

Introduction

- [1] On November 23, 2023 the Tenant filed a *Tenant Application to Determine Dispute* (Form 2(A)) (the "Application") with the Residential Tenancy Office (the "Rental Office").
- [2] Attached to the Application was an *Eviction Notice* (Form 4(A)) (the "Notice") dated November 17, 2023, with a vacate date of December 17, 2023. The Notice was served to the Tenant for the following reasons:

You or someone you have allowed on the property have engaged in illegal activity on the property; and

You or someone you have allowed on the property has caused damage to the rental unit.

- [3] On November 24, 2023 the Rental Office mailed the parties notice of a hearing scheduled for 11:00 a.m. on December 5, 2023.
- [4] On December 1, 2023 an evidence package was emailed to the Landlord by the Rental Office. The Landlord was requested to serve the Tenant with a paper copy of the evidence package.
- [5] On December 5, 2023 a teleconference hearing was held with the parties for determination of the Application. The parties confirmed receipt of the evidence package at the hearing.
- [6] At the Officer's request, the Landlord provided the Rental Office with a copy of a written tenancy agreement with the Tenant.

Issue to be Decided

- i. Does the Tenant and all occupants have to vacate the Rental Unit pursuant to the Notice?

Summary of the Evidence

- [7] The Rental Unit is a one-bedroom, one-bathroom apartment located in a three-level building containing twelve rental units (the "Residential Property").
- [8] The Tenant and the former owner of the Residential Property entered into a written tenancy agreement that commenced on August 1, 2017. The Tenant paid a \$350.00 security deposit to the former owner. The Landlord purchased the Residential Property in May of 2020 and the tenancy continued.
- [9] On May 20, 2022 the Landlord and the Tenant signed a written, fixed term tenancy agreement for the period of June 1, 2022 to May 31, 2023. At the end of the term the tenancy continued on a month-to-month basis. Rent in the amount of \$683.02 is due on the first day of the month.

Landlord's Evidence

- [10] The Representative's evidence is summarized as follows. The Representative began managing the Residential Property for the Landlord in July of 2021.
- [11] The Tenant has been smoking in the Rental Unit even though he has received warnings from representatives of the Landlord not to smoke. On November 11, 2023 the Landlord gave written notice to inspect the Rental Unit on November 14, 2023. When the Representative accessed the Rental Unit it was clear that the Tenant had been smoking in the unit.

- [12] The Landlord submitted into evidence photographs of the Rental Unit (without date stamps). The Representative stated that some photographs were taken during the inspection on November 14, 2023 and some photographs were taken on other dates. The Representative reviewed the photographs and provided evidence regarding damage to a wall, ceiling and bathtub in the unit.

Tenant's Evidence

- [13] The Tenant's evidence is summarized as follows. The Tenant does not know the whereabouts of the original written tenancy agreement with the former owner.
- [14] When the Tenant first moved into the Rental Unit he smoked outside. The Tenant's neighbours asked him why he smoked outside because everyone smoked in their rental units. About a month after the Tenant moved in he began smoking in his Rental Unit. After the Landlord purchased the Residential Property, the Tenant had conversations with representatives of the Landlord in which he was told not to smoke in the Rental Unit.
- [15] The Tenant is a drywall carpenter. The windows of the Rental Unit are near ground level. In 2018 water started coming in through an exterior wall, causing damage to the interior wall of the Rental Unit. The former landlord had the exterior siding taken off, new membranes installed and the exterior siding was reattached. The white substance shown on a wall in the Landlord's photographs is plaster. The interior walls have not been painted since at least August 1, 2017, the date the Tenant moved into the Rental Unit.
- [16] During the first three years the Tenant lived in the Rental Unit, before the Landlord purchased the Residential Property, a small portion of the living room ceiling fell down. This portion of the ceiling is located in the living room in front of the bathroom door. The Tenant had not touched the ceiling before it fell.
- [17] The plumbing in the Rental Unit is approximately 30 to 40 years old and does not appear to the Tenant to have been updated since the Residential Property was first built.

Analysis

Effective Date

- [18] Subsection 61(3) of the *Act* states:

A notice of termination under this section shall end the tenancy effective on a date that is

- (a) not earlier than one month after the date the notice is received; and*
(b) the day before the day that rent is payable under the tenancy agreement.

- [19] As rent is due by the first day of the month, the Officer finds that the effective date of the Notice is automatically changed from December 17, 2023 to December 31, 2023, pursuant to section 54 of the *Act*.

Validity of the Notice

1. Illegal Activity

- [20] The first ground for termination of the tenancy is pursuant to clause 61(1)(e) of the *Act*, which states:

A landlord may end a tenancy by giving a notice of termination where one or more of the following applies:

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

- (i) has caused or is likely to cause damage to the landlord's property,*
- (ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or*
- (iii) has jeopardized or is likely to jeopardize a lawful right or interest of the landlord or another occupant.*

- [21] There are two elements to terminating a tenancy agreement pursuant to this clause. The first element a landlord must establish is an "illegal act." This means that the landlord must prove that the tenant, or a guest of the tenant, engaged in a serious violation of a federal, provincial or municipal law. The law violated does not need to be a Criminal Code offence.
- [22] For the second element, a landlord must establish that the illegal activity was serious enough to have a harmful impact on the landlord's property, other occupants of the residential property, or the landlord.
- [23] Both of these two elements must be proven in order to end a tenancy pursuant to clause 61(1)(e).
- [24] The Landlord's position is that the Tenant smoking cigarettes in the Rental Unit constitutes an illegal activity. However, it has not been established that the Tenant smoking cigarettes in the Rental Unit is a serious violation of a federal, provincial or municipal law.
- [25] In particular, the *Smoke-Free Places Act* RSPEI 1988, S-4.2 prohibits smoking in public places, workplaces and other locations. Charlottetown's *Smoke Free Places Bylaw* (#2018-01) has restrictions regarding City owned properties. Neither of the laws appear to restrict a tenant from cigarette smoking in a rental unit. Instead, it appears that cigarette smoking restrictions are a matter of contract between a landlord and a tenant.
- [26] In this case, although the Landlord has taken the position that the Tenant cannot smoke cigarettes in the Rental Unit, it is unclear to the Officer that smoking cigarettes is in fact restricted by the tenancy agreement. The location of the original tenancy agreement from 2017 is unknown. The tenancy agreement from 2022 is silent regarding whether smoking is restricted in the Rental Unit. There has been a longstanding history of the Tenant smoking in the Rental Unit. The Landlord only became the Tenant's landlord in 2020, almost three years after the original terms of the tenancy were established. A change in ownership does not automatically allow the new landlord to unilaterally impose new conditions to pre-existing tenancy agreements.
- [27] As the Landlord has not established the first required element of an illegal activity, it is unnecessary for the Officer to determine the second element. The Officer finds that the Landlord has not established a breach of clause 61(1)(e).

2. Unreasonable Damage

- [28] The second ground for termination of the tenancy is pursuant to clause 61(1)(f) of the Act, which states:

A landlord may end a tenancy by giving a notice of termination where one or more of the following applies:

- (f) the tenant or a person permitted on the residential property by the tenant has caused unreasonable damage to a rental unit or the residential property.*

[29] Subsections 28(1), (4) and (5) of the Act state:

(1) A landlord shall provide and maintain the residential property in a state of repair that

(a) complies with the health, safety and housing standards required by law; and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(4) A tenant of a rental unit shall repair, in a good and professional manner, undue damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(5) A tenant is not required to make repairs for reasonable wear and tear to the rental unit or common areas of the residential property.

[30] The Officer has reviewed the evidence of the parties. Although the Landlord's photographs establish that there is currently damage inside of the Rental Unit, it has not been established that the damage was caused by the actions or neglect of the Tenant. The Officer notes that ideally these photographs would have been date stamped at the time taken.

[31] Part of the damage appears to be longstanding, before the Landlord purchased the Residential Property. The Representative only began managing the Residential Property in July of 2021. Therefore, the only direct evidence before the Officer up to this time is from the Tenant. The Tenant has denied responsibility for the damage and he has provided reasonable explanations for the current condition of the unit.

[32] Furthermore, much of the damage shown in the Rental Unit appears to be normal wear and tear, which is not the Tenant's responsibility (subsection 28(5)).

[33] For the reasons above, the Officer finds that the Landlord has not established a breach of clause 61(1)(f).

Conclusion

[34] The Notice is invalid and the Application is allowed. The tenancy between the parties will continue in full force and effect.

IT IS THEREFORE ORDERED THAT

1. The Notice is invalid and the Application is allowed.
2. The tenancy between the parties will continue in full force and effect.

DATED at Charlottetown, Prince Edward Island, this 8th day of December, 2023.

(sgd.) Andrew Cudmore

Andrew Cudmore
Residential Tenancy Officer

NOTICE

Right to Appeal

This Order can be appealed to the Island Regulatory and Appeals Commission (the “Commission”) by serving a Notice of Appeal with the Commission and every party to this Order within **20** days of this Order. If a document is sent electronically after 5:00 p.m., it is considered received the next day that is not a holiday. If a document is sent by mail, it is considered served on the third day after mailing.

Filing with the Court

If no appeal has been made within the noted timelines, this Order can be filed with the Supreme Court of Prince Edward Island and enforced as if it were an order of the Court.