Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding NANAIMO AFFORDABLE HOUSING SOCIETY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes PSF, OLC

Introduction

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

- an order to the landlord to provide services or facilities required by law pursuant to section 65; and
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62.

Both parties attended the hearing. This hearing commenced at 1:30 p.m., and ended at 2:50 p.m. in order to give both parties a full opportunity to be heard, to present their sworn testimony, to make submissions, and cross-examine one another.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's dispute resolution package and amendment. In accordance with sections 88 and 89 of the *Act*, I find that the landlord duly served with the tenant's application and amendment. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

Issues

Is the tenant entitled to an order to the landlord to provide services or facilities required by law?

Is the tenant entitled an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began on September 1, 2018. Monthly rent is currently set at $361.00, payable on the first of the month. The landlord holds a security deposit of $216.50 for this tenancy.

The tenant filed this application as the landlord removed the on-site smoking area that the tenant had access to since the beginning of this tenancy. The landlord does not dispute that the on-site smoking area was removed on December 1, 2022, when the landlord declared the property a “smoke free property”.

The tenant requested the restoration and the continued provision of the smoking facility as they feel that this facility was provided for in the tenancy agreement as a standard and material term, and is essential to the tenant’s use of the living accommodation. The tenant notes that the tenancy agreement specifically notes that “a designated smoking area is provided on the property”, and that they had use of the designated smoking area since the beginning of this tenancy. The tenant cited safety concerns as they feel that they do not have any safe alternatives to smoking on the property. The tenant argued that the neighbourhood is not safe, and that the landlord’s decision to remove the smoking area has forced the tenant and other smokers to smoke on the sidewalk where homeless people are constantly asking the smokers for their cigarettes. The tenant argued that the landlord is obligated to provide the tenant a safe place to smoke.

The tenant further argued that the removal of the facility is unconscionable and that the building is located three blocks from the downtown core where a recent murder had taken place. The tenant also expressed concern about the proximity to a safe injection

site a block away, which the tenant states serves 200 users. The tenant feels that the landlord is forcing the tenant and other smokers to leave the property, which puts the tenants at risk.

The tenant submitted copies of newspaper articles, including an article detailing a stabbing that took place in a downtown parking lot, resulting in the victim dying of their injuries. The tenant also submitted an article detailing an incident where an ex-boyfriend was charged with manslaughter of a woman whose body was found downtown on June 3, 2021. Another article was submitted about a nuisance property located nearby. The tenant also included letters written to the editor of the newspaper from concerned citizens about the downtown core and the safe injection site. The tenant testified that they had collected 31 signatures of parties confirming that the neighbourhood is unsafe. The tenant testified that they also had witnesses who could testify to this, and requested that the Arbitrator contact these parties.

The landlord responded that the provision of a designated smoking area is not a material term of term of the tenancy agreement, and that in fact the provision of the smoking facility contradicts another term of the tenancy agreement that clearly states "smoking of any combustible material is not allowed in the building or any common areas of the property". The landlord argued that effective December 1, 2022, all properties are now smoke free properties, and smoking is no longer permitted whatsoever on the property. The landlord argued that smoking on the property was not essential to the tenant's living accommodation, and that the tenant could smoke in other areas off the property. The landlord argued that it was the tenant's opinion that the area was not safe, and argued that the area is sufficiently safe for the tenant to smoke off the property. The landlord argued that crime and murders take place in all major cities, and that this is not sufficient proof that the area is not safe. The landlord argued that they live less than a block away, and was familiar with the area.

Analysis

I note that the tenant made a request for the Arbitrator to contact their witnesses. No witnesses were in attendance during the scheduled teleconference call.

RTB Rule of Procedure 7.19 states the following about a witness' attendance at the dispute resolution hearing

"Parties are responsible for having their witnesses available for the dispute resolution hearing.

A witness must be available until they are excused by the arbitrator or until the dispute resolution hearing ends."

In this case, although I had extended the hearing to allow both parties ample time to make their submissions and cross examine the other party if they wished to do so, no witnesses had called into the teleconference hearing to confirm that they were prepared to provide testimony.

As noted in RTB Rule of Procedure 7.19, the parties are responsible for having their witnesses available for the dispute resolution hearing. As noted above, none of the tenant's witnesses were in attendance.

The onus is on both parties to be prepared for the hearing, including making sure that their witnesses were available to attend at the scheduled hearing time, and submitting relevant evidence prior to the hearing date. I am not satisfied that the tenant had made the proper arrangements to have their witnesses attend. I find that both parties had a fair opportunity to be heard, and call any witnesses in accordance with Rule 7.19. I further note that it is not the responsibility of the Arbitrator to investigate matters after a hearing is held, and decline the tenant's request to do so. I will now proceed with the following findings related to the tenant's application.

Section 27 of the *Act* establishes the basis for a landlord to terminate or restrict services or facilities with respect to a tenancy:

> ***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.*

The tenant argued that the provision of the smoking facility is a "standard term", and therefore cannot be removed from the tenancy agreement. I note that a "standard term"

is defined under the *Residential Tenancy Act* as the “standard terms of a tenancy agreement prescribed in the regulations. *Residential Tenancy Regulation* 13 (1.1) states that “The terms set out in the schedule are prescribed as the standard terms.”. The Schedule sets out that “any change or addition to this tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable”, but that this requirement does not apply to” a withdrawal of, or a restriction on, a service or facility in accordance with the *Residential Tenancy Act*”. The provision of a smoking facility is not considered a “standard term” as per the Act and Regulation. Furthermore, a landlord may remove or restrict a facility in accordance with section 27 of the *Act*, unless the term is essential to the tenant’s living accommodation or is a material term of the tenancy agreement.

RTB Policy Guideline #22 provides further clarification of what constitutes an essential facility or facility:

B. ESSENTIAL OR PROVIDED AS A MATERIAL TERM

An “essential” service or facility *is one which is necessary, indispensable, or fundamental. In considering whether a service or facility is essential to the tenant's use of the rental unit as living accommodation or use of the manufactured home site as a site for a manufactured home, the arbitrator will hear evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the tenant to use the rental unit as living accommodation. For example, an elevator in a multi-storey apartment building would be considered an essential service.*

Unlike a kitchen, bathroom or elevator, I do not consider a designated smoking area to be essential to the tenant’s use of the living accommodation as the removal of the smoking area does not make it impossible or impractical for the tenant to use their rental unit as living accommodation. I will now consider whether the provision of the smoking facility is a material term.

As noted in RTB Policy Guideline #8, a material term is a term 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. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more

terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

I must focus on the importance of the facility in the overall scheme of the tenancy agreement. The tenant argued that the tenancy agreement clearly states that the landlord would provide this facility as part of the tenancy agreement, and that the alternative is unsafe.

"In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, an arbitrator will also consider whether the tenant can obtain a reasonable substitute for that service or facility.

In consideration of the evidence and testimony before me, I am not satisfied that the provision of a designated smoking area to be a material term of the tenancy agreement. Although I recognize the negative impact that the removal of the facility has had on the tenant, I find that the tenant does have access to a reasonable alternative, which is smoking off of the property.

Although the tenant raised concerns about the safety of smoking off of the property, I do not find these concerns to be sufficiently supported in evidence. The tenant provided various articles they had found and selected to support people's concerns about the area, as well as incidents that have taken place in the vicinity. As argued by the landlord, these occurrences and concerns do not necessarily prove that the area is unsafe. I find the articles do not contain sufficient detail to support that merely smoking or walking off of the property would put the tenant's safety in jeopardy. Although I accept that the tenant may be fearful, I do not find that this is sufficient evidence to support that the tenant's safety is at risk, especially to the extent smoking off of the property is not possible or reasonable. I do not find that the provision of an onsite smoking area to be a material term of the tenancy agreement. As such, the landlord may withdraw this facility in accordance with sections 27(2)(a) and (b) of the *Act.*

I do not find that the landlord has contravened the *Act* or legislation at this time. For this reason, I dismiss the tenant's application for the landlord to comply with the *Act.*

Conclusion

I dismiss the tenant's entire application without leave to reapply.

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: May 17, 2023