



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PPG Management Corp.
and [Tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC, FFT

Introduction

The Tenants (hereinafter the “Tenant”) filed an Application for Dispute Resolution (the “Application”) on August 6, 2021 seeking an order to cancel the One Month Notice to End Tenancy for Cause (the “One Month Notice”). Additionally, they seek the Landlord’s compliance with the legislation and/or the tenancy agreement, and a reimbursement of the Application filing fee. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the “Act”) on December 13, 2021. In the conference call hearing I explained the process and offered each party the opportunity to ask questions.

Both the Tenant and the Landlord attended the hearing. The Tenant was assisted by an advocate. Each party had a chance to present their submissions, refer to the evidence, and respond to the submissions of the other. At the outset, both parties confirmed they received the prepared documentary evidence of the other.

Preliminary Matters

The Tenant submitted a final piece of evidence, labelled ‘supplementary’ on December 13, 2021. Tracking information shows this was not delivered to the Landlord in time for the hearing. Though the Tenant referred to this piece in their submissions, the Landlord in the hearing stated they had not received that individual piece by the time of the hearing. In line with the *Residential Tenancy Branch Rules of Procedure* Rule 3.11 and Rule 3.14, I refuse to consider this evidence. I find the Tenant unreasonably delayed service of this evidence, and the Landlord and the Residential Tenancy Branch did not receive this evidence 14 days in advance of the hearing. Any consideration of this

evidence would unreasonably prejudice the Landlord. In line with procedural fairness, I exclude this piece for this reason.

In their Application, the Tenant requested the Landlord's compliance with the legislation and/or the tenancy agreement. This lists the Landlord's refusal to make accommodation for the Tenant's disability, refusal to make repairs, and the Landlord "create[s] scenarios that are untrue, like smoking". After hearing the Tenant's submissions in the hearing and consideration of their evidence documents, I find the description by the Tenant under this ground concerns the Landlord's motivations for issuing the One-Month Notice. I find this subject more properly belongs in the question of the validity of the One-Month Notice, analyzed below. I dismiss this ground of the Tenant's claim; however, I consider these statements in my consideration of the issue below.

Issues to be Decided

Is the Tenant entitled to a cancellation of the One Month Notice?

Is the Tenant entitled to recover the filing fee for their Application?

Background and Evidence

Both parties provided a copy of 4 pages of the tenancy agreement, signed on December 2, 2015. The Landlord's copy includes 2 pages of Rules and Regulations, and other policies and contact information are attached. The Landlord referred to paragraph 17 of the agreement, that which refers to tenant conduct: "the tenant . . . must not disturb, harass, or annoy another occupant of the residential property, the landlord, or a neighbour." The Tenant's copy in the evidence included a document entitled 'Top 6 Bylaws', stating "DO NOT Smoke cigarettes inside suite (smoke only on balcony)". This is presented on the document for the Tenant to "Be a good neighbour and be part of creating a safe and friendly community where everyone is considerate of one another."

The Tenant provided a copy of the One-Month Notice form. The Landlord provided a copy of same in addition to the cover letter they attached when issuing the One-Month Notice. The One-Month Notice bears the signature of the Landlord on July 30, 2021, serving the document in person on that date. The Proof of Service document provided

by the Landlord shows this service on July 30, attested to by a witness who signed that document.

On page 2 of the document, the Landlord provided the reasons for giving notice:

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

The details on page 2 are:

Tenants have been cited numerous times for smoking within their unit, and have failed to comply. They continue to smoke within their unit which has caused other tenants in the building to move out.

The Landlord provided a 20-page evidence package, containing complaint letters from other building residents, dated April 1, 2016, November 3, 2020 (a violation report), June 30, 2021 (describing "chain smokers"), and incident reports detailing a showing of the unit above dated August 18 and September 5 and 13, 2021. Two Violation of Rules Report from October, with no year, are also in this evidence, detailing "bedroom window's constantly open with cigarette smoke coming out" and "constant smell of cigarette smoke in hallway and outside [the rental unit]".

The Landlord also provided a separate account from a long-term resident in the building, dated November 10, 2021. This neighbour noted that the Tenant frequently smokes inside the unit "as evidenced by the strong odor in the common hallway to the units on this floor." The second-hand smoke enters this neighbour's unit via the living room heating element, and electrical outlets. They describe the odour as so strong it is like a nightclub.

In the hearing, the Landlord referred to individual reminder and warning letters in their evidence:

- April 5, 2016 – advises the Tenant they were smoking inside; there is a no smoking policy in the building, allowing smoking outside on the patio. The building is advertised as having a no smoking policy.
- July 6, 2018 – the owner has designed the building as non-smoking. This cites the insurance coverage specifying this, and the local "Clean Air By-Law". This

advised the Tenant: "If you continue to smoke in the Building, you are endangering the lives of our tenants and their property at your risk & peril. You have been warned."

- December 18, 2018 – informs the Tenant that a maintenance inspection revealed that "it was obvious you or someone had been smoking in your unit."
- March 28, 2019 – complaints of the smell, advises the Tenant that "We do not allow smoking on your balcony, or in your suite." This cites the "Clean Air By-Law" and provides that the Tenant's own signed lease agreement states: "No smoking in building or within 6 metres of doorways, open windows or air intakes."
- May 21, 2019 and February 11, 2020 – verbatim of the above previous letter
- May 26, 2020 – notes "repeated reports that you have been smoking within your unit" and cites the tenancy agreement, as above.
- June 16, 2021 – informs the Tenant of complaints from other tenants about cannabis smoking on the property – this goes into windows and is in violation of the lease agreement. There is a reminder to "go at least 6 feet away from any doors, windows or air intakes".
- September 29, 2021 – informs the Tenant that a prospective new tenant in an adjacent unit found the odour of smoke overwhelming and "was forced to leave". The Landlord informed the Tenant in this piece that "Your continued smoking is causing disruption, damage to the building and driving away prospective tenants."

In the hearing, the Landlord stated the Tenant had plenty of opportunities to rectify the issue after five years and has not. The infractions go toward conduct which is set out in the tenancy agreement, and this is a continuous disturbance to other residents.

The Tenant, via their advocate, submitted there is no material term of the tenancy agreement that refers to smoking; therefore, this ground as it appears on the One-Month Notice is "irrelevant." If the Landlord wished to include that, they had the opportunity to amend the agreement; however, they did not.

On the other separate reason re: disturbance/interference listed on the One-Month Notice; the Tenant noted their efforts to establish a separate area away from the building for smoking. This includes other residents, that "large part of the building who are smokers". The Tenant included pictures of this area in their evidence, as well as photos showing the area "32 feet away from the door, where we sit."

The Tenant also questioned the Landlord's manner of notifying them of issues with smoking or odour. They did not receive notices in person or have discussions on this

issue with maintenance or management. The communication they did receive was in the form of letters attached to the door. They were aware that other building residents smoke, and even some repair workers who visited also smoked.

The Tenant submitted the Landlord has other motivations for ending the tenancy. This includes “retaliation” for the Tenant making requests for accommodation of their maintenance, repair, or service requests. Additionally, “possibly the Landlord is trying to move as many smokers out as possible” and because their tenancy has been in place for quite some time, the Landlord would benefit from receiving a higher rent than what the Tenant now pays.

Analysis

The *Act* s. 47 states, in part:

(1)A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- (d) the tenant or a person permitted on the residential property by the tenant has
 - (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property
 - (iii) put the landlord’s property at significant risk

- (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;

In this matter, the onus is on the Landlord to provide they have cause to end the tenancy.

I find the tenant has correctly shown there is no link between the tenancy agreement and a material term therein. There is no direct reference to smoking in the tenancy agreement. The references in past notices to the tenant to the signed lease agreement containing a specific no-smoking clause are incorrect. I find it more likely than not the landlord was in those letters referring to a more contemporary agreement, one that the tenant here did not sign and were not a party to. There is no record of the Landlord updating the agreement for the Tenant to include such a clause. Because of this shortcoming, I find the Landlord was not justified issuing the One-Month Notice on the ground of a breach of a material term.

Above, I noted specifically that the Tenant received a document entitled 'Top 6 Bylaws'. This sets out that there is no smoking inside the unit. While not the most direct form of information a landlord may choose to convey what later became policy, this is some basic information about smoking in the building. This was clarified further in 2018 with the July 6 letter to the Tenant setting out: "The owner of the building has designated these building [sic] as non-smoking." I find it reasonable for the Landlord to refer to the matter of smoking indoors as policy by 2018.

Though not an integral clause in the tenancy agreement, I find the Tenant was aware of the impact of smoking, with that being identified as a disturbance or interference to others. When not referring to the agreement, on in conjunction with it, the Landlord notified the Tenant of complaints of the smell coming from the Tenant balcony or suite. I find this began in 2016. Notification of complaints then continued through 2018, 2019 and into 2020 as shown in the Landlord's evidence. I note the Landlord's consistent use of the word 'complaint', containing as it does the notion of disturbance or interference to others.

The Landlord presented evidence on other residents' complaints. My consideration here is limited to those pre-dating or describing events prior to the One-Month Notice as forming reasons for the Landlord choosing to end the tenancy. The evidence shows:

- The long-term next-unit neighbour notes the odour in the common hallway area, and second-hand smoke entering into their own unit. I find this is a substantial interference and disturbance, and given the close proximity of the adjoining unit, it is more likely than not emanating from the interior of the Tenant's rental unit. This same neighbour notes they submitted written complaints to management on several occasions. I find this shows the repeated pattern of the Tenant's disturbance to others.
- The same neighbour made a complaint to management in November 2020 as shown in the Violation of Rules Report. This is consistent with their later account of "[Tenant] smoking cigarettes in their unit."
- I find the handwritten note dated April 1, 2016 shows the disturbance to others was happening for quite some time.
- The June 30, 2021 account pre-dates the One-Month Notice. This does not illustrate the Tenant smoking in their unit or persistent odour; however, the nature of the statement is that of a complaint, indicating a disturbance that "made living here less than ideal" for that other building resident. This describes the only drawback in their experience living in the building being the Tenant here.

I find these accounts in the Landlord's evidence sufficient to show disturbance or interference to others. Further, given the number of letters to the Tenant, and the prolonged issue, I find the bulk of the Landlord's evidence shows the disturbance to the Landlord in repeatedly addressing the issue with the Tenant who does not comply with requests to stop smoking in the unit.

The Tenant did not present sufficient evidence to show that the issue has abated because of their other arrangements for smoking outside. I find it more likely than not that the Tenant continues to smoke in the unit. It is inconceivable that the smoke and odour entering into neighbouring units, and the hallway, can emanate from any source other than the Tenant. I find the accounts provided by the Landlord are clear and detailed on the odour, and even second-hand smoke, entering into at least one other unit and the common-area hallway. In light of building rules identified to the Tenant on numerous occasions, I find there is no duty upon the Landlord to make structural changes to the building.

The Tenant raised the issue of this being the Landlord's retaliation to the Tenant's own requests for repairs. I find this is speculative. Also, the Landlord was informing the Tenant of this constituting a reason to end the tenancy for quite some time. I find it illogical that the Landlord would undertake repeated warnings over a 5-year period if the motivation was to have the Tenant out for higher rent. The Tenant did not present ample evidence to show a pattern of retaliation from the Landlord in relation to the Tenant's own requests.

In sum, I find the Landlord submitted sufficient evidence to show disturbance or interference to others. This was stated explicitly to the Tenant repeatedly. This constitutes cause.

The *Act* s. 55(1) states that if a tenant applies to dispute a landlord's notice to end tenancy and their Application for Dispute Resolution is dismissed or the landlord's notice is upheld, the landlord must be granted an Order of Possession if the notice document complies with all the requirements of s. 52 of the *Act*. On my review, the One-Month Notice here contains all the required elements set out in s. 52.

By this provision, I find the Landlord is entitled to an Order of Possession and the tenancy shall end. The Tenant's Application for cancellation of the One-Month Notice is dismissed without leave to reapply.

As the Tenant was not successful in their Application, I find they are not entitled to the Application filing fee.

Conclusion

For the reasons outlined above, I grant an Order of Possession to the Landlord effective **January 31, 2022**. Should the Tenant fail to comply, the Landlord may file this Order with the Supreme Court of British Columbia, where it may be enforced as an Order of that Court.

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

Dated: December 24, 2021

Residential Tenancy Branch