Order under Section 16.1 of the Statutory Powers Procedure Act and the Residential Tenancies Act, 2006

Citation: Reinstated Residents v Equity Builders Ltd, 2024 ONLTB 16651 **Date:** 2024-03-06
File Numbers: Schedule A

In the matter of:	Residents 721 Earlscourt Drive Sarnia Ontario N7S1V1	
Concerning:	Equity Builders Ltd.	Landlord
	And	
	Tenants Schedule A	Tenants

INTERIM ORDER 2

Reinstated Tenants (the 'Tenants') applied for an order determining that Equity Builders Ltd, (the 'Landlord'):

- altered the locking system on a door giving entry to the rental unit or residential complex without giving the Tenant replacement keys.
- substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant or by a member of their household.
- harassed, obstructed, coerced, threatened or interfered with the Tenant.

These applications were heard by videoconference over several days of hearing ending October 20, 2023. Following this, the parties provided written submissions.

The Landlord Legal Representatives Timothy Duggan and Natasha Mizzi and the Landlord Tarang shah participated in the hearings.

The Tenant’s Legal Representatives Andrew Bolter and Melissa Bradley and the Tenants participated in the hearings.

Preliminary Issues:

1. The Tenants had requested to amend their applications after the hearings had commenced to include allegations and remedies that the Landlord was withholding a vital service (heat). The request was denied. The hearings were near complete at this point, and it would have unnecessarily delayed the proceedings, whereas the Tenants could file a new application with these allegations.

2. This interim order is intended to set out the findings of the Board following the conclusion of the hearings and on review of all submissions by the parties.

3. This interim order does not address compensation awarded to each of the applicants as those are determined based on individual circumstances. The Board will issue a final order that incorporates by reference this interim order for each application that should be read together.

4. The parties were directed and did provide will say statements for all witnesses. These statements were adopted under oath and the witness cross-examined on the contents. In some cases, the witness authenticated documents referenced in the will say statement.

Prior Orders:

5. The Board issued an interim order on May 8, 2023. (the restoration order) In that order the Board determined that some Tenants had been illegally locked out by their Landlord. The Board ordered the Tenants be put back into possession.

6. On July 17, 2023, the Divisional Court issued its endorsement regarding an appeal of the Board's interim restoration order. The Divisional Court quashed the appeal and directed the parties to the Board to reschedule the hearings.

7. The Board also issued an interim order on May 8, 2023, directing the Landlord to preserve the tenancies and property of the Tenant's. (the preservation order) In that order the Board was not satisfied that the Tenant's were locked out illegally by the Landlord.

8. On July 20, 2023, the parties appeared before the Board, where oral directions were provided to confirm dates for disclosure and hearings.

Determinations:

Illegal Lockout

9. The Board issued an Interim Order dated May 8, 2023, that determined that the Landlord had illegally locked out the Tenants.

10. The Landlord was represented by an Agent Jane Seale that made oral submissions to justify the illegal lockout. The Landlord advanced these same reasons for the lockout during the subsequent hearings.

11. I am satisfied that the Tenants have proven on a balance of probabilities that the Landlord unlawfully locked out the Tenants. The Landlord denied the Tenants rights to return to their rental units once the City of Sarnia had declared it safe to do so.

12. The Landlord submitted that the May 8, 2023 Interim Order was did not constitute a final disposition with respect to any of the matters set out therein per paragraph 22 of the July 17, 2023 Divisional Court Order.

> [22] I am satisfied that the Order is an interlocutory order, in name and in effect. **It did not finally dispose of the issues between the parties.** This finding is borne out by the extensive scheduling directive issued by the Board with respect to the full-day hearing scheduled for July 20, 2023. The Board envisioned the parties calling witnesses including expert witnesses; exchanging will-say statements and providing full disclosure. The Order addressed the narrow issue of the legality of the Landlord locking-out the Tenants from their residential units. Nothing more, nothing less. **The Board did not determine whether it was safe to return to their residential units. Rather, the Board determined only whether the Tenants were lawfully entitled to return to their residential units.** (emphasis added)

13. I agree, the primary purpose of the May 5, 2023, hearing was first and foremost to determine of the Tenants had been illegally locket out and if the Board should order their restoration. This was set out in Board direction issued April 13, 2023, when the Board directed an expedited hearing to consider this issue. No other issues were dealt with at that hearing, rather the Board directed disclosure and set a date to return to continue the proceedings.

> 4. The initial and primary focus of the expedited hearing shall be on the T2 application allegation that the Tenant has been illegally locked out.
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> 5. The remaining issues raised in the applications may be addressed at the hearing at the discretion of the Presiding Member if adequate disclosure has been provided and time permits.

14. The Court at paragraph 21, concurred and adopted the findings of the Divisional court in *Delic* v. *Entietti-Zoppo*, 2022 ONSC 1627 with respect to whether an interlocutory order of the Board may be appealed, at paragraphs 9 - 12 the court writes:

> [9] The stay pending appeal from the order of a statutory decision-maker provided by s. 25 of the Statutory Powers Procedure Act did not apply because the notice of appeal of April 23, 2021 was a nullity. The Residential Tenancies Act, 2006 does not give a right of appeal from an interlocutory order.

> [10] The Act provides:
>
> 210 (1) Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.
>
> [11] Jurisprudence in this court with respect to similar provisions for statutory appeals from other tribunals has consistently held that in the absence of an explicit right of appeal from an interlocutory decision, only a final order of a tribunal can be appealed. [citations omitted] Tribunals and boards are designed to provide expeditious access to justice. That intention is evidenced in section 2 of the Statutory Powers Procedure Act and, with respect to the Landlord and Tenant Board in particular, in section 183 of the Residential Tenancies Act, 2006, which provides:
>
> 183 The Board shall adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter.
>
> [12] It cannot be the legislature's intention at the same time to put tribunal proceedings on hold every time an interlocutory decision is made. Section 210 does not confer a right of appeal from an interlocutory order.

15. The Court found that the Landlord had no right to appeal the order, and therefore quashed the order. In addition, in *Ainsley* v. *Proulx*, 2023 ONSC 6308, the Divisional Court confirms that where the Board directs a matter to a review hearing, and no final order on that review has been issued, that there is no right of appeal, and the Divisional Court has no jurisdiction to hear an appeal of an interlocutory order:

16. The Landlord did not pursue a review of the May 8, 2023 Interim Order. The Board's Rules of Procedures at Rule 26.1 provides that a party may request a review of any order which makes a final determination of a party's rights.

> Any party may request review of any order which makes a final determination of the party's rights. For these purposes **an interim order may contain a final determination of rights**. A person who is directly affected by a final order may also request a review of an order. (emphasis added)

17. The Board's Interpretation Guideline 8, entitled review of an Order states that only final orders may be reviewed, or an interim order that makes a final decision about a party's rights.

> Requests for review must be about a final order **or an interim order which makes a final decision about a party's rights.** See *TSL-60151-15-IN-RV (Re),* 2015 CanLII 25679 (ON LTB). For example, an interim order terminating a tenancy is a final decision about a party's rights. (emphasis added)

18. In my view it was not for the Board to determine if it was safe for the Tenants to return to their units in these applications. That finding had been made by the City of Sarnia, and the parties confirmed that the City of Sarnia order had not been appealed. The Board is entitled to rely on that order.

19. In my view the determination in the May 8, 2023 interim order did make a final determination about the Tenants' rights to return to their units, including enforcement provisions. The Tenants' eventually through Sheriff enforcement were restored back into their units. Throughout the subsequent hearings, the Landlord introduced evidence to adduce that the units were unfit for habitation. However, since the City of Sarnia had determined that the Tenants could return and that it was safe to do so, it would not be appropriate for the Board to make a different finding. That would be an abuse of process as a collateral attack on a lawful order that had not been appealed.

20. The City of Sarnia order was issued pursuant to subsection 15.9 (4) of the *Building Code Act,* 1991. That order also explains the authority respecting occupancy.

> **Order Respecting Occupancy** - If an order of an inspector under subsection (3) is not complied with within the time specified in it. or where no time is specified, within a reasonable time, the chief building official may by order prohibit the use or occupancy of the building; and may cause the building to be renovated, repaired or demolished to remove the unsafe condition or take such other action as he or she considers necessary for the protection of the public. ss. 15.9 (6)

21. It was therefore within the power and authority of the City of Sarnia's Chief Building Official to determine the existence of unsafe conditions and to take such action for the protection of the public.

22. As a result, I am satisfied that the Landlord did not have lawful authority to lock out the affected tenants.

Restoration

23. It was uncontested that the Court Enforcement Office (the 'Sheriff') was required to enforce the order of the Board to restore possession once the Landlord's appeal had been resolved by the Divisional Court. Melissa Bradley was present when this occurred as she had exchanged emails with the Landlord regarding keys.

24. The Sheriff restored possession to the Tenants on July 27, 2023.

25. The Tenants in unit 110 were restored possession by the Sheriff, however the Sheriff restoration notice indicates that unit 110 had been boarded up, and that once they gained access the unit was found to be full of water, mosquitoes, and stench such that it was not fit for habitation.

26. It was undisputed that the Tenants had attempted to secure keys from the Landlord, and failing which they would provide keys to the Landlord Agent as directed by the Landlord.

27. It was undisputed that the Landlord did not provide keys to the Tenants, necessitating that they retained a locksmith to change the locks under the supervision of the Sheriff.

28. It was undisputed that the Landlord immediately changed the locks to these rental units without an order of the Board. It was undisputed that the Tenants were subsequently provided keys from the Landlord.

29. It was undisputed that although the Tenants had been restored possession, Canada Post did not restart mail delivery for these Tenants until some time in October 2023. The mailboxes were located inside building B, the affected part of the residential complex. It was also uncontested that the City of Sarnia order did not make references to access to the building B mailboxes.

Preservation

30. At the conclusion of the hearings, it was uncontested that the Tenants subject to the preservation order had not been returned into possession of their rental units. These included all rental units on the second floor, as well as units 108, 306, 308, and 310.

31. It was uncontested that the Landlord had yet to commence repairs in the affected units. The Landlord had remediated all but 3 of the units. (in effect gutted to prepare for reconstruction).

32. The Landlord was not able to provide any estimate of when the reconstruction of the units would be complete for them to occupy the units.

Tenant Witness Adam MacDonald

33. Adam MacDonald is the Chief Building Inspector for the City of Sarnia. He testified that the Chief Building Inspector is appointed by City Council. He has been in this position since at least 2020. He holds requisite qualifications as a Certified Property Standards Officer and has completed the Ministry of Housing and Municipal Affairs ministry exam specific to Legal, Powers and Duties of a Chief Building Officer.

34. The testimony was considered in his official capacity where he issued the orders relevant to these proceedings and not as an expert witness. I was satisfied that Adam MacDonald

has special knowledge gained through training and experience regarding the orders he issued.

35. I would also note that section 15 of the *Statutory Powers Procedures Act* confers broad powers on the Board to admit evidence that is relevant to the subject matter of this application.

36. The parties were free to make submissions as to the weight I should afford his special knowledge, training, experience, and any opinions he might make in the course of his testimony. In my view because he issued the orders and was not retained by any of the parties, that Adam MacDonald need not be certified as an expert. Although his testimony could be akin to a participatory expertise or fact witness, it was based on his participation and decisions in his official capacity.

37. Adam MacDonald had provided an affidavit that was admitted into evidence at the May 5, 2023, hearing.

38. Adam MacDonald issued the "Order to Remedy Unsafe Building" (the 'Order') following his inspection of building B, on February 21, 2023. That Order required the owner to restrict access to building B.

39. The Order was updated on February 27, 2023, after the City of Sarnia received a report from a Professional Structural Engineer. The amendment restricted access to the entire second floor, as well as units 108, 306, 308 and 310. The Order provided that access to the remainder of building B was permitted.

40. The Order also directed the owner to obtain all necessary permits and undertake the repairs to make the structure safe. He testified that a single request for a permit had been received on or about September 6, 2023.

41. Adam MacDonald also testified that the owner and his agents, including his insurance provider had been in regular contact with him seeking amendments to the Order to restrict access to building B. He testified that he had reviewed the various documents and reports they submitted to him and that he determined that there was no requirement to amend the Order.

42. On cross-examination Adam MacDonald testified that if there was asbestos remediation and air quality issues, these would be out of scope for his order and permits. The owners would be expected to go through the Ministry of Labour.

43. He also confirmed that not all the work required to remediate the damages caused by the fire might require a building permit. He also confirmed that no stop work order had been issued for any work that required a permit, or otherwise.

44. I accepted this testimony and have taken this into consideration in weighing the evidence and testimony he proffered. Adam MacDonald did not stray from his described official duties and did not offer opinions if the air quality and asbestos should have required that the Tenants be excluded from accessing their rental units. He deferred to the Ministry of Labour on those issues. The recommendations on these issues were that any asbestos remediation should be undertaken in accordance with the Ministry of Labour authority.

Tenant Witness John Milne

45. John Milne is a fire inspection officer. His duties include conducting inspections, investigating fires, and planning reviews of building permits. He confirmed that he addresses fire code issues and the fire prevent act, and that he is not otherwise a professional with other acts such as the building code.

46. John Milne testified about the fire investigation report and the extent of fire related damages caused by the fire, smoke, or water damage from combatting the fire the originated on the second floor.

47. He testified that the fire service did air quality testing prior to releasing the scene back to the owners. He confirmed via email dated February 28, 2023, that they “use a 4-gas monitor which has four sensors: Carbon monoxide, lower explosive limit(methane), oxygen and hydrogen cyanide. The air monitoring was "clear" meaning zero CO, zero HCN, and zero LEL. Oxygen levels were normal.”

48. He confirmed on cross-examination that they do not do air quality testing for asbestos and mould.

49. He also confirmed that as part of his fire inspection he entered unit 208, where the fire originated, and unit 308 directly above; and that he did not go into any other units or building A.

50. Finally, he confirmed the conclusion in the investigation report that “fire investigation was able to conclude that the most plausible ignition source was autoignition of cooking oils and the subsequent fire caused from unattended cooking. As a result, this fire is classified as ACCIDENTAL in nature.”

51. John Milne issued an Inspection Order to the owners following his inspection of building B on February 21, 2023. This Inspection Order was amended on March 21, 2023.

52. He testified that all but one of the required items listed in the order at the time of his testimony in October 2023 had been rectified.

53. John Milne testified that he was not aware if the owners had appealed his orders and did not believe they had as he had not been contacted about an appeal.

Unit 110

54. The Tenant in unit 110 Danielle Waddilove testified regarding the state of his rental unit during his visits and after the Sheriff restored possession.

55. Danielle Waddilove testified that he had been permitted in his unit in April 2023, that he was given 30 minutes to retrieve possessions. He stated that at that time he took videos of the condition of the unit to show that there was nothing wrong with the unit.

56. Danielle Waddilove testified that on July 27, 2023, that the Sheriff advised that he could not return possession because the unit was unfit for habitation, that it had been boarded up, was flooded and festering.

Unit 114

57. The Tenant in unit 114 Kimberly Comeau testified regarding a break-in that occurred in her unit.

58. Kimberly Comeau testified that she had been contacted by the Landlord's Agent Joanne Smout on June 27, 2023 to advise that her rental unit had been broken into. She stated that she was permitted to visit the unit to determine what had been stolen.

Landlord Witness Victoria Rochon

59. Victoria Rochon is a chemical engineer employed by ROAR Engineering ('ROAR'). She has been employed by Roar for approximately 8.5 years as of the time she testified.

60. Victoria Rochon testified that ROAR had been retained by Co-operators General Insurance Company ('Co-operators') to provide engineering services in relation to the fire at building B.

61. Victoria Rochon testified that ROAR had provided the structural report to the City of Sarnia on February 24, 2023, setting out their recommendations. However, she only provided the cover letter of the report and not the actual report referenced.

62. Victoria Rochon testified that that she could not recall if the report refers to asbestos.

63. Victoria Rochon testified that the containment, removal, and disposal of materials that contain asbestos should be done in an unoccupied area, using the requisite personal protective equipment ('PPE'); and that the affected areas (such as individual units) could be isolated from the rest of the building while remediation and removal of materials that contained asbestos.

64. Victoria Rochon testified regarding the ROAR letter to Co-operators dated March 2, 2023. The conclusions were said to be limited to areas of material disturbance, for lead and asbestos, and some items were identified as precautions during remediation, including an asbestos management plan.

65. Victoria Rochon testified that at the time of the letter, she (ROAR) concluded that the building was not fit for occupation.

66. Victoria Rochon testified regarding a letter dated March 15, 2023, sent to Co-operators, that they had recommended “building wide” restrictions; that access should be limited to properly trained workers.

67. The Board accepted the report set out in the March 15, 2023 letter and notes the various tests attached. These tests were not undertaken by ROAR and EMSL the company that undertook the tests was not called to explain the results and to be cross-examined on them.

68. Victoria Rochon testified that ROAR had been asked by Co-operators to provide letters to the Landlord. The letters dated April 25, 2023, May 12, 2023 and July 25, 2023 were reviewed. She testified that her conclusions from these letters is that contamination was confirmed; that the building should remain unoccupied; and that workers should be properly trained.

69. Victoria Rochon testified that the July 25, 2023 letter was only intended to provide commentary to the Landlord and that these are not recommendations.

70. Victoria Rochon testified that ROAR had made recommendations to Co-operators and the Landlord that the Tenants should retain their own independent qualified remediation contractor to assess their contents for salvageability and clean salvageable contents. She stated that it was important for the Tenants to be made aware of this because it was outside the scope of work for the insurance coverage provided by Co-operators. She testified that ROAR had not contact with the tenants, that it should be up to the Landlord to relay this information to them.

71. I have considered the Testimony of Victoria Rochon. In terms of the issues surrounding the illegal lockout I found it to be contradictory and devoid of any legal authority to support recommendations that building B remain unoccupied. It is my view that ROAR, in reliance of their expertise, preferred the building to be un-occupied during remediation, even though they acknowledged that the affected units could be isolated for the work to be undertaken.

72. The March 2, 2023 letter at page 6 states “Until the remediation is completed, access to the building must be restricted.” This comment is made in relation to removal of materials containing asbestos. The March 15, 2023 letter at the top of page 5 states “Roar Engineering recommends that access to Building B be restricted to properly trained workers until the above-noted are addressed. Personnel entering the building must wear

appropriate personal protective equipment (PPE). to properly trained workers." The language used appears to be softened from "must be" to simply "recommends".

73. The evidence in the reports is limited to discussions of PPE requirements for properly trained workers. There is no discussion of the Tenants who should be residing in the building. This is important because the scope of work was limited to units 106, 108, 110, 206, 208, 210, 306, 308 and 310 and the common hallways/stairwells of building B. If none of the remaining units were inspected, and remained outside the scope of the retainer, in my view there should have been consideration of their lawful right to occupy their units. If the affected units could be isolated while the remediation work is undertaken, then there does not appear to be a lawful reason to deny them access to their rental units. There was an awareness that the Tenant's ought to be advised on the contamination, however ROAR indicated it was not their responsibility.

74. In reviewing the various reports and letters and the testimony of Victoria Rochon, it would appear that the asbestos was pre-existing in the building, that older buildings commonly have materials containing asbestos. In this case, it would appear that the asbestos is contained in the drywall joint compound, grout and tiles. The March 15, 2023 letter reports on random samples collected throughout building B, including most units, "Asbestos Air Sampling" results show "0% asbestos fibres except for unit 108 but that it was below the clearance threshold. The "Asbestos Surface Sampling" reported negative results except for unis 108 and 308 and common stairwells which was "attributed to cross-contamination from personnel travelling in and out of affected arears." A plain reading of these results suggests that there was no asbestos fibres in the air, such that I infer that air quality was not a valid reason to exclude tenants.

75. Therefore, providing that the contractor isolated the units undergoing remediation, and used qualified and properly trained workers (who could avoid/prevent cross-contamination) then in my view based on this witness, there is no lawful reason to exclude the Tenants from their units. It appeared to be more a matter of convenience for the contractor, since there was no statutory authority to exclude them, no stop work orders, and no other permits required to proceed with the work or other order to exclude the residents.

Landlord Witness Phillip Scott

76. Phillip Scott is a Senior Property Koss Specialist employed by Belfor Property Restoration ('Belfor'). He specializes in large loss with the Belfor National Team. He has been employed by Belfor for 28 years.

77. Phillip Scott testified that Belfor had been retained by the Landlord, Equity Builders Ltd.

78. He testified that on March 2, 2023 at a site meeting between the Landlord, ROAR, Cooperators and Belfor that it was decided that access to the building should be restricted.

79. Philip Scott testified that the asbestos abatement and demolition work was estimated to take up to 12 weeks and reinstatement of the fire alarm system would take 3-6 weeks to

complete; and that in general the work proceeded on schedule with a few delays due to access and other issues because the building had been opened up to tenants.

80. He testified that once the tenants occupied their units, that Belfor workers had to construct scaffolding to access upper levels because workers could not use those corridors per the fire code and the labour code. He stated that it is not common for tenants to return where remediation is required, but that if they return Belfor would be notified and would make concessions to reconfigure the work site.

81. Phillip Scott testified was asked if Belfor had authority to lock out the Tenants. He replied that it would depend on safety, if there are hazards then he should not allow them in and block tenants access.

82. Phillip Scott testified that they could put in place protocols to protect both tenants and workers. This involved using a plastic barrier to isolate the work site. However, he stated that the plastic barrier would not enough because people are curious and will walk in the work site and therefore, they would need additional protocols. He also stated that this would add more time and costs to the project.

83. As of October 10, 2023 there were 3 remaining units to be remediated because the Tenants had not removed their contents, plus the second floor corridor remediation to be completed.

84. Philip Scott testified that the other 6 units had not been repaired because Co-operators did not have a scope of work to put out to tender.

85. Philip Scott testified that he does not like to apply for permits, that he leaves that to the engineers to apply as required. As such he had no knowledge of when ROAR had applied for permits or for what work.

86. Philip Scott testified that it was ROAR that had consulted with or retained the services of an industrialist hygienist to address the asbestos remediation concerns.

87. I did not find this witness testimony to be particularly useful in assessing if there was lawful authority to lock out the tenants. He proffered that it was not normal to have tenants present, that it would mean the remediation takes longer and is more costly. It appears that their recommendations to the Landlord that access should be restricted was for their own convenience because people are curios and “walk through plastic barriers”, and not because of any order or lawful authority. He did confirm that the work could be done with Tenants present.

88. I did not find his testimony regarding the timelines to be credible. The Tenants were locked out until July 27, 2023. That is more or less 16 plus weeks since the fire. Yet as of October 10, 2023 there was still much work to be done, before the remaining affected Tenants could be permitted back into their units, and still 3 rental units that had not had any

remediation work undertaken. There did not appear to be any concern over the lengthy delays and no reasonable explanation other than to suggest it was the tenant's fault.

Landlord Witness Blaine Harvey

89. Blaine Harvey is a claims adjustor employed by Co-operators. Co-operators provides the insurance policy for the residential complex.

90. Blaine Harvey confirmed that Co-operators had retained ROAR and that the Landlord had previously retained Belfor.

91. He testified that he had submitted to the City of Sarnia the air quality reports he received from ROAR and had asked if the City of Sarnia would be updating their Order. The City of Sarnia confirmed that they would not be amending the Order.

92. Blaine Harvey testified regarding what would be required for tenants on level 2 to be able to access their units. This was done with the City of Sarnia because Co-operators believed that the City of Sarnia should amend/rescind their order to remove restricted access by these Tenants once the work was completed.

93. Blaine Harvey testified that Co-operators had retained PAIRO QUANTIFY around March 17, 2023, to prepare a scope of work for the reconstruction of the affected units. He stated that this was not complete because 3 units had not been remediated. He stated that Cooperators intended that there be a single bid package based on a final scope of work. He stated that for the 3 remaining units, the insurance policy did not cover tenant contents, and that he did not know if the Landlord could on his own remove them.

94. Blaine Harvey stated that Co-operators had only recommended restricted access, that it was not their decision to restrict access.

95. Blaine Harvey stated that the Landlord has been and will continue to be compensated for lost rent revenue for the locked-out tenants until the Order is rescinded and the Tenants allowed back into rental units. He stated that for those locked out tenants Co-operators stopped paying for that loss of revenue once those tenants were restored possession. That they had paid for loss of revenue while the Landlord had locked out the tenants.

96. I found this witness to be credible even if unable to explain some of the coverage and the delays in Co-operators proceeding with the reconstruction. Co-operators appeared not to be concerned with paying out a loss of revenue claim even though most of this was attributable solely to the actions of the Landlord to lockout tenants.

97. It is my view that the parties were at an impasse over the 3 remaining units about removal of the tenants' contents so that remediation could be undertaken, and a scope of work completed. No one appears willing to find a resolution and preferred to leave it to the affected Tenants. This meant that the repairs were not advancing in a timely manner so

that the tenants subject to the preservation order could return sooner than later. Certainly, there is no incentive on the Landlord if they are being compensated for loss of rental revenue.

Landlord Witness Ash Singh

98. Ash Singh is the principal of the Landlord, Equity Builders Ltd.

99. Ash Singh testified that he was making decisions based on the recommendations he received from Belfor, ROAR and Co-operators that it was unsafe for the tenants to occupy building B. He reiterated that he was concerned about the safety of the tenants.

100. Ash Singh testified that he felt there was no real leadership from anyone regarding tenant access. In an email exchange with the City of Sarnia on this issue, the City of Sarnia, on April 5, 2023 restated

> "The remaining units and areas of the building do not meet the definition of Unsafe and have not lost Occupancy. Our department is not restricting access to the remainder of the building and no occupancy inspection is required for the remainder of the building. This messaging has remained consistent throughout our correspondence, please keep us updated on submissions related to obtaining a building permit for the repairs within the specific areas above."

101. Ash Singh stated that as a Landlord he was not in a position to contradict the engineers or the insurance company, that that was not an option.

102. Ash Singh testified regarding security arrangements for the complex in an email exchange with Co-operators. As of March 10, 2023, they had agreed that they would share the costs on a 50/50 basis for 2 security personnel to be on site. He testified that they had to retain security because Tenants had been breaking into the building. I note that there was no indication how long security were retained to be onsite, or if they were intended to be present 24/7.

103. Ash Singh testified that on direction from Balfour and Co-operators the Landlord served N13 notices on tenants for units 310, 110 and 106 because these units needed to be gutted and rebuilt. He stated that the Landlord could not go into the units, cannot take or touch, and did not want to be responsible for the contents, it would cause too many problems. He stated that the Tenants have not agreed to move. He testified that in his 10 years as a Landlord that this was the first time, they had used an N13 notice. He confirmed that he understood that these tenants were entitled to compensation and had a right to return to the units.

104. Ash Singh on cross-examination stated that they would not assist tenants to have belongings removed because they had suffered hard costs that were not their fault and that each party has to take responsibility for their own situation.

105. Ash Singh testified that an unsigned letter dated February 22, 2023, addressed to the occupants of building B was intended to be an offer to vacate. He stated that some signed and rescinded N11 notices and that the Landlord permitted this.

106. Ash Singh testified that they have their own lease agreements that set out a requirement for tenants to have tenant insurance. In an email exchange on March 15, 2023, there is a discussion about denying tenants access to their units without proof of insurance. "We are still awaiting the air testing results but can assure you tenants won't be moving back in without proof of the adequate insurance as per their lease agreement." Ash Singh stated that the lease required insurance and they had asked for copies several times. He stated that he did not attempt to terminate the tenancies because it was the last thing the Board would deal with and it would take 8 months to get a hearing, which was not a practical solution.

107. Ash Singh testified regarding a letter dated March 31, 2023, that he could not say what it means because he did not write it. He had been asked to explain what the Landlord meant in the letter where it states:

> "As landlord we want to act reasonably, but we **will NOT take greater liability to allow entry without valid tenant insurance** which forms part of your executed lease. Should you not have insurance or get insurance you will be in breach of your lease obligations and the **landlord will fight hard** to have you evicted." (emphasis added to show focus of the question on crossexamination)

108. Ash Singh stated on cross-examination that the wording is probably not good; and that they have not taken action to evict tenants for not having insurance coverage.

109. Ash Singh stated that he did not understand why some tenants were having problems adding the Landlord as a beneficiary in the tenant insurance policies. He stated that prior to this fire, as a Landlord he did not care about tenant insurance that he did not understand this stuff.

110. Ash Singh was asked about the insurance clause in their standard lease to define what "adequate" means. He stated that he did not know because that this clause comes from a lawyer, with legal terminology. He further stated that he now understands that in the insurance industry a standard tenant insurance policy would include 1-million-dollar liability clause. Finally, he stated that they have not revised their lease agreements language regarding tenant insurance since this fire.

111. I did not find that the Testimony was particularly determinative on the main issues of the illegal lockout. Although he acknowledged that he was ultimately the one making the decisions, throughout his will statement he confirms that he had received

"recommendations" to restrict access, and in cross-examination stated that he was not in a position to contradict their recommendations. There was no evidence that the Landlord and their contractors and advisors had given much thought to the Tenants lawful rights to return. The contractors and advisers focused on using "qualified and properly trained workers" and the balance of convenience to them to restrict access so they could undertake the remediation and repairs.

112. Finally, Ash Singh testified that he runs a "mom and pop" business as a Landlord, and that he had "learned a lot from this experience". I find these extraordinary statements to lack credibility. The Landlord had been before the board under similar circumstances in CET10108-11. In that matter, the Board found that this Landlord had locked out the Tenants after a fire in their rental unit without lawful authority. This decision was upheld on appeal to the Divisional Court and the Court of Appeal.

113. The Landlord submitted that the Board's reliance on this decision would be improper because it was not put to the Landlord, and that it has no probative value. I disagree, in accordance with *Lerose* v. *Princess Apartments,* 2022 ONSC 7 (Div Ct.) at paras 23-24 the Board has the power to take judicial notice of past proceedings. In that case it was between the same parties, in this instance it goes to the credibility of the witness. It shows that on this point the Landlord lacked credibility because he had previously unlawfully locked out tenants after a fire.

114. As a Landlord he refused to accept responsibility for the communications to Tenants, how cumulatively these might be perceived or how they might impact the Tenants. In my view as a principle not knowing what his company was saying to tenants affected by this fire is more akin to wilful blindness or negligence.

Conclusion

115. I am satisfied that the Landlord has not been able to demonstrate on a balance of probabilities that there was lawful authority to deny access of the tenants to return to their units.

116. the Landlord submitted that the Landlord had acted in good faith. I disagree, it was, did the Landlord have lawful authority to restrict access. The Landlord also submitted that it was reasonable to have done so having regard to the real substance of the totality of the circumstances. I disagree, as noted above the determination that it was safe for the Tenants to return was made by the City of Sarnia, and that Order had not been appealed. It was not for the Board to make a finding that it was unsafe, as that would amount to a collateral attack on the City of Sarnia Order.

117. I am satisfied that the Landlord continues to have lawful authority to restrict access for those units affected by the Order. I am, however, not satisfied that the Landlord is acting

in a reasonable manner to ensure that the remediation and repairs are progressing in a timely manner so that the remaining tenants may return to their units.

118. The Landlord submits that they had a reasonable basis for restricting access. I disagree. Ash Singh was not able to show what legal authority there was to restrict access to the units where the City of Sarnia had indicated that it was safe for them to return. If as suggested that there are air quality issues, or the presence of asbestos made it unsafe, in my view there should be some legal authority for a Landlord to turn to, if they intend to deliberately deny tenants their right to occupy their rental units. It appears that the Landlord made no efforts to make inquiries on this issue, and simply bowed to the advice and recommendations from his own contractors and insurance provider. Other options to lawfully restrict access was not raised in the hearing, and so I make no determinations of what if any other options there might or could have been. Suffice to say it does not appear that any other legal authorities were contemplated.

119. Following the Board order of May 8, 2023, and the Divisional Court decision of July 17, 2023, the Landlord's ongoing refusal to voluntarily permit Tenants' to return compelled them to bring in the Sheriff to change the locks to enforce the restoration orders.

120. The Landlord submitted that the Tenants did not adduce any evidence to contradict the Landlord's evidence that the units were unsafe to return. I do not accept this submission. The burden to establish lawful authority to lock out the tenants' rests solely with the Landlord. I would also disagree, because the Tenants led evidence from the Sarnia Fire Department that they had done air quality testing and found it safe before the site was returned to the Landlord.

121. The contractors confirmed that they could have sealed off the affected units and areas and could have worked around tenants if they were present. They stated that they did not believe their own safety protocols on a construction site were adequate to keep people out. If true, this suggests that something beyond plastic barriers should have been adopted if that was a legitimate concern.

122. The contractors stated that there were delays, which in part, they attributed to the tenants. However, they did not explain why if the repairs would take 12 weeks that by the time the tenants enforced their rights some 16 weeks later, that they were scrambling to complete some work, such as the air biosweep that was done in the days and hours before the tenants returned. If air quality was such as issue, in my view, the air biosweep to remove any lingering smoke odours and contaminants ought to have been done at the outset of remediation to protect the qualified workers in the building.

123. There was contradictory evidence regarding air quality. The Sarnia Department declared it safe, the air quality testing indicated no presence of asbestos, and yet the Landlord insisted throughout that the air quality was unsafe with regards to asbestos fiber migration. I preferred the testimony of John Milne from the Sarnia Fire Department. The fire department determined that air was safe before the building was turned over to the

Landlord. This was not contested at the hearing. The Landlord's own evidence also indicated no presence of asbestos fibres in the air quality testing they undertook.

124. By way of a Landlord prepared document entitled "Tenant Access" provided to Tenants on or about April 10, 2023, the document indicates at that time that the earliest opportunity for occupancy of units that do not require full renovations by the fire is estimated to be 6-8 weeks. That would have been end of June early July 2023. By contrast a second document entitled "Tenant Access" dated April 19, 2023, states that for units that require full renovations the earliest occupancy will be 4-6 months. By the time of the final hearings in September and October 2023 those units that required full restoration had not yet been completed and there was no timeline for completion.

125. By the time of the hearings in October 2023, work was still ongoing to obtain final certification for critical items affecting a working early warning systems (i.e., fire alarms) and a Fire Alarm Verification report received and approved. In my view the contractors had complete control over building B for 16 + weeks and were unable to complete the work in a timely manner and did not provide a reasonable explanation for their delays. A few days allocated for Tenants to retrieve possessions does not explain this lengthy and substantial delay.

126. The Landlord and Co-operators in my view were dragging out the reconstruction efforts. Co-operators had hired a contractor to prepare a scope of work in March 2023, and by October 2023 that was still incomplete, meaning they would not tender the reconstruction work. Neither appeared to take steps to resolve the issue over the contents of units 310, 110 and 106 so that work could progress in a timely manner. In my view they sat on their hands and preferred to blame the Tenants for the delays. At the same time, the Landlord made in difficult if not near impossible for Tenants to access units. They restricted how much time the tenants could retrieve possessions, imposed arbitrary conditions for access such as providing proof of insurance. Issues with unit 110, is more concerning, since that unit was not subject to the Order restricting access. That unit became uninhabitable while in the care and control of the Landlord, and the Landlord apparent refusal to do anything about is in my view inexcusable.

127. In my view the issues with unit 110 were not adequately addressed in the hearings by the Landlord and their witness to explain why this unit was rendered unfit for habitation when it was not the subject of the amended Order. It was uncontested by the witnesses that this unit needs a complete restoration. If the Landlord was providing security to the building; there was no explanation for what happened between end April 2023, when the Tenant visited the unit, fount it undamaged, and July 27, 2023, when it was deemed uninhabitable. I would also note that although Co-operators stated the insurance coverage did not include Tenant contents, there was no discussion if it included coverage for the Landlord's actions that caused the damages; in other words was the Landlord liable to reimburse the Tenant for the Tenants losses and insured for that.

Interference with Reasonable Enjoyment & Harassment, Coercion and Threats

128. The Tenants alleged that the Landlord harassed, coerced and threatened them such that it interfered with their reasonable enjoyment of their use of their units. Specifically:

    a. That the notices, letters and demands of the Landlord for proof of insurance, amount to harassment, coercion and threats, and

    b. That denial of access was arbitrary and in itself constitutes substantial interference.

129. I have considered the testimony and the will say statements of all of the witnesses in my deliberations. I am summarizing the key reasons that support my deliberations.

130. I am satisfied on a balance of probabilities that the Landlord / Landlord's Agent / Superintendent substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by members of their household. I also find on a balance of probabilities that the Landlord / Landlord's Agent / Superintendent obstructed, coerced, threatened or interfered with the Tenants.

131. For those tenants whom there was no reason to restrict their return to their rental units, the denial of access until the Tenants enforced their rights of return with the aid of the Sheriff on its own demonstrates on a balance of probabilities that the Landlord interfered with their reasonable enjoyment of their units. There was also in my view no reason for the Landlord to force the Tenants to have the Sheriff change the locks, the Landlord continued to refuse entry and when Sheriff arrived did not provide keys, and afterwards changed the locks without lawful authority.

132. For those tenants where access remains restricted, the Landlord has unreasonably denied access, or limited the scope of access such that it was difficult if not impossible for them to retrieve important contents they each required, or to remove contents so that remediation could be undertaken.

133. The Tenants testimony was uncontested regarding access:

    a. On the morning after the fire, the Sarnia Fire Department provided supervised access for those tenants that requested it to retrieve pets, mediations, important documents, and anything else they may need for a few days.

    b. Tenants who were permitted to return to their units by the Order, were provided 45 minutes of supervised access under strict conditions that included signing a “Tenant Access” agreement that amongst other things demanded that Tenants acknowledge that the building was not habitable. If they refused to sign this document, they were denied access.

c. Tenants whose units were affected by the fire, and not permitted to return by the Order, they were offered a visit not to exceed 3 hours to remove all contents and only during the period April 19-21 2023. They had a different “Tenant Access” agreement to sign failing which they would also be denied access.

d. For those tenants that wanted to sign the N11 notice to terminate the tenancy, as offered by the Landlord in their February 22, 2023 letter, the Landlord kept adding more conditions after the fact. For example, one Tenant testified that they were advised that they must sign the N11 to gain access, and then advised must also withdraw their T2 application against the Landlord.

e. Tenants testified that they were also advised by the Landlord that they must show proof of insurance before being granted any access.

134. The Tenants testimony referred to the notices from the landlord they received, and for their interactions with the Landlords Agent Joanne Smout to describe the harassment, coercion and threats that they had received from the Landlord.

a. February 22, 2023 letter was coercive in that it offered to the first 20 Tenants that signed the N11 notice compensation.

b. March 31, 2023 letter threatened eviction if did not obtain tenant insurance that did included naming the Landlord for the liability portion.

c. Tenant Access notice dated April 19, 2023 states that if the Landlord’s insurer incurs costs to remove and store contents that the Tenants must reimburse those costs prior to regaining occupancy under the N13 notice.

d. A general release document for those Tenants that indicated an agreement to sign the N11 notice, states that the timelines to have the building restored is unknown, and that the parties release and indemnify each other from further claims or damages. This document was not signed by the Landlord when it was presented to the Tenants and does not contain a signature line for the Landlord to countersign if a Tenant had signed.

135. It was uncontested that the Tenants felt that the communications they were having with the Landlord’s Agent Joanne Smout was abrupt and abrasive; they showed a lack of understanding for tenant’s circumstances, and were generally hostile towards the Tenants. Although the Tenants had relied on their legal representatives to coordinate with the Landlord, they would reach also occasionally reach out to Joanne Smout and either did not receive a response or the response was “I don’t know”, “no updates”, or she had “no authority” over what was going on or to provide updates. Most tenants testified that Joanne Smout had constantly encouraged them to find alternative accommodation because repairs were going to take a long time. The allegations remained uncontested in that the Landlord did not deny they occurred and did not call Joanne Smout as a witness to dispute them.

136. The Landlord submitted that they did not call Joanne Smout so as to not delay the proceedings and because the Tenants intended to oppose calling her as a witness. The Board was not asked to determine if Joanne Smout would be permitted to testify; as such in my view this falls with the litigation strategy of the Landlord, that it was their deliberate choice not to call her. I am not making an adverse finding on this.

137. Under cross-examination the Tenants consistently referred to the letters and notices and the communications from Joanne Smout as examples of specific and ongoing harassment and coercion on the part of the Landlord. Although, they could not recite exact dates and times of harassment and coercion, I am satisfied having considered the real substance of these transactions that the Tenants' have established a clear case in all of the circumstances that the Landlord engaged in a course of conduct that the Landlord knew, or ought to have known would be unwelcome, and constitutes harassment, coercion and threatening in nature and intent.

138. The uncontested evidence of tenants from units 110 and 114 regarding thefts and damage indicate that the security measure of the Landlord to preserve the Tenants contents was inadequate. That thefts were happening with security present and damage being caused in my view shows a reckless regard for the Landlords duty to preserve the contents of the building particularly given that the Landlord has illegally locked out the Tenants.

Substantial Interference due to Landlord's "Work"

139. For those tenants who are lawfully restricted access by the Order, and due to the work undertaken by the Landlord to comply with that Order the Board must proceed in accordance with section 8, O.Reg 516/06.

Reasonable enjoyment during repairs
Definition

8. (1) In this section,

"work" means maintenance, repairs or capital improvements carried out in a rental unit or a residential complex.

(2) For the purposes of section 22, paragraph 3 of subsection 29 (1) and subsection 31 (1) of the Act, this section applies to the Board in making a determination,

(a) as to whether a landlord, superintendent or agent of a landlord, in carrying out work in a rental unit or residential complex, substantially interfered with the reasonable enjoyment of the unit or complex for all usual purposes by a tenant or former tenant, or by a member of the household of a tenant or former tenant; and

(b) whether an abatement of rent is justified in the circumstances.

(3) In making a determination described in subsection (2),

(a) the Board shall consider the effect of the carrying out of the work on the use of the rental unit or residential complex by the tenant or former tenant, and by members of the household of the tenant or former tenant; and

(b) 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 or residential complex by the tenant or former tenant, or by a member of the household of the tenant or former tenant.

140. The Board must first determine if the interference is substantial.

141. In *Onyskiw v. CJM Property Management Ltd*., 2016 ONCA 477, the Court of Appeal held that the LTB should take a contextual approach and consider the entirety of the factual situation in determining whether there was a breach of the landlord's maintenance obligations, including whether the landlord responded to the maintenance issue reasonably in the circumstances. The court rejected the submission that a landlord is automatically in breach of its maintenance obligation as soon as an interruption in service occurs.

142. In taking a contextual approach and considering the totality of the situation as it was presented at the merit's hearings in September and October 2023, I am satisfied on a balance of probabilities that there has been substantial interference with the reasonable enjoyment of the Tenants affected by the Order that the Landlord repair their units, for the following reasons:

a. It is undisputed that the Landlord must undertake work in accordance with the Order issued by the City of Sarnia;

b. It is undisputed that the Tenants do not have access to their units due to the works of the Landlord;

c. At the merits hearings it was undisputed that 3 units had yet to undergo remediation;

d. At the merits hearings it was undisputed that the Landlord and their insurer Cooperators had not yet tendered the reconstruction contract and had no timeline for doing so, and

e. At the merits hearing the requirements to vary/amend the Order as it affected the units on the second floor had not yet been completed.

143. The delays are not in my view reasonable in all of the circumstances. Belfor testified that the work would take 8-12 weeks, and less for fire suppression equipment repairs. The Landlord's own notices to the Tenants suggested it would take 4-6 months. However, by September/October 2023, some 7/8 months after the fire, the Landlord had yet to commence reconstruction of affected units and had not yet satisfied the City of Sarnia requirements to amend/vary the order for those tenants on the second floor.

144. The Tenants have been denied use and enjoyment of their units due to the work of the Landlord that is being unreasonably delayed by the inactions of the Landlord and the Landlord's insurer, Co-operators. I am not satisfied that the manner in which the work is being undertaken is reasonable or that the delays are reasonable.

145. Having satisfied that the manner in which the work has been undertaken constitutes substantial interference with the affected Tenants reasonable enjoyment of their units, any remedy will be considered individually for each of the applications.

Miscellaneous

146. The Tenants submit that the Board should make an adverse finding that the Landlord failed to produce the "proof of loss" form, as that would have provided the Board with the extend of the landlord's loss, coverage he received and what the policy coverage included.

147. The Landlord submits that they did provide confirmation of amounts paid under the rent replacement coverage and that any other information would not be relevant for the proceedings.

148. I agree the Landlord and Co-operators did confirm coverage for rent replacement. Co-operators also confirmed that there was no coverage for Tenants contents.

149. There was also evidence that the insurance policy did not cover security costs, and notwithstanding that, the Landlord and Co-operators had agreed to share those costs.

150. There was no evidence and no questions put to witnesses regarding any other insurance coverage or proof of loss issues. It may have been helpful to know if Cooperators might have shared the costs to safely remove and store the contents of 110, 106 and 310, however, the lack of that information is not determinative on the issues. Similarly, there was not evidence or questions on if the Landlord was insured for the losses the Tenants have for theft while the Landlord had control of the building and had security on site. I am not making any adverse influence on these issues.

It is ordered that:

1. This order confirms the May 8, 2023 (restoration) order that the Tenants had been illegally locked out of their rental order.

2. This order confirms that second May 8, 2023 (preservation) order that the Landlord had and continues to have lawful authority in accordance with the Order to restrict access to units set out in that Order.

3. This order finds that the Landlord substantially interfered with the reasonable enjoyment of the rental units or residential complex by the Tenants or by members of their households.

4. This order also finds that the Landlord obstructed, coerced, threatened or interfered with the Tenants.

5. The Board will issue separate orders that set out the remedies that shall be awarded to the Tenants as a result of these findings. It is intended that this interim order and the final orders on remedies be read together.

March 11, 2024
Date Issued

Robert Patchett
Vice-Chair, Landlord and Tenant Board

15 Grosvenor Street, 1st Floor
Toronto ON M7A 2G6

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

Schedule A

Re: 721 Earlscourt Drive, Sarnia Ontario

Table 1: 6X applications subject to Preservation Order

FILE NUMBER	RENTAL UNIT	NAME OF TENANT(S)
LTB-T-028155-23	108B	NATALIE LILES
LTB-T-029697-23	201B	NICOLE ATKINS
LTB-T-029705-23	205B	ANGELA JACOBS & GABRIEL WRIGHT
LTB-T-029727-23	207B	MICHAEL WHITSTONE & EMILIE FLETCHER
LTB-T-029753-23	212B	JUSTIN CONN & GRACE DAUD
LTB-T-029847-23	310-B	KODY RYAN & JAMES FITZPATRICK

Table 2: 14 X applications subject to the Restoration Order

FILE NUMBER	RENTAL UNIT	NAME OF TENANT(S)
LTB-T-027930-23	303B	VALERIE PETRELLA
LTB-T-027947-23	301B	DWAYNE MOTTLEY
LTB-T-028146-23	101B	JESSICA LATREILLE
LTB-T-028148-23	105B	JONATHAN HAVILL & MICHELLE PITMAN

LTB-T-028151-23	106B	DACIANA MACDUFF
LTB-T-028157-23	107B	JACOB NAYLOR
LTB-T-028161-23	110B	DANIELLE WADDILOVE
LTB-T-029695-23	114B	KIMBERLY COMEAU
LTB-T-029780-23	304B	JULIE ROBINSON
LTB-T-029790-2 3	302B	CHRISTOPHER MCGILL
LTB-T-029799-23	305B	MATTHEW ROBERTS
LTB-T-029809-23	307B	LLOYD GINEZ & ANGEL GINEZ
LTB-T-029829-23	314B	SHAWN O'GRADY
LTB-T-029835-23	309B	GARY CONN