



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding NACEL PROPERTIES LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC, FF

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("the Act") for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause ("the 1 Month Notice") pursuant to section 47; and authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The tenant confirmed receipt of the 1 Month Notice and the landlord confirmed receipt of the tenant's application for dispute resolution package disputing that notice. The landlord also filed evidence with the Residential Tenancy Branch on June 2, 2015, the day prior to hearing. The landlord testified that she did not serve the tenant with these materials. Based on the lack of service to the other party and the late nature of the evidence package, I decline to consider the evidence submitted by the landlord on June 2, 2015.

### Issue(s) to be Decided

Should the 1 Month Notice to End Tenancy be cancelled? If not, are the landlords entitled to an Order of Possession?

Is the tenant entitled to recover the filing fee for this application from the landlords?

### Background and Evidence

This tenancy began on June 1, 2014 as a one year fixed term. The rental amount of \$1350.00 is payable on the first of each month. Landlord JD testified that she continues to hold a security deposit in the amount of \$675.00 paid by the tenant at the start of the tenancy.

The landlord applied to end the tenancy for Caused based on one or all of the following grounds;

- the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;
- the tenant does not repair damage to the rental unit or other residential property, as required within a reasonable time;
- the tenant has breached a material term of the tenancy agreement by having an occupant/guest longer than 14 days without permission of the landlord and has not corrected the situation within a reasonable time after the landlord gives written notice to do so;
- the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written permission.

***(emphasis added)***

Landlord JD testified that the tenant caused extraordinary damage to the rental unit by damaging one of the interior bedroom doors and keeping a messy suite. Landlord EM testified that, on entering the rental unit for a suite inspection on April 8, 2015, she found the tenant was not home and that the tenant's nephew was present. He allowed her into the suite. She testified that there was another person in the suite and she was uncomfortable with this person. She also testified that, while within the suite, she noticed a badly damaged interior bedroom door. She testified that the door had several "punch" and "kick" marks that went deep into the door.

Landlord JD testified that the damage to the door as well as items left outside on the tenant's balcony were not repaired or rectified within a reasonable time. She testified that, from sometime in April until the date of service of the 1 Month Notice, the tenant had items including more than 1 mattress; small furniture; and some boxes piled on his balcony. Landlord EM testified that those items were piled nicely and neatly but that they should not have been left there. Both landlords testified that the tenant was notified that these items on the outside of his unit were a problem by issuing the 1 Month Notice and no previous warnings had been given.

Landlord JD testified that the tenant has had his nephew residing in his rental unit for more than 14 days, contrary to the rental agreement. She testified that not only has she seen the nephew on the premises for at least one month prior to issuing the 1 Month Notice, but she testified that this nephew had previously applied for a unit in the building himself and was not accepted by the landlords. She testified that the tenant has not sought her permission to allow this occupant to stay in his unit for a long term or to add him to the lease. She testified that she had spoken to the tenant about the nephew

residing in the residence, that he needed to get permission and that she would unlikely grant that permission in the circumstances.

The tenant testified that he works out of town. He testified that, when he is away, his nephew will often stay in his rental unit. He testified that he had advised the landlord of this fact. The tenant also candidly admitted that, as the nephew is having difficulties, he has allowed him to stay longer than two weeks. Landlord JD also testified that, as the landlords discovered the nephew is paying rent to the tenant, she submits that this is a sublet or assignment situation and should not be allowed to continue. Again, she testified that the nephew has no authorization to reside in the rental unit.

The tenant provided undisputed testimony that he replaced the door in the rental unit. He testified that the marks/holes were done by his adult son who no longer resides with him or visits the premises. The tenant also provided undisputed testimony that he has taken all of the offending items off his balcony as soon as he became aware of the concern of the landlords. I note that the landlords made the tenant aware of their concerns by serving him a 1 Month Notice to End Tenancy. Both representatives of the landlord testified that no previous written notice had been given to the tenant with respect to the items on the balcony or any other issues rose at this hearing. The tenant testified that, if necessary he would ask his nephew to leave the premises.

### Analysis

When a tenant makes an application for dispute resolution to cancel a notice to end tenancy, the burden shifts to the landlord to justify that notice. The landlord must show, on a balance of probabilities that the tenant's behaviour falls within the grounds identified in the notice to end tenancy. Further, the landlord must show, in some circumstances, that they have taken the appropriate steps to address the tenant's behaviour. The landlord relied on a 1 Month Notice to End Tenancy with the following grounds, pursuant to section 47(1).

**47 (1)** A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

(g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3) [obligations to repair and maintain], within a reasonable time;

(h) the tenant

- (i) has failed to comply with a material term, and
- (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

(i) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 [assignment and subletting];

Landlord EM testified with detail with respect to the damage to the interior bedroom door. While I do not doubt that she felt alarmed by seeing the door in this condition, I find that this does not amount to extraordinary damage under the *Act*. Extraordinary damage is defined as unusual or remarkable. It refers to something out of the ordinary. Under the *Act* and Residential Tenancy Policy Guidelines including Guideline No. 16, damages are assessed by their impact like disruption of some kind or a loss, including financial loss. In this case, the damage to the unit described by the landlords is not extensive or potentially dangerous in any manner. The landlord in this case claims that the damage is indicative of the nature of the behaviour within the rental unit. The landlord is obliged to address tenant behaviour directly and purposefully or to address damage to the suite at the conclusion of the tenancy. I find that holes in the interior bedroom door do not result in any disruption to the landlord at this point. The damage to this door cannot be used as evidence of other behaviour issues that may or may not exist. The landlord must provide evidence to a certain standard for each claim they make in their application.

In this case, one part of the interior of the tenant's rental unit was damaged. The tenant provided undisputed testimony that the door has now been replaced. Similarly, with respect to 47(1)(b) - the landlord's claim that the repairs were not done in a reasonable time frame; I find that the tenant's repairs are done and were done in a reasonable time frame. I note again that, prior to the landlord's 1 Month Notice to End Tenancy the tenant had no request from the landlord to make repairs to his rental unit.

Landlord JD expressed concern with respect to the tenant's nephew residing in the premises and with respect to the tenant's failure to properly inform and ask permission of the landlord. In the landlord's application, it indicates that the tenant is either subletting or assigning the tenancy without permission of the landlord.

Pursuant to Policy Guideline No. 19, a tenancy is assigned when a tenant transfers all or part of their interests or rights under a lease to a third party. I do not find that the

landlord has provided evidence that an assignment has taken place. The nephew and tenant both continue to reside in the rental unit and the landlord has not illustrated that the tenant has transferred his tenancy rights, obligations or interest to the nephew. With respect to subletting, if I were to find that the tenant was subletting his rental unit, I would also find that intermediate steps are incumbent upon the landlord to have the tenant rectify the situation. I note that Policy Guideline No. 19 states that “[it] is not reasonable to withhold consent and require a new tenancy agreement in order to increase the rent. It may be reasonable to withhold consent if reference or credit checks indicate that a prospective tenant is unlikely to adhere to the terms of the tenancy agreement.”

While a tenant has the obligation to take appropriate steps in either seeking permission to sublet or allowing the nephew to stay beyond a 14 day guest period, the landlord has an obligation to take into account all circumstances at this time in making a determination with respect to granting permission to the tenant. Furthermore, written notice should be provided in the spirit of the *Act* to allow the tenant to take action to maintain his tenancy. In this case, the tenant has provided sworn testimony that he will ask his nephew to leave if that is requested by the landlord.

The tenant did not dispute that the nephew had been residing in the unit for more than 14 days. The landlord also relies on the grounds for cause to end tenancy that the tenant has breached a material term, mainly the provision of guests/occupants within the rental unit in excess of 14 days.

According to Residential Tenancy Policy Guideline No. 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”. An arbitrator determines whether a term is material by considering “the importance of the term in the overall scheme of the tenancy agreement”. It falls to the person relying on the term, in this case the landlord, to present evidence and make submissions that show a particular term is material. The Guideline outlines the determining factors in finding a material term as well as the process of ending a tenancy agreement for a breach of a material term:

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

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.

One of the fundamental aspects in alleging a breach of a material term, particularly with the goal of ending the tenancy, is that a party may not be found to have breached a material term if they were unaware and uninformed of the problem.

In this case, both landlords testified that the tenant received notice that there was a problem only by the issuance of a 1 Month Notice to End Tenancy. I accept the testimony of the tenant that he addressed the landlord's concerns with respect to any damage in his unit and unsightly items on his balcony. The tenant also testified that, if necessary to continue his tenancy, he would ask his nephew to leave the premises, addressing that problem raised by the landlord, as well.

I accept the testimony of the tenant with respect to his willingness to act in accordance with the requirements of the landlord. I find that the landlord has not shown on a balance of probabilities that the tenant caused extraordinary damage to the unit or property. I find that the landlord has not shown on a balance of probabilities that the tenant has not repaired or rectified any issues with the unit within a reasonable time. I find that the landlords have not met the burden to show that the tenant has breached a material term of his tenancy or that he has assigned or sublet his rental unit without obtaining the landlord's permission. I find that there are intermediate steps and action that the landlord can take to address any current concerns with the tenant. I find that on a balance of probabilities, the landlord has not shown grounds for cause to end the tenancy.

Based on the evidence before me and my findings on this matter, I allow the tenant's application for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause. As the tenant was successful in his application, I find the tenant is entitled to recover his \$50.00 filing fee for this application from the landlords.

Conclusion

I allow the tenant's application to cancel the 1 Month Notice to End Tenancy. The tenancy continues.

I issue a monetary order in the amount of \$50.00 in favour of the tenant.

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: June 04, 2015

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Residential Tenancy Branch

