



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards  
Ministry of Housing and Social Development

## Decision

Dispute Codes: CNC, CNR, MNDC, RP, FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a One Month Notice to End Tenancy for Cause dated September 5, 2008, an order to cancel a Ten Day Notice to End Tenancy for unpaid utilities dated September 5, 2008, a monetary order for an unspecified amount of damages in compensation for mold in the bathroom and a non-functional toilet, an order to compel the landlord to make repairs and recovery of the filing fee. The tenant's application also indicates that the tenant has not received a copy of the tenancy agreement.

Both the landlords and the tenants attended the hearing and gave testimony in turn. The property manager also appeared in support of the landlord.

Subsequent to the close of the hearing further documentation was received from the respondent landlord. However this evidence had not been served on the other party nor submitted prior to the proceedings within the required timelines, pursuant to Residential Tenancy Branch Rules of Procedure, Rule 4.1, and therefore it was wholly disregarded and was not considered in the determination of this dispute.

### Issue(s) to be Decided

The issues to be determined based on the hearing and written evidence are:

- Whether the Ten Day Notice to End Tenancy for unpaid utilities dated September 5, 2008 was justified under the Act. The following questions must be answered:
  - Was the tenant given a written demand for the utilities owed at least 30 days prior to the Notice to End tenancy?
  - If so, did the tenant fail to pay the utilities owed within 5 days of being served with the Notice?
- Whether the One-Month Notice to End Tenancy for Cause dated September 5, 2008 was justified under the Act. This requires a determination of whether or not at least one of the following can be established and proven by the landlord:
  - That the tenant was repeatedly late in paying the rent, ( three times or more)
  - That the tenant failed to do required repairs of damage to the unit/site.
  - That there a breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.
- Whether or not the tenant is entitled to be compensated for damages or loss caused by the landlord in contravention of the Act.
- Whether or not the landlord should be ordered to make repairs to the unit/site/property under the Act.
- Whether or not the landlord should be ordered to give the tenant a copy of the amended tenancy agreement pursuant to section 14 of the Act .

The burden of proof is on the landlord/respondent to justify that the Notices to End Tenancy are warranted under the Act. However, the tenant bears the onus of

establishing and proving the remainder of the matters under dispute in this application.

### Background and Evidence

Both parties submitted extensive written evidence in regards to the above. I am summarizing evidence presented in support of the issues raised by the tenants and rebutted by the landlords. These are listed in point form and are not in any order of importance.

### Tenant's Submission:

- Proof of service by registered mail dated September 13, 2008
- Photos and narrative descriptions dated September 4-13, 2008
- Statement dated September 13, 2008 signed by the tenants
- Handwritten letter dated September 10, 2008 from a former resident of the "small house" on the property
- Copy of a rent cheque payable to the landlord dated August 1, 2008 for \$1275.00. With the reverse side, indicating the cheque cleared the Royal Bank and Canada Trust August 5, 2008.
- Copies of E-mails from the beginning of the tenancy covering a variety of subjects; including mold in the bathrooms, the tenancy agreement change and disputing that the August rent was paid on time.

### Landlord's Submission

- Copy of tenancy Agreement dated April 11, 2008 signed by one tenant and both landlords.

- Repair and Rental Addendum dated April 12, 2008 and signed by one tenant and one landlord and listing six tasks in exchange for rent reductions in April and May 2008 with a deadline to complete of December 31, 2008 with costs of all materials to be born by the landlord either directly or by way of reimbursement to the tenants.
- Condition Inspection Report dated April 12, 2008
- E-mail dated April 22, 2008 from the Property Manager outlining changes to the tenancy agreement and two issues of material breach of contract; i.e. property maintenance and pets without prior permission.
- Communications concerning the mold issue, e-mails dated July and a summary of telephone conversations with the tenants.
- Details regarding site inspection conducted by landlord on July 18 & 20, 2008
- Confirmation that contractors commenced remedial work on the bathroom on July 31 and completed September 2, 2008.
- Cancelled cheques and bank statements showing June and July late rental payments being returned to the landlord for “no sufficient funds” NSF.
- Document alleging late rental payment for August 2008.

In regards to the Ten-Day Notice to End Tenancy, the landlord testified that this was issued because the tenant failed to pay utilities owed. The Landlord testified that the One-Month Notice to End Tenancy was issued due to repeated late payment of rent and provided verification that cheques from the tenant for the months of June and July 2008 were returned NSF on two occasions. The landlord's statement indicated that when attempts were made to deposit the August cheque on August 1, 2008 the bank verbally informed the landlord's agent that there were not sufficient funds in the account. The landlord also testified that the tenant did not perform duties that were part of the tenancy

agreement and were considered by the parties to be a material term in the tenancy agreement. The landlord testified that the tenant refused to permit the landlord access, violated the no pets clause, altered the landscape without permission and committed various other transgressions that the landlord considered to be violations of material terms in the tenancy agreement.

The tenant testified that the rent was paid up to date and not in arrears and that the cheque for August rent was submitted on time and was not returned NSF. The tenant referred to the tenant's bank statement submitted into evidence that verifies sufficient funds in the account on August 1, 2008 and shows August rent being withdrawn from the account on August 5, 2008. In regards to the alleged breaches of material terms of the tenancy agreement, the tenant testified that the original agreement was altered unilaterally by the landlord through an email notification without the tenant's signed agreement. The tenant's statement also indicated that the tenants have never refused access, that the property was not in pristine condition when the tenancy started and that the tenant has fulfilled all obligations in regards to the commitments made to perform the work agreed upon.

In regards to the tenant's claims for compensation, for damages and loss, the tenant's statement testified that one of the washrooms was unusable, there was a mold infestation that was not addressed by the landlord, that the landlord has entered the unit without proper written notice as required under the Act and that the landlord has engaged in harassing conduct that deprived the tenant of peaceful enjoyment of the rental unit.

The tenant did not specifically identify what repairs that the tenant was seeking to be ordered. However, the tenant has complained that one of the washrooms is in a state of disrepair and that the mold issue has not been satisfactorily resolved.

## **Analysis**

### **Analysis -Ten Day Notice for Unpaid Rent or Utilities**

The Notice dated September 5, 2008 indicates that the landlord was owed \$139.50 in utilities and that a written demand was “August 2008”. I note that paragraph 4.2 of the revised agreement the contract stated that, *“the tenants shall be liable for payment of all utilities...Hydro and garbage bills will be sent to the landlord and then forwarded to the tenant for payment.”*

Under section 46 (6) of the Act, if a tenancy agreement requires the tenant to pay utility charges to the landlord, and the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them, the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

I note that the evidence submitted by the landlord indicated that the tenant was given a written demand to pay utilities on August 24, 2008 by email. I find as a fact that the Notice to End Tenancy dated September 5, 2008 was issued less than 30 days after the written demand to pay these utilities. Accordingly, I find that on September 5, 2008, the Landlord was not entitled to consider the utilities to be rental arrears and therefore I find that the Ten-Day Notice to End Tenancy for Unpaid Rent was issued prematurely and is invalid. The Notice cannot be enforced for this reason and must be cancelled.

### **Analysis - Notice to End Tenancy for Cause**

As a preliminary matter, in regards to a one month notice under section 47 of the Act, the effective date 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 situation, the notice was dated September 5, 2008, and therefore the earliest date to end this tenancy would be October 31, 2008. Accordingly, and pursuant to my

authority under section 53 of the Act, I find that the effective date of this Notice in compliance with the legislation is deemed to be October 31, 2008.

In regards to the stated cause I find that the landlord has established that two rent payment cheques were returned for insufficient funds. However, I find that the landlord's claim that on August 1, 2008 that the tenant's account did not contain sufficient funds is contradicted by the tenant's bank statement submitted into which confirms that on August 1, the tenant's bank account contained more than sufficient funds to cover the rent cheque for August and records show that the cheque was not submitted until August 5, 2008, at which time it cleared.

The One-Month Notice also lists as cause that the tenant failed to repair damage to the unit/site. I find that it is not clear to what damage this refers. In any case, unless the tenant was responsible for the damage, section 32 of the Act places the responsibility for repairs onto the landlord.

In regards to the landlord's claim that there were breaches of several material terms of the tenancy agreement I find that the landlord's interpretation of the rights and responsibilities contained in the tenancy agreement have been challenged by the tenant. The landlord's evidence, identified in the material as document '3', titled "*Evidence Regarding Eviction for Cause (Material Breaches of Contract)*", contains details regarding the tenant's alleged violation of a complex arrangement that evidently involved performing certain labour tasks in exchange for a rent reduction. I find that the terms of the tenancy agreement relating to this particular arrangement are not clear. The landlord also took issue with the tenant's violation of certain verbal commitments. Section 6 (3) of the Act states that a term of a tenancy agreement is not enforceable if the term is unconscionable or if it is not expressed in a manner that clearly communicates the rights and obligations under it.

I find that it is not possible to give force to the terms that are contained in the "Repair and Rental Addendum" under paragraphs '3', '4', '5' or '6' as they do not clearly

communicate each party's reciprocal rights and obligations including non-subjective parameters regarding the precise standards, detailed timelines and specific extent and monetary value of each task involved . Moreover, I do not consider these terms to meet the definition of "material terms" in the agreement. I find that these do not properly belong in a tenancy agreement upon which the continued tenancy of the tenant would be contingent and should be contained in a separate contract.

I also note that this tenancy agreement attempts to inappropriately confer some of the responsibilities that legally belong to the landlord under the Act onto the tenant.

I must point out that while parties are at liberty to negotiate their own agreement, section 5 of the Act states that landlords and tenants may not avoid or contract out of this Act or the regulations and that any attempt to avoid or contract out of the Act or the regulations is of no effect.

Finally, I bring your attention to section 14 of the Act which does not permit a unilateral change to the tenancy agreement to be imposed by one party onto the other.

Accordingly, I find that there is not sufficient basis under the Act to uphold the One-Month Notice to end Tenancy for Cause and I find that the tenant's application to have the Notice cancelled must be granted.

### **Analysis - Claim for Damages**

In regards to the tenant's claims for compensation for damages, the evidence from both parties supports the existence of mold in the house and this issue is not in dispute by either party. However, the cause is under dispute by the parties with the landlord alleging that the tenants are responsible for the mold growth from their own actions, while the tenants' position is that the landlords have been neglectful. I note that on the condition inspection report mold is not identified as an issue. The need to replace the bathtub was identified. In regards to the complaint that the toilet was non-functional, the



landlord claims that the tenants removed the toilet themselves in an attempt to complete repairs in accordance with the Repair and Rental Addendum and that the tenants abandoned this work.

In regards to an Applicant's right to claim damages from another party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant must satisfy each component of the test below:

#### Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the landlord. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

I find that the tenants have not met the burden of proof to satisfy each element of the test above in proving damage and loss. However, the landlords have apparently already made a commitment to hire a contractor to complete the work and I find that this should proceed in a timely manner.

### **Analysis - Order Landlord to Complete Repairs**

The repairs and required renovations to address the toilet and the mold issues are apparently in process by the landlord. I encourage the parties to cooperate and to follow the Act with the hope that this results in a timely and complete repair to the problems with the unit. I find that, regardless of what elements are contained in the tenancy agreement, the landlord is not entitled to rely on the tenants to complete repair work or renovation work as section 32 of the Act makes clear. You will also note that the landlord is entitled to access with proper written notice pursuant to section 29 of the Act.

### **Other**

Finally, on the portion of the application that alleges the tenant had not received a copy of the changed tenancy agreement, I find that any revisions to the agreement must be presented to the tenants for their acceptance and signature and that once that occurs a copy of the document must be provided to the tenants as required under the Act. An amended document without the tenant's signature is not valid.

**Conclusion**

Based, on the above, I order that the Ten-Day Notice to End Tenancy for Unpaid Utilities dated September 5, 2008, be permanently cancelled and of no force nor effect.

I further order that the One-Month Notice to End Tenancy for Cause be permanently cancelled and of no force or effect.

The portion of the tenant's application for a monetary order for damages is dismissed without leave to reapply.

The portion of the tenant's application requesting an order that the landlord be compelled to complete repairs is dismissed with leave to reapply should the work in progress not be completed.

I find the tenants are not entitled to be reimbursed for the \$50.00 filing fee.

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October 27, 2008