



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC LRE FF

### Introduction

This hearing dealt with an application by the tenants pursuant to the *Residential Tenancy Act* (“the Act”) for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause (“1 Month Notice”) pursuant to section 47 *Act*;
- to suspend or set conditions on the landlord’s right to enter the rental unit; and
- a return of the filing fee pursuant to section 72 of the *Act*.

Both of the tenants, and the landlord attended the hearing. All parties present were given a full opportunity to be heard, to present their testimony and to make submissions.

The tenants acknowledged receipt of a copy of the landlord’s 1 Month Notice to End Tenancy in person on September 30, 2017. Pursuant to section 88 of the *Act*, the tenants are found to have been duly served with the landlord’s 1 Month Notice on September 30, 2017, the date of its receipt.

The landlord acknowledged receipt of the tenants’ Application for Dispute Resolution by way of Canada Post Xpresspost, on approximately October 5, 2017. While not a recognized form of service under the *Act*, I am satisfied that the landlord received the tenants’ application. Pursuant to section 71 of the *Act*, the landlord is found to have been served with the tenants’ Application for Dispute Resolution. Both parties confirmed that receipt of each other’s evidentiary packages. Pursuant to section 88 of the *Act*, the landlord and tenants are found to have been duly served with the each other’s evidentiary package.

### Issue(s) to be Decided

Can the tenants cancel the landlord’s Notice to End Tenancy? If not, should the landlord be granted an Order of Possession?

Should the landlord have conditions set on her right to enter the rental unit?

Are the tenants entitled to a return of the filing fee?

### Background and Evidence

A copy of the tenancy agreement entered into evidence by the landlord showed that rent was \$2,200.00 per month. The tenants explained that a security deposit of \$1,100.00 paid at the outset of the tenancy continues to be held by the landlord.

The tenants said that they were seeking a cancellation of the landlord's Notice to End Tenancy, and an Order setting conditions on the landlord's right to enter the rental unit.

On September 30, 2017 the tenants received a 1 Month Notice to End Tenancy. The reasons cited on the notice were as follows;

- Tenant is repeatedly late paying rent;
- Tenant has allowed an unreasonable number of occupants in the unit/site;
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so; and
- Tenant has assigned or sublet the rental unit/site without landlord's written consent.

At the hearing, the landlord explained that the tenants had been repeatedly late paying rent in 2015. She cited three occasions between July 15, 2015 and December 2015 where rent was paid late. Additionally, she said that the tenants were late paying rent on four occasions in 2016; January (two), February, April and June. The landlord acknowledged that all rent in 2017 had been paid in accordance with the terms of their tenancy agreement and that no rent remained outstanding.

When asked which material terms of the tenancy agreement that had been breached by the tenants, the landlord referred to the tenancy agreement entered into by the parties. Specifically, she cited the portions of the agreement speaking to the property being a non-smoking property, the section of the tenancy agreement preventing the tenants from using the property for business, and the term of the tenancy agreement not allowing persons to live on the property without the prior written permission. In addition, the landlord argued that various other points (specifically items #1 to 13 of the tenancy agreement) had been violated by the tenants during the course of the tenancy.

During the hearing, the landlord stated that the tenants had allowed a sibling to move into the rental unit for the Spring/Summer of 2015 without written permission. In addition, she alleged that the tenants had sublet a portion of the garage to some people who were using the property to sell birdhouses. She said that these people informed her that they were living in the home, and running their business from the premises.

The tenants dispute all of reasons cited by the landlord in her notice to end tenancy. They acknowledged that until recently, they had smoked on the premises but they argued that they did not do so in the home, and they stated that the landlord had never presented them with any formal warning related to their smoking habits. When questioned about this, the landlord conceded that no written warnings had been issued to the tenants; however, she said numerous verbal warnings had been given to the tenants regarding her concerns with their conduct.

At the hearing, the tenants agreed with the timeline provided by the landlord concerning the length of time a sibling had been in occupation of the rental unit in 2015, but they said that the landlord was aware of the presence of the sibling in the home, raised no objections to her stay while she was in occupation of the unit, and they noted that she had met the landlord and was present when the tenants signed their original lease. Additionally, the tenants denied that they had sublet any portion of the home. They stated that the landlord had mistakenly assumed that a business was being run out of the rental home. The tenants said that the people seen by the landlord in the garage were friends who were staying with the tenants for a few weeks and left the property as soon as they were asked to do so. The birdhouses which were being built were as a casual pastime and were sold online and in various thrift stores as a hobby project.

### Analysis

When a Notice to End Tenancy is disputed by a tenant, the burden of proof is shifted to the landlord to demonstrate why they are entitled to an Order of Possession. In this case, the landlord explained that she issued a 1 Month Notice to End Tenancy for the following reasons:

- Tenant is repeatedly late paying rent;
- Tenant has allowed an unreasonable number of occupants in the unit/site;
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so; and
- Tenant has assigned or sublet the rental unit/site without landlord's written consent.

I will analyse these issues in descending order, starting with the allegation regarding late payments of rent.

*Residential Tenancy Policy Guideline #38* states, “A landlord may end a tenancy where the tenant is repeatedly late paying rent...three payments are the minimum number sufficient to justify a notice under this provision...it does not matter whether the late payments were consecutive or whether or more rent payments have been made on time between the late payment.”

This guideline continues by stating, “If the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be *repeatedly* late...a landlord who fails to act in a timely manner after the most recent late payment may be determined by an arbitrator to have waived reliance on this provision.”

During the hearing, the landlord explained that no rent in 2017 was paid late. She stated that she issued the 1 Month Notice because of repeated late payments of rent in 2015 and 2016. I find that the landlord has waived her right to seek enforcement of this portion of the notice to end tenancy. If the landlord had concerns regarding these repeated late payments of rent, they should have been addressed in a timely manner after the most recent late payment. According to the landlord's own testimony and evidence, the last late payment of rent occurred in June 2016. The landlord issued her notice to end tenancy in September 2017, over 12 months after the last late payment of rent. It would be inequitable to the tenants to allow the landlord to rely on these late payments from 2015 and 2016 and I therefore dismiss this portion of the notice to end tenancy.

The second aspect of the landlord's notice to end tenancy concerns the tenants allowing an unreasonable number of occupants in the unit/site. During the hearing the landlord explained that the tenants had allowed a sibling to live in the rental period for a time period running from spring to summer 2015. I do not find that the presence of 3 children and 4 adults in a 4 bedroom home to be an unreasonable number of occupants. Little evidence was presented at the hearing that this was an unreasonable number of occupants residing in the rental unit. The landlord did not provide any details as to how this number of people was unreasonable other than testifying that the sibling in question had to share a bedroom with one of the children. I do not find this to be unreasonable, and do not find that any hazards or issues regarding the presence of this sibling affected the tenancy in any manner. Furthermore, I find it difficult to reconcile why this issue is only being addressed by the landlord over 2 years after the presence

of the sibling in the rental unit. If the landlord had grave concerns regarding an unreasonable number of people in the rental unit, this should have been addressed at the time of the sibling's occupation. For these reasons, this portion of the landlord's notice to end tenancy is dismissed.

The final two aspect of the landlord's notice to end tenancy concern various alleged breaches of the tenancy and the tenants' purported subletting of the rental unit. I will begin by examining the issue of subletting and then will examine the allegations of material breaches of the tenancy agreement.

*Residential Tenancy Policy Guideline #19* states;

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and a new agreement is typically entered into by the original tenant and the sub-tenant...disputes between tenants and landlord regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party.

The use of the word 'sublet' can cause confusion because under the *Act* it refers to the situation where the original tenant moves out of the rental unit and a has a subletting agreement with a sub-tenant. 'Sublet' is also used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. In determining if a scenario such as this is a sublet as contemplated by the *Act*, the arbitrator will assess whether or not the relationship between the original tenant and third party constitutes a tenancy agreement and a landlord/tenant relationship.

I find that little evidence was presented at the hearing demonstrating that any subletting of the rental unit took place. The tenants allowed some guests to occupy the rental unit for a short period of time. There is no indication that the tenants accepted rent, acted as landlords, or at any point vacated the rental unit. For these reasons, I find no evidence that the tenants sublet their rental unit and dismiss this portion of the landlord's Notice to End Tenancy.

The final portion of the landlord's notice to end tenancy concerns alleged breaches of material terms of the tenancy agreement that were not corrected within a reasonable time after written notice to do so. By the landlord's own admission, she did not provide any written warnings to the tenants regarding their breaches of tenancy agreement.

*Residential Tenancy Policy Guideline #8* examines the issue of Material Terms in a tenancy agreement. It states, “A material term is a term that the parties both agree is so important that the most trivial breach of that term give the other party the right to end the agreement.” It continues by stating, “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. Finally the letter must state that if the problem is not fixed by the deadline, the party will end the tenancy.”

I find little evidence that the tenants were ever given any specific written warnings regarding the issues related to breach of a material term of the tenancy. The landlord had a duty to inform the tenants in writing of their alleged breaches, and then to give them an opportunity to correct their behaviour. The landlord failed to do this, and therefore cannot rely on any alleged breaches as reason for the issuance of a Notice to End Tenancy. For these reasons, I dismiss this portion of the Notice to End Tenancy.

The final portion of the tenants’ application for dispute resolution concerned a request suspending or setting conditions on the landlord’s right to enter the rental unit. The tenants argued that on September 29, 2017, the landlord had entered the rental unit without their permission.

Section 29 of the *Act* details the landlord's obligations related to entry of the rental unit. It reads as follows:

A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

- (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
- (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
  - (i) the purpose for entering, which must be reasonable;
  - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

While it is evident that breach of the *Act* occurred, the tenants are not seeking any relief other than an Order suspending or setting conditions on the landlord's right to enter the rental unit. I do not find that the single violation of section 29 of the *Act* requires conditions being set on the landlord regarding her ability to enter the rental unit. The landlord is reminded that entrance to the rental is subject to the provisions listed above, and that failure to adhere to these provisions can lead to an award of damages.

This tenancy shall continue until it is ended in accordance with the *Act*. As the tenants were successful in their application, they may recover the \$100.00 filing fee from the landlord. In lieu of a monetary award, the tenants may withhold \$100.00 from a future rent payment on **one** occasion.

### Conclusion

The tenants were successful in cancelling the landlord's notice to end tenancy. This tenancy shall continue until it is ended in accordance with the *Act*.

As the tenants were successful in their application, they may recover the filing fee for their application and on **one** occasion, may withhold \$100.00 from a future rent payment.

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: December 19, 2017

---

Residential Tenancy Branch