Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC O OLC MNDC FF

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenant on August 10, 2016. The Tenant filed seeking an order to cancel a 1 Month Notice to end tenancy for cause and for other reasons.

On September 12, 2016 the Tenant filed an Amendment to his application for Dispute Resolution. He submitted additional evidence and a cover page listing nine additional items/issues requested to be resolved during this hearing.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenant. Each person gave affirmed testimony. I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Tenant affirmed that he served the Landlord with copies of the same applications and documents that he had submitted to the Residential Tenancy Branch (RTB). The Landlord acknowledged receipt of those documents and no issues regarding service or receipt were raised. As such, I accepted the Tenant's submission as evidence for these proceedings.

The Landlord affirmed that she served the Tenant with copies of the same documentary evidence that she had submitted to the RTB. The Tenant acknowledged receipt of those documents and no issues regarding service or receipt were raised. As such, I accepted the Landlord's submissions as evidence for these proceedings.

Both parties were provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Although all relevant submissions were considered in making this Decision, they may not all be listed below.

Issue(s) to be Decided

1. Has the Tenant been served a valid 1 Month Notice to end tenancy for cause?
2. If so, should that 1 Month Notice be upheld or cancelled?

3. Has the Landlord restricted services and/or facilities in breach of the *Act?*
4. If so, is the Tenant entitled to monetary compensation and/or reduced rent as a result of those restrictions?

Background and Evidence

The Landlord testified the Tenant entered into a written tenancy agreement while the Tenant argued the tenancy agreement was verbal.

The Landlord submitted a two page document into evidence titled "APPLICATION FOR TENANT" and asserted this was the tenancy agreement the Tenant had entered into. That document states, in part, as follows:

> *IF APPLICATION IS ACCEPTED I/We will enter into a Residential Tenancy Agreement shown to me/us which I/We will have an opportunity to examine.*
>
> [Reproduced as written p 1]

Each party provided oral submissions confirming that the terms of the tenancy were a month to month tenancy agreement which began on March 1, 2015. Rent was initially payable on the first of each month in the amount of $850.00 and was subsequently increased to $874.65 per month effective September 1, 2016. On February 23, 2015 the Tenant paid $425.00 as the security deposit.

The rental unit was described as being a basement suite located on the lower level on one side of the shared laundry room in a split level single detached home. The Landlord's teenage son's bedroom was located on the other side of the shared laundry room up a few stairs; and the Landlord's main living space was located on the upper level of the house a few stairs above her son's bedroom. The Tenant primarily exited and entered his suite through an exterior door from the laundry room which was located directly underneath the Landlord's back yard deck.

The Landlord testified the door into the Tenant's suite did not have a lock on it and that his area was not considered a self-contained suite.

The Tenant disputed the Landlord's submissions and argued his suite was fully self-contained with its own kitchen, bathroom, bedroom, and living room area. He asserted that despite his door having a lock on it the Landlord often entered his suite without proper notice.

Both parties testified that from the onset of the tenancy the Tenant had access to unrestricted Wi-Fi internet services, at no extra cost. In addition, the Tenant had use of one side of (half of) the Landlord's deep freezer and shortly after the start of the tenancy the Landlord arranged to have the installation completed for a fully functioning wall mounted convection air type electric heater inside the rental unit.

The Landlord submitted a written statement arguing the written tenancy agreement did not include free internet/WIFI service; did not include free or any other type of use of the Landlord's chest freezer; and the entire house, including the suite, was heated by a gas heat pump system. The Landlord's written submission also stated the convection wall heater was installed in the suite after the commencement of the tenancy in response to the Tenant's complaints of feeling cold.

On August 6, 2016 the Landlord issued a 1 Month Notice to end tenancy and posted it to the Tenant's door. Both parties confirmed the1 Month Notice was issued listing an effective date of September 9, 2016 and the following reasons:

- Tenant or a person permitted on the property by the tenant has:
    - Significantly interfered with or unreasonably disturbed another occupant or the landlord
    - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord
- Tenant has engaged in illegal activity that has or is likely to
    - Adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord

Neither party submitted a copy of the aforementioned 1 Month Notice into evidence.

The Landlord testified that on August 5, 2016 the Tenant became upset after she had changed the WiFi password cutting off his WiFi access. She stated the Tenant came up on her deck towards her open patio door, while she was standing in her kitchen, and asked if he could discuss access to the WiFi. The Landlord submitted that she told the Tenant she did not want to discuss the WiFi with him at that moment and requested that he please leave. When the Tenant refused to leave she said she tried to close her patio door and he put his arm in the door to prevent her from closing the door. When he still refused to leave she called 911.

The Landlord asserted she was very upset that the Tenant would not leave while she was on the phone with the 911 operator. She said the operator walked her through the process, keeping her calm, while she went to be with her 16 year old son in his room while they awaited the arrival of the police. The Landlord asserted that if this had been the first incident with the Tenant she would not have called the police.

The Landlord went on to explain that she no longer felt safe with the Tenant living in her home. She submitted she felt threatened when the Tenant would not do as she requested for him to leave her deck. She alleged the Tenant berated her on a couple of occasions; he had previously fallen asleep in a chair on her deck with a drink while she was in the tub; and he continues to come up on her deck uninvited.

The Landlord put a lot of focus identifying the fact that she owned the home; she had been a landlord for over 26 years; and the Tenant was residing in her home and therefore was required to do what she instructed him to do.

The Landlord asserted the Tenant did not take the appropriate steps to deal with the situation. She stated the Tenant's written request/letter was served upon her after he filed his application for Dispute Resolution.

The Tenant testified that the Landlord's "picture of their relationship" was not accurate. He argued he had resided in the rental unit for a year and a half during which they had a great relationship. He would visit with the Landlord on her deck on a daily basis; he would assist her with yard work; they would help each other out when needed; they would exchange meals and gifts; and they were never confrontational with each other.

The Tenant admitted he was irritated after the Landlord entered his suite after Easter without proper notice; after she cancelled his use of the deep freezer right after he had filled it with food; after she disconnected his heater; and then changed the WiFi password. He asserted he did not go to the front door or attempt to call the Landlord to discuss the disconnection of the WiFi because he knew she would not answer the door or his telephone call.

When asked if there was an event that may have caused the Landlord to restrict his services the Tenant testified his girlfriend had come to visit shortly before these events occurred. He submitted that his girlfriend lives in the United States and had arrived in July 2016 for approximately 3 weeks leaving on August 8, 2016. He stated she had visited two or three times before that and each time he had the Landlord's permission. He asserted the Landlord had built a friendship with his girlfriend, going for walks, and hanging out together and that she was excited that his girlfriend was coming for another visit. The Landlord did not dispute the aforementioned.

The Tenant stated that his girlfriend had been smoking outside, under the Landlord's deck, as she had done in previous visits, and then all of a sudden their patio chairs had been moved to the other side of the yard, right by the Landlord's bedroom, with no notice. They moved their chairs back under the deck, as they did not want to be close to the Landlord's bedroom, and his girlfriend began to smoke out on the street. The Tenant testified that all of a sudden the Landlord began to restrict his access to things daily, leaving him notes on what he could and could not access.

The Tenant submitted that when the Landlord refused to allow him usage of the deep freezer she had knowledge that he had just stocked the freezer with food to feed himself and his girlfriend. He said he had no choice but to go out and purchase a deep freezer to put his food in so that his food did not spoil. He asserted he also had to pay to connect his own internet services after she changed the WiFi password, as supported by the receipts submitted in his documentary evidence. The Tenant stated the Landlord had also entered his suite without proper notice and disconnected his heater. He said if

that heater is not reconnected he will be forced to purchase a heater as the suite is too cold in the winter.

The Tenant submitted receipts into evidence which indicate the Tenant has signed up for internet services. The Tenant testified his internet costs for the first three months were $45.00 plus tax and then from the 4th month onward, starting in mid-October 2016, the costs will increase.

The Tenant requested that his application also be amended to include the cost of the filing fee. He asserted the on-line application process did not provide clear instructions on how to request recovery of the filing fee.

The Tenant testified that while he realizes now that he should have left the Landlord's deck sooner, prior to her calling 911, he was in no way displaying behaviour that would pose a threat to the Landlord. He said he met with the police when they arrived and that the Landlord's concerns of threat were unfounded. He said he simply wanted to resolve the issue so he could get his internet access returned as his entire life revolved around his internet usage.

The Landlord argued she gave the Tenant one week's written notice that his access to the deep freezer was being cancelled. She confirmed she had moved the chairs to the other side of the yard without notice and that she was of the opinion she could move them because they were her chairs. The Landlord confirmed that she had an electrician enter the Tenant's suite, without prior written notice, sometime in approximately May 2015 after his girlfriend left, to disconnect the electric convection heater. In addition, the Landlord confirmed she did not give the Tenant written notice that she would be cancelling his access to internet WiFi by changing the WiFi password.

When asked why she would restrict the Tenant's access as described above, the Landlord responded that the Tenant and his girlfriend would "not do what I asked them to do". She said the Tenant "was not responding to my requests in my home". She asserted she could hear the Tenant and his girlfriend having sexual relations; and despite her request for them to be quiet during those relations, she could still hear them. She said she was concerned that her 16 year old son could hear the Tenant and girlfriend and she did not want him being exposed to those sounds.

Analysis

After careful consideration of the relevant evidence of each party I have reached a decision on the balance of probabilities, after taking into account the relevant sections of the *Act;* Regulation; and/or policy.

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*.

Section 53 (1) of the Act provides that if a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) as applicable.

Subsection (2) of Section 53 states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

From the evidence before me I find the Landlord served the Tenant a 1 Month Notice to end tenancy on the prescribed form. The effective date of that Notice would have automatically corrected to September 30, 2016, pursuant to section 53 of the *Act.*

Where a Notice to End Tenancy comes under dispute, the Landlord has the burden to prove the tenancy should end for the reason(s) indicated on the Notice. Where more than one reason is indicated on the Notice the Landlord need only prove one of the reasons.

After careful consideration of the submissions from both parties I favored the Tenant's submissions as they were forthright; credible, and consistent with the events presented by both parties. I favored the Tenant's submissions over the Landlord's submissions because the Tenant's submissions were reasonable given the circumstances presented to me during the hearing.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I found the Landlord's submissions to be inconsistent, not only with the circumstances presented, such as whether the rental unit had a lock and was self-contained and also with the documentary evidence. The document she submitted was clearly an application and not a tenancy agreement and the Tenant submitted emails which clearly indicate the electric heater had been disconnected in August 2016 not earlier as stated by the Landlord. That being said, I find the undisputed terms of the verbal tenancy agreement are recognized and enforceable under the *Residential Tenancy Act*, as per the following.

The *Residential Tenancy Act* defines a "**tenancy agreement**" as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Section 91 of the Act stipulates that except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia. Common law has established that oral contracts and/or agreements are enforceable.

The undisputed evidence related to the Landlord's continued breaches of the *Act,* not the Tenant's breaches. Furthermore, I found the Landlord's actions to be irrefutably conscious actions intended to coerce and intimidate the Tenant to move out. I do not accept the Landlord's submissions that she was unaware of her obligations under the *Act* as the Landlord was clearly aware of the *Act* when issuing the 1 Month Notice.

In addition, I find that when the Landlord's previous actions of disconnecting the heater, moving the patio chairs, and prohibiting access to the deep freezer failed to result in the Tenant moving out, she cut off the Tenant's access to the WiFi on August 5, 2016. I conclude the Landlord intentionally created a situation by cutting off the WiFi access whereby the Landlord was certain the Tenant would approach her at which time she planned to call 911; create a police record; and then issue the Tenant a Notice to end tenancy.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

Policy Guideline 6 states: "in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed".

In addition, Policy Guideline 6 provides that an arbitrator may award aggravated damages where a serious situation has occurred or been allowed to occur. Aggravated damages are damages which are intended to provide compensation to the applicant rather than punishing the erring party, and can take into effect intangibles such as distress and humiliation that may have been caused by the respondent's behaviour.

Notwithstanding the Tenant's submissions that he felt he had no choice but to purchase a deep freezer to save his food, I find there was insufficient evidence to prove the Landlord would be responsible for the cost, or any portion of the cost, of a new deep freezer. Rather, that *Act* provides the Tenant would be entitled to reduced rent for the loss of the service or facilities and aggravated damages due to the Landlord's intentional breach of the *Act.*

Section 62(3) of the *Act* stipulates that the director may make any order necessary to give effect to the rights, obligations and prohibitions under this *Act*, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this *Act* applies.

Section 27(2)(b) of the *Act* states that a landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Section 67 of the Residential Tenancy Act provides that without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Based on the totality of the evidence before me and notwithstanding her concerns about her teenage son hearing the Tenant's sexual relations, I conclude the Landlord's actions of restricting access to: the deep freezer; the disconnection of the heater; the moving of the chairs; the disconnection of the internet WiFi; and her access to the Tenant's rental unit without proper notice of entry are egregious breaches of sections 27 and 29 the *Act,* as copied to the end of this Decision*.* Furthermore, I find there was insufficient evidence to uphold the reasons listed on the 1 Month Notice.

Accordingly, I find in favor of the Tenant's application. I have considered that the Tenant has paid his October 1, 2016 rent in full and I **order** as follows, pursuant to sections, 27, 29, 62, and 67 of the *Act*:

- The 1 Month Notice issued August 6, 2016 is hereby cancelled and is of no force or effect;
- The electric convection heater is a service or facility that is essential to the Tenant's use of the rental unit as living accommodation; therefore, the Landlord cannot remove or restrict access or use of that heater. The Landlord is ordered to have the existing electric convection heater reinstalled and fully operational in the Tenant's suite, after providing proper written notice of entry, immediately upon receipt of this decision and no later than **October 17, 2016;**
- The Tenant is entitled to compensation for the loss of use of the heater which has devalued the tenancy and his quiet enjoyment of the suit for the period of August 31, 2016 to October 17, 2016. The award is based on a daily amount which was calculated based on approximately 5 percent of the daily rent at $1.45 per day for 48 days for a total award of **$69.60;**
- The Tenant is entitled to compensation for his actual costs to access internet / WiFi services from August 16, 2016 to November 16, 2016, in the amount of $151.20 plus loss of a service and facility and the loss quiet enjoyment of his suite for the period of August 5, 2016 to August 16, 2016 in the amount based on

a daily amount of approximately 5 percent of the daily rent at $1.45 for eleven days totally $15.95. The total aforementioned award is granted in the amount of **$167.15** ($151.20 + $15.95);

- The Tenant is entitled to compensation for loss of use of the deep freezer and loss of quiet enjoyment from August 5, 2016 to October 31, 2016 based on approximately 5 percent of the daily rent at $1.45 per day for 87 days for a total award of **$126.15;**
- In regards to aggravated damages for the situation in which the Landlord was found to have intentionally staged the scenario in order to create a police report, causing the Tenant stress being involved with the police, and the undue stress caused by the Landlords intentional restriction to services purposely designed to cause the Tenant grief, I grant the Tenant the aggravated damages in the amount equal to 15% of his currently monthly rent in the amount of **$131.20;**
- The Tenant has managed the loss of WiFi and deep freezer services and facilities by acquiring his own deep freezer and WiFi services that were previously included in his rent. As such I grant the Tenant a rent reduction beginning November 1, 2016 in the amount of **$85.16** per month (2 x $1.45 x 365 days ÷ 12 months) and order that the Tenant maintain his own WiFi account and deep freezer. The deep freezer remains the Tenant's personal property as this award is for the loss of services or facilities. As such, effective **November 1, 2016** I order the Tenant's rent will be **$789.49** per month ($874.65 - $85.16) until such time as the rent is increased in accordance with the *Act*; and
- The Landlord is ordered to comply with the *Act,* Regulation, and the terms of the verbal tenancy agreement, as listed and amended above. The amendments relate to the reduced rent for the discontinued services and facilities.

As to the noise relating to the Tenant's sexual relations while inside the privacy of his rental unit, I find that the best possible solution lies within the willingness and abilities of the parties to communicate appropriately and make accommodations for one another. It will not be resolved by the Landlord unilaterally restricting the Tenant's access to services or facilitates or her continued breaches of the *Act.*

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Tenant has succeeded with their application; therefore, I grant his request to amend his application to include recovery of the filing fee and I award recovery of that fee in the amount of **$100.00**, pursuant to section 72(1) of the Act.

The parties are reminded of the provisions of section 72(2)(a) of the *Act*, which authorizes a tenant to reduce his rent payments by any amount the director orders a landlord to pay to a tenant, which in these circumstances is **$594.10** ($69.60 + $167.15 + $126.15 + $131.20 + 100.00). Therefore, the Tenant could pay the Landlord the

reduced sum of $195.39 ($789.49 – $594.10) as full recovery of the above awards and as full payment of his November 1, 2016 rent. Accordingly, December 1, 2016 rent, and subsequent rents would resume at $789.49 per month until such time as the rent is increased in accordance with the *Act.*

In the event this tenancy ends prior to the Tenant receiving the full compensation awarded above, the Tenant has been issued a monetary order in the amount of $594.10. This order is enforceable through small claims court after service upon the Landlord.

I caution the Landlord that under section 95(2) of the Act, any person who coerces, threatens, intimidates or harasses a tenant from making an application under the Act, or for seeking or obtaining a remedy under the Act, may be found to have committed an offence and is subject to a fine or administrative penalty. In addition, if the Landlord does not comply with the orders as outlined above, the Tenant may seek further monetary compensation.

Conclusion

The Tenant was successful with his application. The 1 Month Notice issued August 6, 2016 was cancelled and the Tenant was awarded monetary compensation of $594.10 and a rent reduction.

This decision is final, legally binding, and 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: October 11, 2016

Residential Tenancy Branch

Section 29 of the *Act* stipulates a landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

(i) the purpose for entering, which must be reasonable;

(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

(d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

(f) an emergency exists and the entry is necessary to protect life or property.

Section 1 of the *Act* defines a service or facility to include, in part, utilities and related services, such as appliances and furnishings; internet and cablevision access; and heating facilities.

Section 27 of the *Act* stipulates that

27 (1) A landlord must not terminate or restrict a service or facility if

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.