Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CML PROPERTY MGT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC

Introduction

This hearing dealt with the Tenant's application under the Residential Tenancy Act (the "Act") for:

- cancellation of a One Month Notice to End Tenancy for Cause dated July 7, 2022 (the "One Month Notice") pursuant to section 47; and
- an order that the Landlords comply with the Act, the regulations, or tenancy agreement pursuant to section 62.

The Tenant, one of the named Landlords JC, and the Landlords' agent TD attended this hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. During the hearing, the Tenant was represented by a legal advocate JK who made submissions on the Tenant's behalf. The Tenant also called her son TP to testify as a witness.

All attendees at the hearing were advised that the Residential Tenancy Branch Rules of Procedure prohibit unauthorized recordings of dispute resolution hearings.

Preliminary Matter – Service of Dispute Resolution Documents

The parties did not raise any issues with respect to service of dispute resolution documents. The Tenant submitted a registered mail receipt with tracking number for service of the notice of dispute resolution proceeding package (the "NDRP Package") on the Landlords. Tracking records show that this package was delivered on August 8, 2022. JK testified a copy of the Tenant's evidence was given to the Landlords on September 23, 2022. JC and TD acknowledged receipt of the NDRP Package and the Tenant's evidence. JK confirmed that the Tenant received a copy of the Landlords' evidence for this hearing. Based on the above, I find the Landlords were served with the

NDRP Package and the Tenant's evidence in accordance with sections 88 and 89 of the Act. I further find the Tenant was served with the Landlord's evidence in accordance with section 88 of the Act.

Issues to be Decided

1. Is the Tenant entitled to cancel the One Month Notice?
2. Is the Tenant entitled to an order that the Landlords comply with the Act, the regulations, or tenancy agreement?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this application and my findings are set out below.

The rental unit is part of a rental complex owned by BC Housing and operated by the corporate Landlord, CML Property Mgt ("CML"). The individual Landlord JC is a caretaker of the rental complex whose work is managed by CML.

TD testified that CML took over management of the rental complex earlier this year. TD referred to a letter dated July 8, 2022 from CML to the Tenant submitted into evidence by the Landlords. This letter states in part as follows (portions redated for privacy):

> *In November 2021 a dispute resolution hearing was held and it was agreed that you could continue tenancy at the unit provided you did not permit [TP] to access your unit or either of the buildings.*
>
> *On July 6, 2022, you broke your part of the agreement to provide [TP] access to the building and your unit. You admitted on phone you let him access for a bike lock and confirmed [JC], the resident caretaker witnessed the event. You stated that the reason he was there is that you could not unlock a bike lock and bring to him offsite.*
>
> *We had a conversation the week prior when I returned your call with a voicemail requesting permission for [TP] to come to retrieve property. When I called you*

back you said he didn't need to come anymore and you promised that you would call if anything else was needed.

After reading the circumstances leading to the dispute hearing and reviewing the settlement agreement, and after our conversation, you clearly were well aware providing [TP] access would result in an immediate notice to end tenancy. There are other ways to arrange removal of his property.

The resident caretaker, has provided our office copy of a notice to end tenancy he delivered and proof of service and it will be on file.

JC testified that a neighbour who witnessed TP coming onto the rental property called him to report the incident due to TP's reputation in the neighbourhood and knowing that TP wasn't permitted on the property. JC testified he went to the building and witnessed TP in the building. JC testified he told the Tenant that what happened is a breach of the agreement that had been made at the previous arbitration hearing (file numbers referenced on the cover page of this decision). JC testified the building's security system showed TP captured on camera entering and leaving the building. JC testified that he proceeded to issue the One Month Notice on the following day.

Copies of the One Month Notice have been submitted into evidence. The One Month Notice is dated July 7, 2022 and has an effective date of August 31, 2022. The reason for the notice is: "Non-compliance with an order under the legislation within 30 days after the tenant received the order or the date in the order". The details of cause stated on the One Month Notice are as follows (portion redacted for privacy):

As per RTB File [number] (attached) settlement agreement paragraph 5. "If B.P. breaches term 3 or 4 of this settlement agreement, tenant B.P. agrees to vacate the subject rental property within 30 days of receipt of a written notification from the landlord of breach of this settlement agreement. On the 6 July 2022 at 2244 hrs. Tenant [name] did allowed [TP] access to the subject property and building contrary to reference order.

The Landlords submitted a copy of the decision from the previous arbitration hearing dated November 18, 2021 into evidence, which contains the following settlement terms (the "Settlement Terms"):

Both parties agreed to the following final and binding settlement of all issues currently under dispute:

1. Tenant T.P. will move out of the subject rental property by 1:00 p.m. on November 25, 2021.
2. The landlord agrees to continue the tenancy with tenant B.P. at the same rental rate as the current tenancy agreement.
3. Tenant B.P. agrees to not allow tenant T.P. access to the apartment building in which the subject rental property is located.
4. Tenant B.P. agrees to not allow tenant T.P. access to the subject rental property.
5. If tenant B.P. breaches term 3 or term 4 of this settlement agreement, tenant B.P. agrees to vacate the subject rental property within 30 days of receipt of written notification from the landlord of breach of this settlement agreement.

In response, JK submitted on behalf of the Tenant that section 47(1)(l) of the Act, upon which the cause in the One Month Notice is based, does not apply to term 5 of the Settlement Terms. JK argued this is the case because term 5 does not have a specific deadline, but rather has a rolling deadline.

JK argued the Settlement Terms are “unconscionable” because the terms constitute a zero-strike agreement. JK questioned whether it would be considered a breach of the Settlement Terms if the Tenant had met with TP on the sidewalk adjacent to the rental property and asked TP to enter the parking lot in order for TP to help the Tenant lift something.

JK argued the Settlement Terms should be treated as an amendment to the parties’ tenancy agreement and addition of material terms. JK argued that the Tenant must be notified if the Landlords believe a material term was breached. JK argued the possible consequences should have been explained to the Tenant and a reasonable period of time be provided for the issue to be remedied. JK argued that it would be poor precedent to adopt a zero-strike policy. JK argued that the principles of natural justice would not permit an amendment of the One Month Notice under section 68(1)(a) of the Act to change the cause to a breach of material terms.

JK argued the Landlords are judging based on stigma related to TP, and that the Tenant had agreed to the Settlement Terms to keep her home.

JK explained that the Tenant's claim for the Landlords to comply with the Act, the regulation, and the tenancy agreement was included as the Landlords are acting outside their responsibilities, in particular due to harassment and conflict from JC.

The Tenant testified she had asked JC for permission in "spring" to allow TP to come onto the rental property to deal with TP's belongings. The Tenant testified JC told her that he would be away that weekend that it was a good time for TP to come. The Tenant testified TP did come to pick up his belongings after JC allowed it.

The Tenant testified she later asked TD if TP could come to the property. The Tenant testified that TD said TP could come if the police attended to keep the peace.

The Tenant testified that she may have asked for permission one other time but was told that TP would not be allowed and there was nothing that could be done.

The Tenant confirmed that TP was permitted to come onto the rental property twice, once by JC and once by TP. The Tenant testified that TD said to call the police in case JC was going to be a problem. The Tenant testified that JC would harass TP when TP was in the Tenant's vehicle on the property.

The Tenant testified that TP does not come to the property now, except for the time TP came to get his bike. The Tenant testified she had allowed TP to come onto the rental property that time because she was under pressure, as TP was pressed for time due to his curfew. The Tenant testified that she was unable to get the lock off his bike. The Tenant stated she was concerned because TP would not be able to secure his bike at the shelter and TP would be on the streets again.

TP testified that since he moved out in November 2021, he would text and call the Tenant and stay on the other side of the fence. TP stated it was hard not being able to visit the Tenant. TP testified that things became "unclear" because he was being allowed on there previously.

TP stated he decided to enter the property for a few minutes to grab a lock, so that the Tenant would not panic about TP's curfew. TP testified that previously he would ask the Tenant to bring down his belongings. TP stated that his bike is heavy and that the Tenant would have needed to bring it down three flights of stairs. TP testified the Tenant did not know how to unlock the bike and was having a "panic attack" about TP being

late for his curfew. TP testified he was coaching the Tenant from the street on how to unlock it, but after the Tenant struggled for 5 to 10 minutes, TP decided to run up there.

TP testified he is currently in recovery from the “toxic” lifestyle decisions that he had made previously. TP described the programs that he is currently attending.

In reply, JC argued that all parties, including the Tenant’s advocate JK, were at the previous arbitration hearing and that the Settlement Terms were created primarily by the Tenant and JK. JC argued that everyone had acted in good faith, but now the Tenant wants to go back on her agreement and acknowledgement that she understood the Settlement Terms, as stated in the previous decision.

JC denied having a conversation with the Tenant about allowing TP to come onto the property on the weekend.

TD testified there was some misinterpretation by the Tenant, and that when TD suggested police presence TD was not granting permission for TP to be on the property. TD stated that she did not suggest police presence in response to JC, but acknowledged that there is a conflict between the Tenant and JC. TD testified that this call took place sometime in June 2022, though she did not recall the exact date. TD testified that she did not know whether TP did come with police. TD testified that this was not related to the bike incident.

TD explained that previous events with TP has caused much hardship on other residents in the building, which involved the police and other residents’ safety, and that these concerns are still recent for JC. TD questioned whether there were other ways for TP to retrieve his belongings without coming onto the rental property.

Analysis

1. Is the Tenant entitled to cancel the One Month Notice?

Section 47 of the Act permits a landlord to end a tenancy for cause upon one month’s notice to the tenant. Section 47(1) describes the situations under which the landlord will have cause to terminate the tenancy.

Section 47(3) of the Act requires a notice to end tenancy for cause given by the landlord to comply with section 52, which states:

Form and content of notice to end tenancy

52 In order to be effective, a notice to end a tenancy must be in writing and must

(a) be signed and dated by the landlord or tenant giving the notice,

(b) give the address of the rental unit,

(c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,

(d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and

(e) when given by a landlord, be in the approved form.

Section 47(2) further requires that the effective date of a landlord's notice under section 47 must be:

(a) not earlier than one month after the date the notice is received, and

(b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case, I have reviewed the One Month Notice and note that it appears to be in an older RTB form from 2016. I find the One Month Notice to otherwise comply with the requirements set out in sections 52 and 47(2) of the Act. Section 10(2) of the Act states that deviations from an approved form that do not affect its substance and are not intended to mislead do not invalidate the form used. I find that the One Month Notice is a valid notice to end tenancy as I find any deviations from the current form do not affect the substance of the One Month Notice and are not intended to mislead.

I find the Tenant was served with a copy of the One Month Notice in person on July 7, 2022, in accordance with section 88(a) of the Act.

Section 47(4) of the Act permits a tenant to dispute a one month notice to end tenancy for cause within 10 days of receiving such notice. Therefore, the Tenant had until July 17, 2022 to dispute the One Month Notice. Records indicate that the Tenant submitted this application on July 15, 2022. I find the Tenant made this application within the 10-day dispute period required by section 47(4) of the Act.

Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, Rule 6.6 of the Rules of Procedure places the onus on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

In this case, the Landlord issued the One Month Notice to end the tenancy on the grounds of "Non-compliance with an order under the legislation within 30 days after the tenant received the order or the date in the order".

Section 47(1)(l) of the Act states as follows:

> **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:
> […]
> (l) the tenant has not complied with an order of the director within 30 days of the later of the following dates:
> (i) the date the tenant receives the order;
> (ii) the date specified in the order for the tenant to comply with the order.

To determine whether CML has established cause under section 47(1)(l) and the One Month Notice, I will consider the following sub-issues: (a) whether the Settlement Terms are unconscionable, (b) whether the Settlement Terms should be treated as material terms of the tenancy agreement, (c) whether the Settlement Terms are orders of the director, (d) application of section 47(1)(l) to the Settlement Terms, and (e) application of the above analysis to the One Month Notice.

a. Unconscionability

Residential Tenancy Policy Guideline 8. Unconscionable and Material Terms ("Policy Guideline 8") states as follows regarding unconscionable terms:

> **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.
>
> The burden of proving a term is unconscionable is upon the party alleging unconscionability.

In this case, I have reviewed the Settlement Terms and I do not find them to be "so one-sided as to oppress or unfairly surprise the other party". I find the emphasis in terms 2 and 3 of the Settlement Terms to be that the Tenant does not "allow" TP access. I find that this wording works to ensure the Tenant is not held responsible for situations outside of her control. Moreover, while I am not privy to the exact circumstances which resulted in TP no longer being a tenant, I do not find it inherently unreasonable for the Settlement Terms to require, by implication, that the Tenant and TP visit each other outside of the rental property.

Furthermore, I do not find the Settlement Terms to have resulted from one party taking "advantage of the ignorance, need or distress of a weaker party". I find the Tenant was represented by the same legal advocate JK at the previous proceeding and would have negotiated the Settlement Terms with JK's assistance. I note CML did not have a lawyer or legal advocate in these proceedings. I find it was open to the Tenant, with the help of JK, to negotiate different settlement terms, or to reject the Settlement Terms and have the previous arbitrator simply adjudicate the case on its merits.

I also note the previous arbitrator specifically indicated that "[b]oth parties gave verbal affirmation at the hearing that they understood and agreed to the above terms as legal, final and binding, which settle all aspects of this dispute" (emphasis added).

Therefore, I do not accept the Tenant's argument now that the Settlement Terms are unconscionable and unenforceable.

b. Material Terms

Policy Guideline 8 defines a “material term” of a tenancy agreement as one that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

Policy Guideline 8 further states:

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
>
> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> - that if the problem is not fixed by the deadline, the party will end the tenancy.

I do not agree with the Tenant’s position that a breach of the Settlement Terms should be treated as a breach of material terms in the tenancy agreement. First, there is no clear indication from the previous arbitrator’s decision that the Settlement Terms, in particular terms 3, 4, and 5, would be added as material terms to the parties’ tenancy agreement. Second, I find the parties could have negotiated the wording of the Settlement Terms in a way that would avoid a zero-strike agreement but ultimately did not do so. I find requiring CML to give a written warning and reasonable time for a breach to be corrected would be inconsistent with the wording in term 5 of the Settlement Terms. Third, I find there would be no practical way for terms 3 and 4 to be enforced if they are to be treated as material terms, given that the Tenant could allow TP access to the rental property and TP could leave before CML is able to issue a written warning to the Tenant. Based on the foregoing, I do not find a breach of the Settlement Terms should be treated as a breach of material terms of the tenancy agreement. Therefore, I also do not find that cause for failure to comply with a material term under section 47(1)(h) of the Act would have been applicable in the circumstances.

c. Orders of the Director

The Settlement Terms were issued pursuant to section 63 of the Act, which states:

> **Opportunity to settle dispute**
> 63(1) The director may assist the parties, or offer the parties an opportunity, to settle their dispute.
> (2) If the parties settle their dispute during dispute resolution proceedings, the director may record the settlement in the form of a decision or an order.
>
> (emphasis added)

In my view, terms 3, 4, and 5 of the Settlement Terms are "orders" of the director because they require the Tenant and TP, who was also a tenant at the time, to do or refrain from doing certain acts. I note that apart from Orders of Possession and Monetary Orders which are issued as separate documents, decisions issued by arbitrators routinely include other orders under the Act which compel parties to do or refrain from doing certain acts. Such orders are not issued in separate documents but are included as part of the decision itself. As such, I find that the Settlement Terms in question are orders of the director by consent under section 63 of the Act.

d. Application of Section 47(1)(l)

Turning to section 47(1)(l) of the Act, I find there is difficulty in fitting terms 3 and 4 of the Settlement Terms under the framework of this section, as neither of the orders in terms 3 and 4 specify a date for compliance. Therefore, in my view, it is not possible to issue a one month notice to end tenancy for cause under section 47(1)(l) of the Act for a breach of terms 3 and 4 alone, given the way these terms are worded.

However, I find that term 5 of the Settlement Terms does not have the same problem because its wording allows for a determinable date for compliance. In my view, term 5 may be captured as an order of the director with a deadline for compliance under section 47(1)(l)(ii) of the Act.

I find that in this case, the deadline in term 5 of the Settlement Terms would have been August 7, 2022, or 30 days after the Tenant received the letter from CML on July 8, 2022. I find this letter would have constituted sufficient written notification from CML that the Tenant had breached terms 3 and 4 of the Settlement Terms. I note that in the absence of CML's letter, I would also consider the One Month Notice itself to be written notification from CML for the purposes of term 5.

d. Breach of Settlement Terms

I find the Tenant breached terms 3 and 4 of the Settlement Terms by allowing TP access into the rental unit for several minutes on July 6, 2022 to retrieve his bike. I find the Tenant did not receive CML's permission to allow TP onto the property on this occasion. While I find this breach to be trivial, I find the Tenant was aware of the Settlement Terms and made a choice to allow TP access not only onto the rental property but actually inside the rental unit. I agree with the Landlords' position that there were other ways to remove TP's bike without breaching the Settlement Terms. I find TP's bike could have been picked up on different day when there was no rush or with another person's assistance.

Furthermore, I find the Tenant did not move out of the rental unit by August 7, 2022, or within 30 days after receiving CML's letter dated July 8, 2022. I find the Tenant continues to reside in the rental unit. I find that as a result, the Tenant also breached term 5 of the Settlement Terms.

e. Application to the One Month Notice

I find the Settlement Terms are binding and enforceable upon the parties. I find the Tenant is in breach of terms 3, 4, and 5 of the Settlement Terms.

However, I find the One Month Notice was issued on July 7, 2022 before the Tenant had in fact breached term 5 of the Settlement Terms. I have found above that section 47(1)(l) of the Act would apply to a breach of term 5, but not to a breach of terms 3 and 4 alone, because only term 5 includes a determinable date for compliance. As a result, I find the One Month Notice was issued prematurely under section 47(1)(l), and that this is a fatal defect with the One Month Notice which I am unable to cure under the Act.

I note this would be a very technical reason for cancelling the One Month Notice, particularly in light of my findings that the Tenant is still in the rental unit and has breached term 5 of the Settlement Agreement. However, my authority is derived from the Act, and I am unable to conclude that the Act provides any mechanism for allowing the One Month Notice to be found valid and effective with regards to a breach or cause that occurs *after* the One Month Notice is issued.

Accordingly, I order that the One Month Notice be cancelled and of no force or effect.

I conclude that CML is at liberty to issue another one month notice to end tenancy for cause under section 47(1)(l) of the Act for breach of term 5 of the Settlement Terms. I note that I would also be prepared to find the parties have agreed their tenancy is ended under section 55(2)(d) of the Act. I note that the Settlement Terms, which are in writing and were by consent of the parties, provided conditions under which the tenancy would end, and that those conditions would appear to have been met on August 7, 2022.

2. Is the Tenant entitled to an order that the Landlords comply with the Act, the regulations, or tenancy agreement?

Section 62(2) of the Act states 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".

In this application, the Tenant states that she wants the Landlords to comply as follows (portions redacted for privacy):

> *I want [JC] to not harass myself or [TP] anymore. He harasses [TP] when he is allowed to be on the road side of the fence. He snoops to see what I have in the back of my car. [W] his wife came around the neighbors fence to catch [and] this type of behaviour has been happening since Nov. 2021. [TP] has respected the agreement except for 1 time for 2 minutes to save me hassle.*

I find the Tenant has not provided sufficient evidence to demonstrate on a balance of probabilities that an order for the Landlords, in particular JC, to comply with the Act, the regulations, or tenancy agreement is warranted in the circumstances. I find the Tenant has not provided sufficient details to substantiate her claim that she and TP have been "harassed" by JC since November 2021. I find there is insufficient evidence to demonstrate a pattern of behaviour which amounts to a breach of the Tenant's right to quiet enjoyment under section 28 of the Act, or another breach under the Act, the regulations, or tenancy agreement.

Accordingly, I dismiss the Tenant's claim under this part without leave to re-apply.

Conclusion

The One Month Notice is cancelled and of no force or effect.

The Tenant's claim for the Landlords to comply with the Act, the regulations, and the tenancy agreement is dismissed without leave to re-apply.

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 11, 2022

Residential Tenancy Branch