods dealers' licensing by-law with provisions regarding the collection and transmission of some personal information that it may well be able to justify under s. 28(2). I would note that s. 46(a) of MFIPPA allows the Commissioner to "offer comment on the privacy protection implications of proposed programs of institutions". There is much merit, in my view, for a city to make use of this provision to have any proposed new by-law vetted through a detailed examination of each provision and the necessity for it by the Commissioner at first instance, rather than by a court. The Commissioner has both the expertise and the experience in addressing these types of issues and can do so in a more efficient and cost-effective manner than a court.

(3) Is the transaction fee authorized under the Act?

[55] Section 22(f) of the by-law imposes a fee on licensed second-hand goods dealers of up to $1.00 per transaction. The city relies on s. 150(8) of the Act, which allows the city to impose "special conditions" for a business license, and on s.

150(9) that restricts the total fees that can be charged for a license to the "costs directly related to the administration and enforcement of the by-law. . .". The appellants challenge s. 22(f) on the basis that it does not specifically authorize a volumetric fee as required by the Supreme Court of Canada in three cases, Kirkpatrick v. Maple Ridge (District), [1986] 2 S.C.R. 124, [1986] S.C.J. No. 47, 30 D.L.R. (4th) 431; Montral (City) v. Civic Parking Centre Ltd., [1981] 2 S.C.R. 541, [1981] S.C.J. No. 96; Longueil Navigation Co. v. Montral (City) (1888), 15 S.C.R. 566, [1888] S.C.J. No. 28.

[56] The application judge was not referred to these Supreme Court cases and decided the issue based on the application of s. 150(9).

[57] As I would declare of no effect the sections that mandate the transmission of the collected personal information to the police, the transaction fee provision becomes moot on this appeal. Furthermore, if the city were to reintroduce a licensing by-law that does not conflict with s. 28(2) of MFIPPA, it will do so under the new Municipal Act that came into effect on January 1, 2007. Under the new provisions, s. 150(2) of the Act has been repealed and replaced with new licensing powers and s. 150(9) has been repealed and replaced with new provisions [page419] regarding licensing fees. In those circumstances, it is unnecessary to address this issue. [See Note 1 below]

Result

[58] In the result, I would allow the appeal, set aside the order of the application judge and declare ss. 10(c) and (d), 15, 20, 22(a) and (b) of the by-law of no effect with costs of the appeal to the appellants on the partial indemnity scale fixed at $25,000 inclusive of disbursements and GST, and costs of the original application fixed in the amount of $20,000 inclusive of disbursements and GST.

Appeal allowed.

Notes

Note 1: As the amended Municipal Act (in force January 1, 2007) no longer contains s. 150(2), any replacement licensing by-law may also undergo a different analysis regarding compliance with s. 28(2) of MFIPPA in relation to the use of the information for law enforcement purposes.
