



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding AUSTEVILLE PROPERTIES  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      AS, CNC, FFT, OLC

### Introduction

This hearing convened as a result of Tenant's Application for Dispute Resolution wherein the Tenant requested the following relief:

- an Order canceling a 1 Month Notice to End Tenancy for Cause issued on April 9, 2018 (the "Notice");
- an Order that the Landlord comply with the *Residential Tenancy Agreement*, the *Residential Tenancy Regulation*, or the tenancy agreement;
- an Order that the Landlord allow the Tenant to assign or sublet the rental unit; and,
- recovery of the filing fee.

The hearing was conducted by teleconference on June 14, 2018. Both parties called into the hearing. The Corporate Landlord was represented by the Property Manager, D.C., and the Chief Financial Officer, C.S. All in attendance were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the

evidence relevant to the issues and findings in this matter are described in this Decision.

### Issues to be Decided

1. Is the Tenant entitled to an Order canceling a 1 Month Notice to End Tenancy for Cause issued on April 9, 2018 (the “Notice”)?
2. Should the Landlord be ordered to comply with the *Residential Tenancy Agreement*, the *Residential Tenancy Regulation*, or the tenancy agreement and allow the Tenant’s son to occupy the rental unit?
3. Should the Landlord be ordered to allow the Tenant to assign or sublet the rental unit?
4. Should the Tenant recover the filing fee?

### Background and Evidence

*Residential Tenancy Branch Rules of Procedure* provide that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and is the Applicant, the Landlord presented their evidence first.

The Landlord’s property manager, D.C., testified as follows. He confirmed that the rental unit is located in one of two towers at the rental property owned by the Landlord; each tower has 110 units.

Introduced in evidence was a copy of the residential tenancy agreement which confirmed that this tenancy began January 1, 2015, initially as a fixed term tenancy, following which it was to continue on a month to month basis.

The rental unit is a one bedroom unit which is approximately 700 square feet. Two individuals are noted as Tenants on the tenancy agreement, R.B. and M.B. No occupants are noted on the tenancy agreement.

Initially the rent payable was \$1,445.00; D.C. testified that currently the rent is \$1,590.00.

The reasons cited on the Notice were that the Tenant has allowed an unreasonable number of occupants and has breached a material term by providing access to the building to a third person, who is not a party to the tenancy agreement.

In terms of the breach of the material term, D.C. drew my attention to paragraph 30 of the tenancy agreement which provides as follows:

**30. LOCKS.** The Landlord must not change locks or other means of access to areas of the residential property (authorized by the Landlord) unless the Landlord provides each Tenant with new keys or other means of access to these areas of the residential property. The Landlord must not change locks or other means of access to a rental unit unless the Tenant agrees and is given new keys or access device(s). The Tenant must not change locks or other means of access to common areas of the residential property, unless the Landlord agrees in writing to the change, or to his rental unit, unless the Landlord agrees in writing to, or a Dispute Resolution Officer has ordered, the change.

The door to the Tenant's rental unit must be kept closed and in the Tenant's absence locked. Subject to the Act no lock or security device, such as a door chain or alarm system, may be installed or changed or altered, and extra keys must not be made for any lock on the residential property or rental unit, except with the prior written consent of the Landlord. The entry to any part of the residential property or rental unit by unauthorized possession of a key or otherwise by any person is a breach of a material term of this Agreement. The Tenant will be responsible for any cost incurred to regain entrance to the residential property or rental unit including any damage and all necessary repairs, in the event the Tenant locks himself out of the residential property or rental unit.

D.C. stated that they reviewed the access control records for the fobs which were assigned to the Tenants. He stated that there were inconsistencies, which indicated that an unauthorized person was using R.B.'s fob. D.C. stated that the building staff do not know this person but they see this person come and go. D.C. stated that to his knowledge this unauthorized person was using the fob for approximately three months.

D.C. also drew my attention to paragraph 13 of the tenancy agreement which provides as follows:

**13. ADDITIONAL OCCUPANTS.** No person, other than those listed in paragraphs 1 and 2 above, may occupy the rental unit. A person not listed in paragraph 1 or 2 above who resides in the rental unit for a period in excess of 14 cumulative days in any calendar year will be considered to be occupying the rental unit contrary to this Agreement and without right or permission of the Landlord. This person will be considered a trespasser. A Tenant anticipating an additional person to occupy the rental unit must promptly apply in writing for permission from the Landlord for such person to become an approved occupant. Failure to apply and obtain the necessary approval of the Landlord in writing is a breach of a material term of this Agreement, giving the Landlord the right to end the tenancy after proper notice. Any approval of the Landlord under this paragraph may be withheld or denied by the Landlord in its sole discretion.

C.S. stated that in March of 2018 during the suite inspection they discovered a makeshift bed. They then looked at the use of the FOB and determined that the Tenant had an unauthorized occupant living in the rental unit. They gave the and his wife the opportunity to remedy the situation and did a follow up inspection on April 9, 2018. They attended again and the makeshift bed was still there. C.S. stated that they took photos of this bed but did not submit them in evidence.

As well, the FOB records and video surveillance were also not provided in evidence as C.S. cited "privacy concerns".

C.S. stated that the Tenants have not paid rent for June 2018 as the Landlord “did not run their rent for the end of June because the notice to vacate was for the end of May”.

In response to the Landlord’s claims the Tenant, R.B., testified as follows.

R.B. stated that the person using the fob is the Tenant’s 28 year old son, R.E.B. R.B. stated that he and his wife are well into their retirement years and their son helps them with groceries, and other errands. R.B. submitted that he has authorized his son to use his fob as his son helps him. He submitted that he has *authorized* R.E.B. to use the fob, he is not in breach of paragraph 30.

R.B. also stated that his son does not reside in the rental unit as he has his own rental unit where he lives with his sister.

In reply, the Landlords’ representatives reiterated that the Landlord relies on the fact they discovered a makeshift bed in the rental unit during an inspection. He also stated that the security footage and the record of FOB usage confirm that the Tenant has an unauthorized occupant in the rental unit.

The Tenant applied for an Order that the Landlord permit the Tenant to assign or sublet their tenancy pursuant to section 65(1) of the *Act*. As this is a month to month tenancy, the Tenant is not permitted to assign or sublet his tenancy. The parties were informed of this during the hearing such that no evidence on this issue was adduced.

### Analysis

Ending a tenancy is a significant request and must only occur in accordance with the *Act*. In this case the Landlord alleges they have cause, pursuant to sections 47(1)(c) and (h) of the *Act*, to end the tenancy because the Tenant has allowed an unreasonable number of occupants in the rental unit and breached a material term of the tenancy by allowing a third party to use his fob.

As noted, the Landlord bears the burden of proving the Notice on a balance of probabilities.

I find, after consideration of the evidence before me and the testimony of the parties that the Notice should be canceled. My reasons follow.

*Residential Tenancy Policy Guideline 8—Unconscionable and Material Terms* provides as follows:

### **Material Terms**

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.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was 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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I accept the Tenant's evidence that he has allowed his son to use his fob in order to help with groceries and errands. In this sense, the Tenant has authorized his son to use his access fob. While it is arguable that the "authorization" referenced in section 30 of the tenancy agreement likely means the Landlord, section 30 does not specify this. The Tenants submits that he has authorized his son to use the fob and in this sense that his son is not an "unauthorized person".

*Contra proferentem* is the legal principle which provides that where there is ambiguity in a contract the contract should be interpreted in favour of the party who did not draft the contract. In this case, the Landlord drafted the residential tenancy agreement (contract) and as such any ambiguity should be interpreted in favour of the Tenant.

I accept the Tenant's evidence that his son, R.E.B., attends at the rental unit helps his parents with groceries and other errands. I accept his evidence that he has allowed his son to use the fob in order to facilitate this assistance.

I am unable to find that the Tenant allowing his son to use the fob to access the building for the purposes of assisting his parents is evidence of a breach of a material term of the tenancy. I am also unable to find that this term is material to this tenancy, even if the agreement is written as such. While it is understandable the Landlord wishes to restrict non-tenant's access to the building, particularly one with as many units as this rental property, I find that the Tenant's son's use of the fob does not create the anticipated security risk. I also note that the Tenant agreed during the hearing that going forward he would not allow his son to use the fob, and that he would meet him at the entry to the building.

The Landlord alleges the Tenant has allowed an unreasonable number of occupants in the rental unit. While it is clear the Tenant has asked to have his son added as an occupant, there is insufficient evidence before me that his son is actually residing in the rental unit. I accept the Tenant's testimony that his son resides elsewhere and is not an occupant of the building.

The Landlord indicated they have security footage and fob access records which would support a finding that the Tenant's son is residing in the rental unit. That evidence was not before me and was therefore not considered. The Landlord bears the burden of providing the Notice and this includes providing their best evidence at the hearing. Without corroborating evidence from the Landlord, I am unable to prefer their testimony over that of the Tenants'.

For the above reasons I find the Landlord has failed to prove the reasons for issuing the Notice and I hereby grant the Tenant's request to cancel the Notice.

The Tenant's evidence suggests he has asked the Landlord to permit his son to be an occupant of the rental unit; however, the evidence further indicates no such formal application has been received. The Landlord is entitled to consider any such requests on their merits once a formal application is made. As such, I find it is premature to

consider any request by the Tenant to compel the Landlord to permit the Tenant's son to reside in the rental unit as an occupant.

As the Tenant has been substantially successful, I find he is entitled to recovery of the filing fee. He may reduce his next month's rent by \$100.00 as compensation for that sum.

### Conclusion

The Notice is cancelled. The tenancy shall continue until ended in accordance with the *Act*.

The Tenant's request for an Order that the Landlord comply with the *Residential Tenancy Act*, the *Regulation* or the tenancy agreement with respect to his request to add his son as an occupant is dismissed with leave to reapply.

The Tenant's request for an order that he be permitted to assign or sublet his tenancy is dismissed.

The Tenant is entitled to withhold \$100.00 from his next month's rent as recovery of the \$100.00 filing fee.

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 22, 2018

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Residential Tenancy Branch