Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) seeking:

- to cancel the landlord's One Month Notice to End Tenancy for Cause (the One Month Notice) dated January 10, 219, pursuant to section 47 of the Act; and
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement;

Both parties attended the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to make submissions and to cross-examine one another.

The landlord's agent ("TK") confirmed that he received a copy of the tenant's dispute resolution hearing package from the tenant. Both parties also exchanged written evidence with one another in advance of this hearing. I am satisfied that the landlord has been served with the tenant's dispute resolution hearing package and the parties have served their evidence to one another in accordance with the Act.

The tenant had initially denied having received some documents included as part of the landlord's evidence package, but subsequently referred to those same documents as part of his testimony, thereby confirming receipt of those documents.

I note that Section 55 of the Act requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is

dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Preliminary Matter – Jurisdiction

At the onset of the hearing, the landlord was asked to provide submissions with respect to whether the terms of the tenancy agreement would fit within the provisions of section 4(g)(vi) of the Act. The terms of the tenancy agreement, along with the landlord's written submissions, may suggest that section 4(g)(vi) of the Act would apply to the tenancy, thereby deeming that the Act does not apply to the tenancy.

The landlord provided testimony to submit that the building within which the rental unit is located does not provide rehabilitative or therapeutic treatment or services to the occupants of the building.

Therefore, the landlord confirmed that the tenancy is not such that the landlord provides rehabilitative or therapeutic treatment or services to the tenant. The landlord provided affirmed testimony to expressly state that the Act does apply. Based on the foregoing, I find that section 4(g)(vi) of the Act does not apply to the tenancy and application before me, and I find that I have jurisdiction to hear the tenant's application as the Act, in its entirety, does apply.

Preliminary Issue – Scope of Application

I advised the tenant that he has applied for a number of items as part of his application. Residential Tenancy Branch Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding, the Arbitrator determines that it is appropriate to do so, the Arbitrator may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply.

The Residential Tenancy Branch Rules of Procedure, Rule 2.3 provides me with the discretion to sever unrelated claims:

> **2.3 Related issues**
> Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

After reviewing the documentary evidence, the tenant's claim, and hearing from the tenant, I determined that the tenant's claim in relation to cancelling the One Month

Notice was unrelated to the other issues raised by the tenant. As the One Month Notice is the more pressing matter, I exercised my discretion to dismiss the remainder of the issues identified in the tenant's application, whereby the tenant seeks an order requiring the landlord to comply with the Act, regulation or tenancy agreement, with leave to reapply as these matters are not related. Leave to reapply is not an extension of any applicable time limit.

Issue(s) to be Decided

1. Is the tenant entitled to cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47 of the Act?

2. If the tenant's application is dismissed and the landlord's Notice to End Tenancy is upheld, is the landlord entitled to an Order of Possession, pursuant to section 55 of the Act?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. I refer to only the relevant facts and issues in this decision. The principal aspects of the tenant's claim and my findings around it are set out below.

The parties agreed that the tenancy began on December 31, 2014. The monthly rent was determined to be due on the first day of each month. The tenant qualifies for subsidized rent, and in the form of a tenant rent contribution, is expected to pay the sum of $375.00 as the monthly rent. The parties agreed that the tenant provided a security deposit in the amount of $425.00 which continues to be held by the landlord. The landlord provided as evidence a copy of a written tenancy agreement signed by both parties, which confirms the details provided orally by the parties.

The subject rental unit is located in a building complex which contains multiple units located on different floors. The building is operated by the organization listed as the landlord on this application.

All occupants of the building signed a tenancy agreement which expressly prohibits its occupants from using alcohol and illicit drugs. The building is meant for occupants who have, or are, recovering from substance abuse, such as drugs and alcohol. The landlord described the occupants of the building as being from a vulnerable community that undertake residency at the building since the building offers a space free from

exposure to substances such as drugs and alcohol, as the rules prohibit those substances from being on the premises, and prohibits its occupants from being on the premises if they have used those substances.

The landlord issued a One Month Notice, dated January 10, 2019, to the tenant with an effective vacancy date of February 10, 2019. The landlord's 1 Month Notice identified the following reasons for ending this tenancy for cause:

- *Tenant or a person permitted on the property by the tenant has:*
    - *significantly interfered with or unreasonably disturbed another occupant or the landlord;*
- *Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.*

In the section of the One Month Notice titled "Details of Cause", the landlord provided the following details to describe the nature of the purported activity which comprised the significance interference of unreasonable disturbance:

> "*On January 8/19 the tenant was notified that he would have to conduct a drug test as per the tenancy agreement when it was noticed a strong odor of cannabis coming from his suite. This is an alcohol and drug free housing complex. On January 10/19 a drug test was administered to the tenant and it was positive for THC."*
>
> [reproduced as written]

The landlord provided affirmed testimony to detail the reasons that gave rise for the landlord to determine that cause existed for the landlord to issue the One Month Notice based on the reasons cited above. Much of the landlord's affirmed testimony was captured in the written submission provided by the landlord as part of its evidence package, which is reproduced, in part, as follows:

> *The Residence is a long term residential facility for men and women who have attended and graduated from a residential treatment facility and who are looking for a low rent, safe and secure facility. The tenants at the Residence also receive rehabilitative services.*

The Residence has been designated an "Illicit Drugs and Alcohol Free" facility to assist tenants with addiction recovery programs and for the health, welfare and benefit of the tenants generally.

Under clause 15 of the Agreement, the tenants are prohibited from use of all "Illicit Drugs" at and around the Residence. "Illicit Drugs" is a defined term under the Agreement and includes marijuana.

Before signing the Agreement, the Tenant was made aware that given the particular nature of the Residence and the fact that the tenants in the Residence participate in addiction recovery programs, including those dealing with marijuana addiction, the covenant not to use marijuana was particularly crucial.

Before signing the Agreement, the Tenant was made aware that the Residence has been designated an "Illicit Drugs and Alcohol Free" facility.

Before signing the Agreement, the Tenant was made aware that breach of clause 15 would endanger the health and wellbeing of other tenants in the Residence.

Further, the Tenant was warned by the Landlord about the consequences of using marijuana and agreed not to use it.

On January 10, 2019, the Landlord became aware that the Tenant used marijuana in the Residence.

The Landlord submits that by breaching the marijuana prohibition, the Tenant has seriously jeopardize the health and safety of other occupants of the Residence who are dealing with addiction issues. The tenants of the Residence are a particularly vulnerable community who choose to live at the Residence to be in an environment free from drugs such as marijuana, in order to decrease their chances of relapse, and give themselves the best chance for recovery.

By breaching the marijuana prohibition, the Tenant seriously jeopardized the health and safety of other tenants of the Residence because exposure to the smell and presence of marijuana increases the risk of relapse. For many of these tenants, relapse could result in significant negative consequences both health and otherwise.

The landlord testified that the tenant presented with an odour of marijuana, as the landlord asserted that the tenant had been using marijuana. The landlord asserted that the odour of marijuana was noticed to be emanating from the tenant's rental unit. The landlord stated that the source of the marijuana odour in the hallway in which the rental unit is located was determined to be the tenant's rental unit. The landlord testified that

the lingering odour in other parts of the building was found to be the odour emanating from the tenant after the tenant had used marijuana.

The landlord's agent TK testified that the odour of marijuana in the building and on the tenant was noticeable since approximately January 01, 2019. TK testified that he, along with numerous staff members and other occupants of the building detected the marijuana odour on the tenant, and could detect the odour emanating from the floor on which the tenant's unit is located. TK provided that he detected a strong odour emanating from the tenant's rental unit, which led him to believe that the tenant may have been using marijuana inside of his unit.

The landlord provided as evidence a letter, dated February 14, 2019, from a representative of the landlord, who, for the purpose of this decision, will be referred to as "TM". In the letter, TM provided that she had received multiple complaints of an odour of marijuana in the hallway of the floor in which the tenant's unit is located.

TM further provided that the marijuana odour poses a significant risk to the other occupants of the building who are residing in the building for the purpose of recovering from addiction, as the odour can be a "trigger" which may have negative consequences, such as relapse, for other occupants who have recently overcome, or are trying to overcome, addictions to various substances. TM also wrote that she herself has noticed the strong smell of marijuana emanating from the hallway of the third floor (the floor on which the subject unit is located) and in other parts of the building.

The landlord's agent TK provided that the tenant was administered a urine test which determined that the tenant tested positive for THC (a chemical compound found in cannabis). As evidence to corroborate this statement, TM provided a copy of a written statement from a witness and representative of the landlord which supports the testimony provided by TK.

The landlord requested that the One Month Notice be upheld and that the landlord be provided an Order of Possession.

The tenant testified to deny using marijuana inside of the rental unit, and also stated that he did not use marijuana outside of the rental unit. The tenant testified that he is not the source of the marijuana odour detected inside the building and cannot ascertain the source of the marijuana odour.

The tenant testified that use of cannabis is legal and that the landlord should not be able to enforce the term of the tenancy which prohibits occupants of the building from using cannabis as a condition of their tenancy. The tenant provided that he understood that the terms of the tenancy agreement prohibited the smoking of marijuana inside of the rental unit.

Analysis

Section 47 of the Act allows a landlord to end a tenancy by giving notice to end the tenancy if, among other things, the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord or breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The tenant provided sworn testimony that he received the One Month Notice on January 10, 2019. Therefore, I find that the tenant was served with the One Month Notice on January 10, 2019.

In accordance with subsection 47(4) of the Act, the tenant must file an application for dispute resolution within ten days of receiving the One Month Notice. In this case, the tenant received the One Month Notice on January 10, 2019. The tenant filed his application for dispute resolution on January 16, 2019. Accordingly, I find the tenant filed within the ten day limit provided for under the Act.

Where a tenant applies to dispute a One Month Notice, or in a matter in which the landlord seeks an Order of Possession, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the One Month Notice to end a tenancy for cause is based. Therefore, in the matter before me, the burden of proof rests with the landlord.

I find that, on a balance of probabilities, the landlord has not met the burden of proof to demonstrate that the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property, or breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. My reasons for finding so are set out below.

Although I am sympathetic to the landlord’s desire to provide a housing facility for individuals who have attended a residential treatment facility and seek a secure facility as part of their ongoing efforts with respect to their respective recovery programs, the

landlord provided affirmed testimony to confirm that the Act does apply to the tenancy which is the basis of the application before me.

As a preliminary matter, the landlord was provided an opportunity to provide submissions with respect to the question of whether the Act applied to the tenancy, or whether it would be excluded pursuant to section 4(g)(vi) of the Act. The landlord testified that the building does not offer rehabilitative or therapeutic services, and subsequently expressly stated that the Act does apply. Therefore, I find that the landlord remains obligated to adhere to the provisions of the Act which, in part, provides that a tenancy agreement may not contain unconscionable terms.

Section 6(3) of the Act provides, in part, the following with respect to unconscionable terms:

> ***Enforcing rights and obligations of landlords and tenants***
>
> *6 (3) A term of a tenancy agreement is not enforceable if*
>
> *(a) the term is inconsistent with this Act or the regulations,*
>
> *(b) the term is unconscionable*

Section 3 of the *Residential Tenancy Regulation* (the Regulation) provides the following:

> *Definition of "unconscionable"*
>
> *3 For the purposes of section 6 (3) (b) of the Act [unenforceable term], a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.*

Residential Tenancy Policy Guideline #8 (Unconscionable and Material Terms) deals with unconscionable and material terms in a tenancy agreement, and provides the following with respect to unconscionable terms:

> *Under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.*
>
> *Terms that are unconscionable are not enforceable. Whether a term is unconscionable depends upon a variety of factors.*
>
> *A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting*

> *damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.*

I find that the terms of the tenancy agreement, which state that the tenant is not permitted to use marijuana outside of the residential building is an unconscionable term. The Act does permit the landlord to set conditions which prohibit smoking inside of a rental unit (which will be discussed in subsequent sections of this decision); however, the Act does not give a landlord leave to set conditions with respect to how a tenant chooses to conduct himself while outside of the rental unit.

Therefore, the term of the tenancy agreement which stipulates that the tenant may not use marijuana outside of the rental unit is oppressive and fits the definition of an unconscionable term under section 3 of the Regulation, and is therefore not an enforceable term pursuant to section 6(3) of the Act.

The term of the tenancy agreement which stipulates that individuals who have used alcohol or illicit drugs during his/her stay outside of the residential building will be evicted is also an unconscionable term, as it fits the definition of an unconscionable term under section 3 of the Regulation, and is therefore not an enforceable term pursuant to section 6(3) of the Act.

I find that the term is oppressive and grossly unfair, as the landlord does not have broad authority to enforce the manner in which a tenant chooses to conduct his life while outside of the rental unit, and cannot make a **predetermination to evict a tenant** (emphasis added) if the tenant chooses to partake in the consumption of alcohol or marijuana as part of his/her lifestyle while outside of the rental unit.

The ability of a landlord to place restrictions on the manner in which a tenant conducts the affairs of his life while outside of the rental unit (insofar as the consumption of alcohol and marijuana is considered) is beyond the scope of permitted limitations that a landlord may impose on a tenancy as afforded under the Act.

I also find that the terms of the tenancy agreement which stipulate that the tenant is to submit to alcohol and drug testing fits the definition of unconscionable terms as they represent a significant intrusion of privacy contrary to Section 28 of the Act, and are therefore not enforceable.

Section 21.1 of the Act provides, in part, the following with respect to cannabis:

> *(2) If a tenancy agreement entered into before the cannabis control date*

(a) includes a term that prohibits or limits smoking tobacco, and

(b) does not include a term that expressly permits smoking cannabis,

the tenancy agreement is deemed to include a term that prohibits or limits smoking cannabis in the same manner as smoking tobacco is prohibited or limited.

(3) For greater certainty, vapourizing a substance containing cannabis is not smoking cannabis for the purpose of subsection (2).

The landlord referred to the tenancy agreement to illustrate that the definition of "illicit drugs", within the context of the tenancy agreement, includes marijuana, and that the parties to the agreement signed the tenancy agreement with the understanding that illicit drugs, as defined in the tenancy agreement, would not be permitted inside of the rental unit, and that use of the illicit drugs would not be permitted inside the residential apartment building.

Although, as the tenant stated, the use of cannabis for personal reasons is no longer illegal in Canada as a result of legislative changes, at the time the tenancy agreement was entered into, the tenancy agreement was drafted in such a fashion that marijuana was captured within the definition of "illicit drugs" in the tenancy agreement.

Additionally, the tenancy agreement includes a term which stipulates that the use of illicit drugs (which includes marijuana) in any manner within the residential building is strictly prohibited. Therefore, the tenancy agreement would suggest that smoking marijuana within the rental unit is prohibited.

I find that the manner in which the tenancy agreement is drafted, particularly in respect of the term prohibiting the smoking of marijuana within the rental unit, is such that it does not fit within the intention of the deeming provisions of section 21.1 of Act. Section 21.1 of the Act provides the guidelines within which parties can determine that the smoking of cannabis can be deemed prohibited if the tenancy agreement does not include a term that expressly permits smoking cannabis.

However, the details of the tenancy agreement before me are different, such that the prohibition of smoking cannabis within the rental unit was captured as a clear and material term of the tenancy. Therefore, I find that the deeming provisions of section 21.1 do not apply insofar as making a determination as to whether the parties understood that smoking cannabis may not have been permitted. Rather, by signing the tenancy agreement, both parties understood that the smoking of cannabis inside of

the rental unit was expressly prohibited, and this understanding was reflected in the testimony provided by both parties.

The question of what occurred is not an easy determination to make when weighing conflicting verbal testimony. In the matter before me, I find that, on a balance of probabilities, it is more likely than not that the landlord's testimony represents a factual and likely depiction of the events preceding the landlord's decision to issue the One Month Notice. Overall I find that the landlord's evidence accords with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable.

The often cited test of credibility is set out in *Faryna v Chorny,* [1952] 2 DLR 354 (BCCA) at p.357:

> The real test of the truth of the story of a witness… must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I find that the landlord was consistent in his testimony, and that his testimony accords with the evidentiary material provided, such as the witness statement dated February 14, 2019, in which a representative of the landlord details a strong odour of marijuana emanating from the floor in which the tenant resides. This testimony fits with the landlord's assertion that the smell of marijuana was noticeable on the tenant's floor, and in particular, that the source of the marijuana odour seemed to be the tenant's rental unit.

I prefer the consistency and the logic of the landlord's testimony. I find that the tenant seemed hesitant and uncertain at times when providing testimony, and sometimes retracted a statement initially provided and needed time to deliberate when providing a response to seemingly straightforward and simple questions.

At times, the tenant provided initial testimony and then provided subsequent testimony which served to contradict his earlier testimony and cast doubt as to the validity and reliability of his testimony. For example, the tenant initially denied receiving certain documentary evidence from the landlord, only to later cite the same document in subsequent testimony.

I find that the tenant's testimony was inconsistent and that he changed his testimony to cater to the questions asked of him. I find that, as a whole, the tenant's testimony lacks an air of reality. I find the culmination of observations with respect to the tenant's

testimony could be viewed as an attempt by the tenant to present misleading information. The tenant was cavalier in his approach to the case.

The tenant acknowledged that the tenancy agreement expressly prohibited the tenant (or any other occupants of the building) from smoking marijuana inside of the residential building.

When questioned to provide a response to the landlord's assertion that the tenant was smoking marijuana inside of the rental unit, and that the odour of marijuana was noticeable, by many different individuals (both representative of the landlord and other occupants of the building), on the tenant and inside of his rental unit (for which the landlord provided witness corroboration in the form of documentary evidence), the tenant was not able to provide a plausible explanation in his defense.

In contrast, the landlord's testimony presents as consistent and logical. The landlord asserted that the other residents in the building reported that the tenant presented with an odour of marijuana on his body, and that an odour of marijuana emanated from the floor on which the tenant's rental unit is located, and that the source of the odour seemed to be the tenant's rental unit. This testimony fits with the witness statement dated February 14, 2019, in which a representative of the landlord, TM, details the odour of marijuana emanating from the floor on which the tenant's rental unit is located. TM details that multiple complaints were filed by other occupants of the building regarding the odour of marijuana.

Therefore, on a balance of probabilities, I find that it is more likely than not that the tenant was smoking marijuana inside of the rental unit.

I must determine whether the tenant's smoking of marijuana inside of the rental unit *significantly interfered* with or *unreasonably disturbed* (emphasis added) another occupant or the landlord of the residential property. The relevant aspect, according to the landlord, is that the tenant's use of marijuana resulted in the odour of marijuana presenting on the tenant's body, within his rental unit, within the hallways surrounding his rental unit, and within the building generally.

The landlord's position is that the tenant's actions caused the odour of marijuana to present in the building, which is a significant interference and unreasonable disturbance to the other occupants of the building, since the other occupants had decided to undertake residency at the building expressly for the purpose of being able to reside in an environment free of exposure to substances such as marijuana, as that forms a part

of their recovery plan. All residents of the building signed the tenancy agreement with the understanding that the building is a “dry house”, such that they it reasonable for all occupants to expect the building to be free of any exposure to, and remnants of (in the form of odour from marijuana), substances such marijuana.

However, as stated earlier, although I am sympathetic to the landlord’s submission that the building in which the rental unit is located is used for the purpose of providing housing for individuals who have recovered from substance abuse issues, and that the necessity to ensure that those individuals are provided an environment free from exposure to substances such as marijuana is of vital importance, I find that the landlord remains obligated to adhere to the provisions of the Act.

Therefore, in determining whether the tenant smoking marijuana inside of the rental unit *significantly interfered* with or *unreasonably disturbed* another occupant or the landlord, I will place little weight on the landlord’s submission that all occupants of the building can reasonably expect to never be exposed to the smell of marijuana as part of their recovery efforts.

Although the collective conduct and behaviour on the part of the tenant insofar as smoking marijuana inside of the rental unit (as described the landlord) can reasonably be categorized as inappropriate given the prohibition of smoking marijuana inside of the rental unit as stated on the tenancy agreement, and can be construed as a disturbance and as an interference, I find that the infrequency of the tenant’s conduct and behaviour does not rise to the level such that it meets the threshold of being categorized as *significant* or *unreasonable* (my emphasis added) sufficient to end the tenancy.

I also find that the landlord cannot rely on the assertion that the building in which the rental unit is located is used for the purpose of providing housing for individuals who have recovered from substance abuse issues, since the tenancy is not excluded from the Act pursuant to section 4(g)(vi) of the Act.

Based on the foregoing, I find that, on a balance of probabilities, the landlord has not met the burden of proving that the tenant engaged in behavior that “significantly interfered with or unreasonably disturbed another occupant or the landlord”, as set out on the One Month Notice, and as provided in section 47(d)(i) of the Act.

I find that if the landlord determined that the tenant may have breached a material term of the tenancy agreement by smoking marijuana inside of the rental unit, the landlord

could have sought remedy pursuant to section 47(h) of the Act, which provides, in part, the following:

> *Landlord's notice: cause*
>
> *47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:*
>
> *(h) the tenant*
>
> *(i) has failed to comply with a material term, and*
>
> *(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;*

Although the landlord did cite as one of the reasons on the One Month Notice that the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so, I find that there is no evidence before me to demonstrate that the tenant was given a written notice to correct the breach before being served the One Month Notice.

Rather, the landlord has provided testimony and documentary evidence to depict that the landlord served the One Month Notice to the tenant on January 10, 2019, the same date on which the landlord determined that the tenant breached a material term of the tenancy agreement by smoking marijuana inside of the rental unit.

Therefore, I find that the landlord did not adhere to section 47(h) of the Act, as the landlord did not provide the tenant an opportunity to remedy the issue and correct the identified breach, as the landlord did not issue a written notice to the tenant to correct the breach before issuing the One Month Notice.

As the landlord did not adhere to the provisions of section 47(h) of the Act, I find it was not open to the landlord to issue the One Month Notice pursuant to section 47(h) of the Act, and therefore, I find that the landlord did not have leave to issue the One Month Notice based on the landlord’s assertion that the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Conclusion

Based on the above, I order the One Month Notice, dated January 10, 2019, is cancelled and is of no force or effect. The tenancy will continue until it is ended in accordance with the Act.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 26, 2019

Residential Tenancy Branch