

## Decision

Dispute Codes: CNC, CNR, OLC, RP, RR, FF, O

### Introduction

This hearing dealt with an application by the tenants for orders setting aside notices to end this tenancy, that the landlord comply with the Act and tenancy agreement, that the landlord make repairs and that the tenants be permitted to reduce their rent. Both parties participated in the conference call hearing.

### Issue(s) to be Decided

Does the landlord have grounds to end this tenancy?

Should the landlord be ordered to repair the fireplace?

Should the landlord be ordered to comply with the Act and tenancy agreement?

### Background and Evidence

The rental unit is located on the upper floor of a residential property in which the lower floor is occupied by other tenants under a separate tenancy agreement.

The rental unit has a fireplace which the tenants said they have used approximately 3 times, most recently in early October when the tenants noticed that smoke was backing up into the home. On October 19 the landlords gave the tenants a letter advising them that they should not use the fireplace. The landlords do not want to repair the fireplace. The tenants request an order that the landlords repair the fireplace and a reduction in rent for the time they were not able to use the fireplace.

The parties agreed that the tenants were served with a 10-day notice to end tenancy and a one month notice to end tenancy. At the hearing the landlord withdrew the 10-day notice. The one month notice to end tenancy alleges that the tenants are

repeatedly late paying rent, that the tenants have seriously jeopardized the health, safety or lawful right of the landlord or another occupant and that the tenants have put the landlord's property at significant risk. The tenants who live in the lower unit testified that they have smelled marijuana on a number of occasions and that the tenants on

several occasions have done laundry as late as 10:30, which they found disturbing. The tenants testified that they do not smoke marijuana and that they only did laundry late on one occasion, when the tenants on the lower floor were using the machines during a day when the upper floor tenants were supposed to be able to access the machines, forcing the upper tenants to do their laundry in the evening. The landlord maintained that if the tenants used the fireplace, they placed the home in jeopardy as the fireplace was unsafe. The landlord testified that he alleged that the tenants were repeatedly late paying rent because they gave him a letter advising him that advising that starting in November they would be withholding part of their rent in compensation for loss of use of the fireplace.

The tenants seek an order that the landlord comply with the tenancy agreement and continue to permit them to smoke on the deck of the rental unit. The landlord acknowledged that he knew the tenants smoked and had no problem with them smoking outside the rental unit until he started receiving complaints from the tenants in the lower unit that they were smelling marijuana. On November 23 the landlord gave the tenants a letter advising that smoking would no longer be tolerated anywhere on the residential property.

At the hearing the parties agreed to settle other issues by agreeing to meet to coordinate a third day for the tenants to have access to the laundry room and by further agreeing that the tenants could pay the rent by personal cheque by placing the cheque in the mailbox of the unit.

### Analysis

First addressing the notice to end tenancy, the landlord has the obligation to prove that he has grounds to end the tenancy. I find that an anticipated late payment of rent cannot be considered grounds to end the tenancy as the event has not occurred. As the tenants stopped using the fireplace immediately when advised to do so by the landlord, I find that they have not placed the landlord's property at significant risk. I am not satisfied that the landlord has proven that the tenants smoked marijuana in the rental unit or that it could be characterized as a significant interference with the other occupants. I find that occasional late nights doing laundry may be irritating, but cannot form grounds to end the tenancy. Accordingly I find that the landlord has not established grounds to end this tenancy and I order that the notice to end tenancy be

set aside and of no force or effect. As a result, the tenancy will continue.

When the landlords entered into the tenancy agreement with the tenants, they were bound by the terms of the agreement. The landlords cannot unilaterally change those terms. I find that the use of the fireplace is a term of the tenancy. I find that the landlords are obligated to repair the fireplace and I order the landlords to have the fireplace inspected by a certified professional no later than December 31, 2009. The landlords must provide the tenants with proof of the professional inspection. I order the landlords to either repair the fireplace as recommended by the inspector or to apply to the Residential Tenancy Branch for an order relieving them of his obligation to repair the fireplace in the event the required repairs are so extensive as to render the repair unfeasible. I find that the tenants are entitled to a rent reduction for the period of time in which they are not able to use the fireplace. The tenants may reduce their rent by \$40.00 for each month in which they are unable to use the fireplace. This award is retroactive, meaning that the tenants are entitled to a refund of \$20.00 for October's rent as they were unable to use the fireplace for half of that month and \$40.00 for November's rent.

I find that the landlords gave the tenants permission to smoke outside at the outset of the tenancy and I find this to be a term of the tenancy agreement. I order the landlords to comply with the tenancy agreement and not forbid smoking outside the rental unit.

I find that the tenants are entitled to recover the \$50.00 paid to bring this application. The tenants may deduct this amount from future rent owed to the landlords.

### Conclusion

The notice to end tenancy is set aside. The landlords are ordered to repair the fireplace. The tenants may deduct \$40.00 from their rent for each month in which they do not have use of the fireplace. The tenants are awarded their filing fee and may deduct \$50.00 from their rent.

Dated November 26, 2009.