Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC FF

Introduction

This hearing dealt with an application by the tenants pursuant to the *Residential Tenancy Act* ("the Act") for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause ("1 Month Notice") pursuant to section 47 *Act*; and
- a return of the filing fee pursuant to section 72 of the *Act*.

Both of the tenants, their counsel M.N.C., and the landlord attended the hearing. M.N.C. explained to the hearing that she would be presenting submissions on behalf of the tenants. All parties present were given a full opportunity to be heard, to present their testimony and to make submissions.

The tenants acknowledged receipt of a copy of the landlord's 1 Month Notice to End Tenancy in person on August 8, 2017. Pursuant to section 88 of the *Act*, the tenants are found to have been duly served with the landlord's 1 Month Notice on the date of its receipt.

The landlord acknowledged receipt of the tenants' Application for Dispute Resolution by way of Canada Post Registered Mail, on approximately August 18, 2017. Pursuant to section 89 of the *Act*, the landlord is found to have been served with the tenants' Application for Dispute Resolution. Both parties confirmed that receipt of each other's evidentiary packages. Pursuant to section 88 of the *Act*, the landlord and tenants are found to have been duly served with the each other's evidentiary package.

Issue(s) to be Decided

Can the tenants cancel the landlord's notice to end tenancy? If not, should the landlord be granted an Order of Possession?

Are the tenants entitled to a return of the filing fee?

Preliminary Issues

Following opening remarks, the landlord objected to tenant C.R.S.' standing to present submissions via his lawyer which were translated from French. The landlord said that he would be unfairly prejudiced if C.R.S. were allowed to give submissions in this manner. The landlord argued that C.R.S. was not a party to the tenancy agreement, and therefore had no standing to present translated submissions. At no point in the hearing did C.R.S. present any form of submissions; therefore, the landlord's application questioning the standing of C.R.S. to present evidence is dismissed.

In addition to his concerns regarding tenant C.R.S.' submissions, the landlord asked that I make a ruling concerning the admissibility of recordings that he said were illegally made by the tenants, and on which a portion of his Notice to End Tenancy was based. The landlord is basing his argument on his interpretation of sections 184 and 193 of the *Criminal Code of Canada* which prohibits the interception of private communications.

Counsel for the tenants did not deny that the tenants had recorded the landlord who was having a conversation with the owner's son that could readily be heard by the tenants from within their residential unit; however, she maintained that these recordings were made legally. Counsel directed my attention to section 183 of the *Criminal Code of Canada* which states:

Private Communications means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it.

On a plain reading of this provision, it is evident that a conversation between two people that is loud enough to be readily heard by nearby persons cannot reasonably be considered a *private communication.*

The landlord expressed great concern over his privacy inside his own home, though no evidence was presented at the hearing to show that the tenant had in any way made attempts to gain access to the landlord's private communications in his residential unit. Counsel for the tenants noted that no recording devices were placed inside the vents or against the wall as had been feared by the landlord and that the conversations in question had been recorded by the tenants from inside their unit as the landlord spoke loudly to the owner's son.

Justice Stober in *R. c. Desjardins, 2014 (QCCS 6790)* notes in paragraph 20, "It is indisputable that private communications as defined in s. 183 of *Criminal Code*, encompass e-mails, chat conversations, as well as text and Pin to Pin messages, and that their interception requires judicial authorization pursuant to Part VI of the *Criminal Code*." The Supreme Court of Canada examined the issue of private communications in detail in their decision of *R. v. TELUS Communications Co., [2013] 2 SCR 3, 2013 SCC 16.* This decision makes it clear that a text message is a "private communication" as defined in section 183 of the *Criminal Code* and that any interception of such a message must be authorized under Park VI of the *Criminal Code*.

It is therefore reasonable to conclude that had the tenant intercepted electronic communications between the landlord and another person that they would possibly be found by a criminal court to be a violation of the *Criminal Code.* This was not the case. The tenant recorded, from inside her own unit, of a conversation that was readily available because it could easily be heard and hence was not private.

If the landlord had sincere belief that the tenants were engaged in illegal activity (recording his private communications) the landlord could have contacted the police and urged them to undertake an investigation. This did not occur. *Residential Tenancy Policy Guideline #32* states, "The term *illegal*

activity would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property…The party alleging the illegal activity has the burden of proving that the activity was illegal."

For these reasons, I find that the landlord cannot rely on the tenants' recordings of an audible conversation he had with the owner's son, as the basis for the issuance of a Notice to End Tenancy for Cause citing the tenant having engaged in illegal activity.

Background and Evidence

A copy of the Residential Tenancy Agreement submitted to hearing as part of the landlord's evidentiary package showed that this tenancy began on November 1, 2016. Rent is $850.00 per month, and a security deposit of $425.00 paid at the outset of the tenancy, continues to be held by the landlord.

The landlord explained that he had served a 1 Month Notice for the following reasons -

Tenant or a person permitted on the property by the 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;*
- *jeopardized a lawful right or interest of another occupant or the landlord*

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;*
- *put the landlord's property at significant risk.*

During the course of the hearing, the landlord stated that he felt he had reason to issue the 1 Month Notice because the tenants had illegally recorded his private conversations. He explained that he could no longer quietly and peacefully enjoy the property because he felt that his privacy was invaded, and he was fearful that he would be recorded at any moment. Additionally, the landlord argued that his health and safety had been seriously jeopardized by the tenants having blocked the stairs and door to his rental unit with a table and chairs, thus preventing him from escaping in the event of an emergency.

The landlord continued by noting that his tenancy had significantly been interfered with because of the caustic relationship he has with the tenants following their disagreement about the backyard. The landlord said that he had been unreasonably disturbed by the tenants' complaints to the home's owner, their neighbours and the police. The landlord said that despite no threatened eviction or disturbance, he feared eviction by the property's owner because of ongoing issues with tenants. Furthermore, the landlord explained that he felt the tenants had put a large television in the backyard in June 2017 as a means of goading him in to a confrontation.

Counsel for the tenants explained that one source of friction between the parties was use of the backyard and the surrounding furniture. She explained that the tenants have followed a decision of an Arbitrator with the *Residential Tenancy Branch* at the August 16, 2017 which held that the backyard was a shared space. The landlord acknowledged during the present hearing of November 3, 2017, that the tenants have followed the directions of the Arbitrator and that his door and stair access have not been impeded since August 16, 2017.

At the hearing counsel for the tenants contended that the recordings on which the landlord is partially basing his Notice to End Tenancy are not illegal and are therefore irrelevant. In her written submissions, the tenants' counsel argued that the remainder of the landlord's Notice to End Tenancy should be dismissed because the matter had already been ruled on at the August 16, 2017 proceedings and the landlord was therefore estopped from presenting further arguments in support of his 1 Month Notice.

Analysis

In his oral testimony and written submissions, the landlord argued that his Notice to End Tenancy was based on three factors. The first being the recordings of his private conversations, the second being disturbances to which he has been subject at the hands of the tenants as a result of a dispute regarding patio furniture, and the last being an incident involving a television being placed in the backyard in June 2017.

In my preliminary findings, I held that the recordings submitted by the tenants were both legal and allowable. With this in mind, I do not place much weight on the recordings which were actually provided and placed in evidence by the tenants, nor do I place great emphasis on the landlord's reasoning that he suffered as a result of these recordings. The recordings presented at the hearing by the tenants were between 30 and 90 seconds, are of very poor quality and were essentially indecipherable.

The landlord's written submissions explain that he felt his privacy had been invaded as a result of these recorded conversations, and thus had suffered significant interference and an unreasonable disturbance. He continued by arguing that his lawful rights had been violated.

As discussed above, *Residential Policy Guideline #32* states, "The term *illegal activity* would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property."

While I understand the landlord's concerns regarding the recording of his conversation, the tenants' actions are not illegal. Counsel for the tenants explained at the hearing that the conversations were recorded from the tenants' apartment while the landlord engaged in a conversation that could easily be heard and was not therefore a "private conversation", with the property owner's son. She continued by explaining they were not recorded through any venting or against the wall. There is therefore no basis on which to serve a Notice to End Tenancy for illegal activity and this portion of the landlord's Notice to End Tenancy is therefore dismissed.

The other portion of the landlord's Notice to End Tenancy concerns, a significant interference and unreasonable disturbance of the landlord's enjoyment of the property, along with having put the landlord's

property at significant risk and having seriously jeopardized the health, safety or lawful right of the landlord.

During the hearing the landlord explained that because of the nature of his relationship with the tenants that he has faced police complaints, and suffered a worsening relationship with the property's owner and his neighbours. The landlord said that despite no threat from the property owner to evict him, he fears that the owner may ultimately choose to remove him from the property as a means of relieving conflict between the landlord and the tenants. Furthermore, he explained that the tenants have unnecessarily involved the police and their neighbours on several occasions, creating an unpleasant living situation for him.

I do not find that the behaviour of the tenants towards the landlord is sufficiently bad to be considered a *significant or unreasonable* disturbance. The parties have had their disagreements and because of these disagreements they previously attended a hearing before an Arbitrator with the *Residential Tenancy Branch*. Following the decision of the Arbitrator in this matter, the tenants have, by the landlord's own admission, followed the Orders as directed. Other than the now resolved issues around the shared outdoor space, little evidence was presented at the hearing that the tenants have disturbed the landlord in any manner outside of a disputed event with a television. Some testimony was presented at the hearing by the landlord that an incident involving a television resulted in a disagreement between the parties; however, this conflict appears to have occurred on one occasion and did not result in further strife.

The landlord's own written submissions explain that, "The actions of the tenant and her guest tenant had adversely impacted the ability of the other residents to use and enjoy their premises. In addition to being denied use of the backyard, and sidewalk they are concerned the tenants will continue to make false and frivolous complains to the police, the property owner and the RTB, and may imperil their own [the landlord's own] residence."

The tenants are entitled to call the police; much in the same way that the landlord is entitled to call the police about the tenants should he feel threatened. The previous arbitration of August 16, 2017 dealt with the issues surrounding the backyard and all parties agree that the sources of tension, namely the table and side access have now been resolved and have not returned. I do not find that merely contacting the police *unreasonably* disturbs the landlord, as I cannot impute such an intention to the decision making that led to the tenants' decision to do so. For these reasons, the tenants are successful in their application cancelling the landlord's notice to end tenancy for cause.

As the tenants were successful in their application, they may recover the $100.00 filing fee from the landlord pursuant to section 72 of the *Act*. In lieu of a monetary order, the tenants may on **one** occasion, withhold $100.00 from a future rent payment.

Conclusion

The tenants were successful in cancelling the landlord`s Notice to End Tenancy. This tenancy shall continue until it is ended in accordance with the *Act*.

The tenants may withhold $100.00 from a future rent payment on **one** occasion in satisfaction for a return of their filing fee.

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: November 8, 2017

Residential Tenancy Branch