

Introduction

- [1] On March 18, 2024 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 were two *Eviction Notices* (Form 4(A)s), both dated March 15, 2024. In this decision the two notices are referred to collectively as the "Notice." The first termination notice has two reasons for termination but has an incorrect effective date of April 15, 2024. The second termination notice does not state a reason for termination, but it has a permissible effective date of May 1, 2024. It appears to the Officer that the second termination notice is effectively a correction of the effective date of the first termination notice.
- [3] The Notice was served to the Tenant for the following reasons:
- You or someone you have allowed on the property have disturbed or endangered others;
and
You or someone you have allowed on the property have engaged in illegal activity on the property.*
- [4] On March 22, 2024 the Rental Office mailed and emailed the parties notice of a teleconference hearing scheduled for 9:00 a.m. on April 9, 2024, along with a copy of the Application.
- [5] On April 5, 2024 the Rental Office emailed an evidence package to the parties via TitanFile, which included 37 videos from the Landlord (the "Evidence Package" or "EP").
- [6] On April 8, 2024 the teleconference hearing was rescheduled to 9:00 a.m. on April 12, 2024.
- [7] On April 11, 2024 the Rental Office telephoned the Tenant to confirm whether she was able to access the Evidence Package. The Tenant advised the Rental Office that she had not received an email from the Rental Office regarding the Evidence Package. The Rental Office then sent a second email providing the Tenant with access to the Evidence Package via TitanFile.
- [8] On April 12, 2024 a teleconference hearing was held with the parties before the Residential Tenancy Officer (the "Officer") for determination of the Application. The Tenant and her two witnesses, TW1 and TW2, participated in the hearing. The Representative participated in the hearing on behalf of the Landlord, along with the Landlord's witness, LW1.

Preliminary Matter

- [9] At the beginning of the hearing the Officer asked the parties whether they had received the Evidence Package from the Rental Office. The Representative confirmed receipt of the Evidence Package.
- [10] The Tenant advised the Officer that she had received the Evidence Package but she was unable to open it. The Officer asked the Tenant if she wanted to adjourn the hearing in order to provide additional time to review the Evidence Package. The Tenant advised the Officer that she wanted to proceed with the scheduled hearing.

Issue to be Decided

- i. Does the Tenant have to vacate the Unit due to the Notice?

Summary of the Evidence

- [11] The Unit is located in a 17-unit motel (the "Residential Property") that the Landlord purchased approximately ten years ago. In February of 2020 the Landlord and the Tenant had previously entered into an oral tenancy agreement for unit 3, a different unit of the Residential Property.
- [12] In 2021 the Landlord and the Tenant entered into an oral, month-to-month tenancy agreement for the Unit. Rent in the amount of \$824.00 is due on the first day of the month. The Tenant stated that a \$700.00 security deposit was paid and the Representative stated that a \$500.00 security deposit was paid.
- [13] The Landlord and the Tenant were parties to two earlier Rental Office decisions and one Island Regulatory and Appeals Commission (the "Commission") decision, which are included in the Evidence Package. These decisions addressed two earlier attempts by the Landlord to end the tenancy.

Landlord's Evidence and Submissions

Representative

- [14] The Representative's evidence is summarized as follows.
- [15] The Representative stated that the Landlord and the Tenant did not complete a written tenancy agreement because the parties agreed that a written agreement was unnecessary.
- [16] The Representative stated that the Tenant has caused the Landlord significant trouble. The Landlord submitted into evidence a document (EP 19) dated March 16, 2024 with the names of fifteen people (the "Petition"), which states as follows:
- "This is a petition to have [Unit] [Tenant] to be put out as she is a trouble maker and causes problems around here."*
- [17] The Representative submits that the Tenant is prohibited from smoking inside of the Unit. A no smoking sign has been installed on the front door of the Unit for at least ten years. The other doors of the Residential Property also have no smoking signs and the Representative provided the Tenant with warnings not to smoke in the Unit. The Landlord submitted into evidence a warning letter. The Representative stated that the warning was signed by the Tenant and dated August 4, 2023 (EP 17).
- [18] Despite these measures the Tenant smokes inside of the Unit. The Tenant's witness (TW1), who lives in unit 2 of the Residential Property, also smokes in the Unit.
- [19] There are a couple of people that live above the Unit who do not smoke. In the winter the hot air rises, along with the smoke. The Representative stated that smoking is harmful to human beings.
- [20] The Representative disputed the evidence of the Tenant and her witness that he smokes.
- [21] The Representative stated that the Tenant hosts many drug dealers at the Unit during quiet time, between 11:00 p.m. and 7:00 a.m. The Landlord has received a number of noise complaints against the Tenant from other tenants. The Landlord installed a surveillance camera showing a common area of the Residential Property. The Representative stated that the videos submitted into evidence show people coming in and out of the Unit during quiet time.
- [22] The Tenant sent LW1 an insulting text message, which was submitted into evidence (EP 18).

LW1

- [23] The evidence of LW1 is summarized as follows.
- [24] LW1 lives in unit 17, which is in a separate, three-unit building forming part of the Residential Property. Unit 17 is across from the Tenant's Unit.
- [25] The Tenant has been unhappy about items that LW1 has placed in his window. From June to August of 2023 LW1 put a security camera in his window that he had purchased from Amazon. In August of 2023 LW1 put a second camera in the window that he had purchased from Canadian Tire. LW1 stated that the second camera *"is not even hooked up, it's just sitting in the window as intimidation."*
- [26] At 4:02 p.m. on March 10, 2024 LW1 received a text message from the Tenant while LW1 was in the United States (EP 18). LW1 stated that no criminal charges resulted from the text message.
- [27] LW1 stated that the Tenant has problems with her neighbours every five minutes and she is provoking people all of the time. LW1 stated that the Tenant will provoke a response and then call the police.

Tenant's Evidence and Submissions**Tenant**

- [28] The Tenant's evidence is summarized as follows.
- [29] The Tenant submits that she is permitted to smoke in the Unit. The Tenant stated that a number of people smoke inside of their units, including the Landlord's witness, LW1. The Tenant stated that the Representative smoked weed with the Tenant. The Tenant disputes signing the warning letter dated August 4, 2023 (EP 17).
- [30] The Tenant stated that she has PTSD, she sometimes gets scared at night, and she has difficulty sleeping. The Tenant sometimes has people over to keep her company.
- [31] The Tenant stated that she previously had a relationship with LW1. The Tenant stated that LW1 had a camera in his window until a fire occurred at the Residential Property. LW1 later put up a new camera. Another tenant at the Residential Property told the Tenant that LW1's camera was recording her.
- [32] The Tenant submits that the Representative wants to evict her in order to increase the rent for the Unit.

TW1

- [33] TW1's evidence is summarized as follows.
- [34] TW1 lives in unit 2 of the Residential Property. TW1 stated that everyone in the Residential Property smokes, including the Representative.
- [35] TW1 stated that the Tenant's unit is quiet.
- [36] TW1 stated that she received videos of herself via a family member that had been recorded from LW1's unit.

TW2

- [37] TW2's evidence is summarized as follows.
- [38] TW2 stated that the Representative had parked his car in front of the Unit in order for the dashcam camera to record through the Unit's window.

Analysis**1. Disturbed or Endangered Others**

- [39] The first ground for termination of the tenancy is pursuant to clause 61(1)(d) of the *Residential Tenancy Act* (the "Act"), which states:

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

- (d) the tenant or a person permitted on the residential property by the tenant has*
- (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,*
 - (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or*
 - (iii) put the landlord's property at significant risk;*

- [40] In Order LR23-38 the Commission determined whether a notice of termination served for smoking in a rental unit was a breach of this clause. The Commission stated as follows at paragraph 14:

"The prohibition of smoking is clearly stated in the tenancy agreement. It is a material term of the tenancy agreement. Smoking has health risks and fire safety risks. It can interfere or disturb other tenants or the landlord. It can seriously jeopardize the health, safety or lawful right of the landlord or another occupant. It can put the landlord's property at significant risk. The Commission agrees with the Rental Officer that the perspective of the other tenants is important. The Commission would add that the perspective of the landlord is also important."

- [41] A clear smoking prohibition in the written tenancy agreement was an important factor in Order LR23-38 for finding that a tenant had breached clause 61(1)(d).
- [42] One of the many benefits of having a written tenancy agreement is clarity of the terms that have been agreed upon by a landlord and a tenant.
- [43] In this case there is an oral tenancy agreement and no written tenancy agreement. The Landlord could have required the Tenant to sign a written tenancy agreement before occupation of the Unit, however, the Landlord decided that such a document was unnecessary. The absence of a written tenancy agreement puts into question whether the Tenant is in fact prohibited from smoking in the Unit.
- [44] The Tenant provided evidence that there is a widespread practice of smoking in rental units at the Residential Property. Although the door of the Unit has a no smoking sign, this does not automatically add a "no smoking" clause to an oral tenancy agreement. The Tenant has denied that she signed the warning letter submitted into evidence by the Landlord (EP 17). Even if the Tenant did sign the letter, it is unclear whether the Tenant's signature would mean acknowledgement of receipt of the letter or agreement to the contents of the letter. Based upon the evidence presented, the Officer is unable to conclude that the Tenant's oral tenancy agreement prohibits smoking in the Unit.

- [45] Although there are inherent risks of smoking, the law on Prince Edward Island allows for freedom of contract regarding smoking.
- [46] The *Smoke-Free Places Act* RSPEI 1988, S-4.2 prohibits smoking in public places, workplaces and other locations. This law does not prohibit a tenant from cigarette smoking inside of a rental unit. The *Act* and the *Residential Tenancy Regulations*, EC269/23 do not specifically address smoking in a rental unit.
- [47] There may be a case where a tenant smoking in a rental unit breaches clause 61(1)(d), even if the tenancy agreement does not prohibit smoking. However, in this case insufficient evidence has been presented to establish a breach. The tenants in the units adjacent to the Unit did not participate in the hearing and provide testimony. The Petition submitted into evidence by the Landlord does not provide particulars of complaints against the Tenant regarding smoking (EP 19).
- [48] The evidence establishes that the Tenant has smoked in the Unit. However, the evidence presented does not establish a breach of clause 61(1)(d) regarding smoking.
- [49] The Officer has reviewed the evidence of the parties regarding the Tenant having guests at the Unit late at night and early in the morning and alleged drug usage, including the videos provided by the Landlord. The evidence does not establish a breach of clause 61(1)(d).
- [50] The March 10, 2024 text message from the Tenant to LW1 is unsavoury. However, the evidence presented provides the context in which the text message was sent. In particular, the evidence establishes that LW1 has a surveillance camera in the window of his unit, which is located across from the Unit. The Officer finds that the March 10, 2024 text message did not breach clause 61(1)(d) of the *Act*.
- [51] **Further unsavoury communications between the Tenant and LW1 could result in the termination of the tenancy. The Tenant and LW1 would be well advised to avoid further communication with one another.**
- [52] The evidence presented raises concerns regarding LW1 recording other tenants of the Residential Property. However, the sole matter before the Officer is the Notice served by the Landlord to the Tenant.

2. Illegal Activity

- [53] The second 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.

- [54] 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.

- [55] 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.
- [56] Both of these two elements must be proven in order to end a tenancy pursuant to clause 61(1)(e).
- [57] The evidence regarding the Tenant smoking cigarettes in the Unit, the March 10, 2024 text message, the Tenant's guests at the Unit during quiet hours, and alleged drug usage do not establish a serious violation of a federal, provincial or municipal law. The Landlord provided video evidence regarding guests the Tenant allowed in the Unit. The Officer is unable to draw inferences that the Tenant or these guests engaged in illegal acts.
- [58] As the Landlord has not established the first required element of an illegal act, 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).

Written Tenancy Agreements

- [59] Since April 8, 2023, the date the *Act* came into force, landlords have been required to prepare written agreements for all new tenancies. Subsection 11(1) states:
- A landlord shall prepare a written tenancy agreement in respect of a tenancy that is entered into on or after the date this Act comes into force.*
- [60] There are many required terms for all tenancy agreements on Prince Edward Island (see subsection 11(2) of the *Act*). The Landlord cannot include additional terms in the written tenancy agreement that conflict with the rental legislation.
- [61] The Landlord should be preparing written tenancy agreements for all new tenants of the Residential Property. If the Landlord wants to prohibit smoking by the new tenants, then the Landlord can state this in the written agreement. The Landlord should also have a consistent practice of written warnings and enforcement for rental units where smoking is prohibited.

Conclusion

- [62] The Notice is invalid and the Application is allowed. The tenancy between the Landlord and the Tenant will continue in full force and effect.

IT IS THEREFORE ORDERED THAT

1. The tenancy between the Landlord and the Tenant will continue in full force and effect.

DATED at Charlottetown, Prince Edward Island, this 17th day of April, 2024.

(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.